WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Enrolled

Committee Substitute

for

Senate Bill 352

SENATORS WELD AND CLINE, original sponsors

[Passed March 9, 2019; in effect from passage]
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AN ACT to amend and reenact §15A-3-14 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto a new section, designated §15A-3-14a, all relating to the Division of Corrections and Rehabilitation acquiring and disposing of services, goods, and commodities; clarifying notice requirements; allowing the division to require surety; expanding acceptable forms of surety; allowing the division to utilize best value procurement; providing exception; establishing procedure for best value procurement; allowing for direct award procurement; establishing procedure for direct award procurement; allowing the division to run criminal background checks, financial background checks, licensing background checks, and credit checks to determine eligibility for award of contract; enumerating grounds upon which division shall disqualify vendors from being awarded a contract or having contract renewed; limiting disclosure under Freedom of Information Act of records obtained in response to solicitations for bids and records relating to solicitations for, or purchases of, items related to safe and secure running of any facility under jurisdiction of commissioner of division; creating special revenue fund; and providing for methods of disposition of surplus property owned by the division.

Be it enacted by the Legislature of West Virginia:

ARTICLE 3. DIVISION OF CORRECTIONS AND REHABILITATION.

§15A-3-14. Exempt from Purchasing Division; purchasing procedures.

(a) The provisions established in §5A-3-1 et seq. of this code do not apply to the division or any institution under the control of the division.

(b) When the cost under any contract or agreement entered into by the division, other than compensation for personal services, involves an expenditure of more than $2,500 and less than $25,000, the division shall solicit at least three bids, if possible, from vendors and make a written contract, or agreement, with the lowest responsible bidder. When the cost under any contract or agreement entered into by the division, other than compensation for personal services, involves
an expenditure of $25,000 or more, the division shall make a written contract with the lowest responsive, responsible bidder after public notice is published, which notice shall state the general character of the work and general character of the materials to be furnished, the place where plans and specifications therefor may be examined, and the time and place of receiving bids. The notice may be published by an advertising medium the division deems advisable. The division may also solicit sealed bids by sending requests by mail or electronic transmission to prospective vendors. But a contract for lease of a correctional facility is not subject to the foregoing requirements and the division may enter into the contract for lease pursuant to negotiation upon the terms and conditions and for the period as it finds to be reasonable and proper under the circumstances and in the best interests of proper operation or efficient acquisition or construction of the projects. The division may reject any and all bids. A bond with good and sufficient surety, approved by the division, may be required by the division. The good and sufficient surety may be in the form of a bid bond, performance bond, payment bond, maintenance bond, labor and materials bond, or any other type of surety deemed necessary by the division.

(c) The division may use best value procurement to enter into a contract when the commissioner determines in writing that it is advantageous to the state.

(1) A solicitation for bids under best value procurement shall be made in the same manner as provided in this section.

(2) Best value procurement awards shall be based on criteria set forth in the solicitation and information contained in the proposals submitted in response to the solicitation. Those criteria include, but are not limited to, price and the total cost of acquiring, operating, maintaining, and supporting a commodity or service over its projected lifetime, as well as technical criteria. The technical criteria may include, but are not limited to, the evaluated technical merit of the bidder’s bid or proposal, the bidder’s past performance, the degree to which a proposal exceeds other proposals in technical merit, the utility of any novel or unrequested items in the proposal, and the
evaluated probability of performing the requirements stated in the solicitation on time, with high quality, and in a manner that accomplishes the business objectives set forth in the solicitation.

(3) The award must be made to the highest scoring responsive and responsible bidder whose bid is determined, in writing, to be most advantageous to the state, taking into consideration all evaluation factors set forth in the best value solicitation.

(4) The division may not use best value procurement to enter into government construction contracts, including, but not limited to, those set forth in §5-22-1 et seq. of this code.

(d)(1) The division may make a direct award of a contract without competitive bidding if:

(A) The commissioner shall make a written determination that the direct award is in the best interest of the state;

(B) The division documents in writing that competition is not available because there is no other source for the commodity or service, or that no other source would be willing or able to replace the existing source without a detrimental effect on the division, the existence of a detrimental effect being determined by the commissioner in his or her sole discretion;

(C) The division publicly advertises a notice of intent to make a direct award without competition in the state’s official bid notification system, as well as any other public advertisement that the division deems appropriate, for no less than 10 business days; and

(D) No other vendor expresses an interest in providing the commodity or service in question.

(2) If a vendor expresses an interest in providing the commodity or service described in the notice of intent to make a direct award, then the division must convert the direct award to a competitive bid, unless the commissioner determines that the interest expressed by a vendor is unreasonable. The competitive bid may, at the discretion of the commissioner, be either a request for quotation or request for proposal.

(3) The notice of intent to make a direct award shall contain the following information:

(A) A description of the commodity or service for which a direct award will be made;
(B) A time period by which delivery must be made or performance must occur;
(C) The price that will be paid for the commodity or service;
(D) Any limitations that a competing vendor would need to satisfy;
(E) An invitation to all vendors interested in providing the commodity or service to make that interest known; and
(F) Contact information for the commissioner or his or her designee, and instructions to submit a statement of interest to the commissioner or his or her designee.

(e) The commissioner, or division, shall not award a contract or renew a contract to any vendor or prospective vendor when the vendor or prospective vendor, or a related party to the vendor or prospective vendor, is a debtor and:

(1) The debt owed is an amount greater than $1,000 in the aggregate; or
(2) The debtor is in employer default.

(f) The division has the authority to run criminal background checks, financial background checks, a licensing check, and a credit check, and any vendor, or any and all principals in a company or corporation, must submit to said checks to be eligible to be awarded a contract for the division. The commissioner, or division, shall not award a contract to a vendor if any of the following are present:

(1) Conviction of an offense involving fraud or a felony offense in connection with obtaining or attempting to obtain a public contract or subcontract;
(2) Conviction of any federal or state antitrust statute relating to the submission of offers;
(3) Conviction of an offense involving embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property in connection with the performance of a contract;
(4) Conviction of a felony offense demonstrating a lack of business integrity or business honesty that affects the present responsibility of the vendor or subcontractor;
(5) Default on obligations owed to the state, including, but not limited to, obligations owed
to the Workers’ Compensation Fund, as defined in §23-2C-1 et seq. of this code, and obligations
under the West Virginia Unemployment Compensation Act and West Virginia state tax and
revenue laws. For purposes of this subsection, a vendor is in default when, after due notice, the
vendor fails to submit a required payment, interest thereon, or penalty, and has not entered into
a repayment agreement with the appropriate agency of the state or has entered into a repayment
agreement but does not remain in compliance with its obligations under the repayment
agreement. In the case of a vendor granted protection by order of a federal bankruptcy court or a
vendor granted an exemption under any rule of the Bureau of Employment Programs or the
Insurance Commission, the commissioner may award a contract: Provided, That in no event may
the contract be awarded to any vendor who has not paid all current state obligations for at least
the four most recent calendar quarters, excluding the current calendar quarter, or with respect to
any vendor who is in default on a repayment agreement with an agency of the state;
(6) The vendor is not in good standing with a licensing board, in that the vendor is not
licensed when licensure is required by the law of this state, or the vendor has been found to be
in violation of an applicable licensing law after notice, opportunity to be heard, and other due
process required by law;
(7) The vendor is an active and knowing participant in dividing or planning procurements
to circumvent the $25,000 threshold requiring a sealed bid or otherwise avoid the use of a sealed
bid; or
(8) Violation of the terms of public contracts or subcontracts for:
(A) Willful failure to substantially perform in accordance with the terms of one or more
public contracts;
(B) Performance in violation of standards established by law or generally accepted
standards of the trade or profession amounting to intentionally deficient or grossly negligent
performance on one or more public contracts;
(C) Use of substandard materials on one or more public contracts or defects in construction in one or more public construction projects amounting to intentionally deficient or grossly negligent performance, even if discovery of the defect is subsequent to acceptance of a construction project and expiration of any warranty thereunder;

(D) A repeated pattern or practice of failure to perform so serious and compelling as to justify disqualification; or

(E) Any other cause of a serious and compelling nature amounting to knowing and willful misconduct of the vendor that demonstrates a wanton indifference to the interests of the public and that caused, or that had a substantial likelihood of causing, serious harm to the public.

(g) Unless the context clearly requires a different meaning, for the purposes of this section, the term:

(1) “Debt” means any assessment, premium, penalty, fine, tax, or other amount of money owed to the state or any of its political subdivisions because of a judgment, fine, permit violation, license assessment, amounts owed to the Workers’ Compensation Fund as defined in §23-2C-1 et seq. of this code, penalty, or other assessment or surcharge presently delinquent or due and required to be paid to the state or any of its political subdivisions, including any interest or additional penalties accrued thereon;

(2) “Debtor” means any individual, corporation, partnership, association, limited liability company, or any other form of business association owing a debt to the state or any of its political subdivisions, and includes any person or entity that is in employer default;

(3) “Employer default” means having an outstanding balance or liability to the Old Fund or to the Uninsured Employers’ Fund or being in policy default, as defined in §23-2C-2 of this code, failure to maintain mandatory workers’ compensation coverage, or failure to fully meet its obligations as a workers’ compensation self-insured employer. An employer is not in employer default if it has entered into a repayment agreement with the Insurance Commissioner and remains in compliance with the obligations under the repayment agreement;
“Political subdivision” means any county commission; municipality; county board of education; any instrumentality established by a county or municipality; any separate corporation or instrumentality established by one or more counties or municipalities, as permitted by law; or any public body charged by law with the performance of a government function and whose jurisdiction is coextensive with one or more counties or municipalities; and

(5) “Related party” means a party, whether an individual, corporation, partnership, association, limited liability company, or any other form of business association or other entity whatever, related to any vendor by blood, marriage, ownership, or contract through which the party has a relationship of ownership or other interest with the vendor so that the party will actually, or by effect, receive or control a portion of the benefit, profit, or other consideration from performance of a vendor contract with the party receiving an amount that meets or exceeds five percent of the total contract amount.

(h) The prohibitions of subdivision (5), subsection (f) of this section do not apply where a vendor has contested any tax administered pursuant to chapter 11 of this code, amount owed to the Workers’ Compensation Fund as defined in §23-2C-1 et seq. of this code, permit fee, or environmental fee or assessment and the matter has not become final, or where the vendor has entered into a payment plan or agreement and the vendor is not in default of any of the provisions of such plan or agreement.

(i) The division may disqualify a vendor if award to the vendor would jeopardize the safe, secure, and orderly operations of the division.

(j) All bids, contract proposals, or contracts with the state or any of its political subdivisions submitted or approved under the provisions of this code shall include an affidavit that the vendor, prospective vendor, or a related party to the vendor or prospective vendor is not in employer default and does not owe any debt in an amount in excess of $1,000 or, if a debt is owed, that the provisions of subsection (h) of this section apply.
(k) If the division has to make a purchase under emergency conditions, or an emergency situation, that jeopardizes the safe, secure, and orderly operations of the division, as deemed by the commissioner, and approved by the Secretary of the Department of Military Affairs and Public Safety, subsection (b) of this section shall not apply.

(l) The commissioner may enter into agreements with medical schools and institutions of higher education in this state to develop standards for appropriate and innovative medical programming and care for inmates: Provided, That the division will follow the procedures set forth in subsection (b) of this section for delivery of regular and normal medical care within the facilities.

(m) Notwithstanding any other provision of this code to the contrary, any records obtained in response to solicitations for bids from the division shall not be subject to disclosure pursuant to §29B-1-1 et seq. of this code, until and unless the time frame for submission of bids has closed: Provided, That once bids close, the records may be exempt from disclosure pursuant to §29B-1-4 of this code. Any record relating to any solicitation for, or purchase of, any item related to the safe and secure running of any facility under the jurisdiction of the Commissioner of the Division of Corrections and Rehabilitation is not subject to disclosure pursuant to §29B-1-1 et seq. of this code.

§15A-3-14a. Creation of special fund for surplus property revenue; disposal of surplus property.

(a) There is hereby created a special revenue fund in the State Treasury known as the Division of Corrections and Rehabilitation Surplus Property Fund. Moneys from this fund shall be used for facility maintenance and repair.

(b) The commissioner is hereby authorized to dispose of surplus state property owned by the division in the following manner:

(1) Transferring the particular commodities or expendable commodities between departments;
(2) Selling the commodities to county commissions, county boards of education, municipalities, public service districts, county building commissions, airport authorities, parks and recreation commissions, nonprofit domestic corporations qualified as tax exempt under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended, or volunteer fire departments in this state when the volunteer fire departments have been held exempt from taxation under Section 501(c) of the Internal Revenue Code;

(3) Trading in the commodities as a part payment on the purchase of new commodities;

(4) Cannibalizing the commodities pursuant to procedures established under subsection (g) of this section;

(5) Properly disposing of the commodities as waste;

(6) Selling the commodities to the general public at the posted price or to the highest bidder by means of public auctions or sealed bids, after having first advertised the time, terms, and place of the sale as a Class II legal advertisement in compliance with the provisions of §59-3-1 et seq. of this code. The publication area for the publication is the county in which the sale is to be conducted. The sale may also be advertised in other advertising media that the division considers advisable. The division may sell to the highest bidder or to any one or more of the highest bidders, if there is more than one, or, if the best interest of the state will be served, reject all bids; or

(7) Selling the commodities to the highest bidder by means of an internet auction site approved by the division, as set forth in an emergency rule promulgated pursuant to the provisions of §29A-3-15 of this code.

(c) Upon the sale to the general public or transfer of commodities or expendable commodities between departments, or upon the sale of commodities or expendable commodities to an eligible organization, the division shall set the price to be paid by the receiving eligible organization, with due consideration given to current market prices.
(d) The division may sell expendable, obsolete, or unused motor vehicles owned by the division to an eligible organization, other than volunteer fire departments. In addition, the division may sell expendable, obsolete, or unused motor vehicles owned by the division with a gross weight in excess of 4,000 pounds to an eligible volunteer fire department. The division, with due consideration given to current market prices, shall set the price to be paid by the receiving eligible organization for motor vehicles sold pursuant to this provision: Provided, That the sale price of any motor vehicle sold to an eligible organization may not be less than the “average loan” value, as published in the most recent available eastern edition of the National Automobile Dealers Association (NADA) Official Used Car Guide, if the value is available, unless the fair market value of the vehicle is less than the NADA “average loan” value, in which case the vehicle may be sold for less than the “average loan” value. The fair market value shall be based on a thorough inspection of the vehicle by an employee of the division who shall consider the mileage of the vehicle and the condition of the body, engine, and tires as indicators of its fair market value. If no fair market value is available, the division shall set the price to be paid by the receiving eligible organization with due consideration given to current market prices. The duly authorized representative of the eligible organization, for whom the motor vehicle or other similar surplus equipment is purchased or otherwise obtained, shall cause ownership and proper title to the motor vehicle to be vested only in the official name of the authorized governing body for whom the purchase or transfer was made. The ownership or title, or both, shall remain in the possession of that governing body and be nontransferable for a period of not less than one year from the date of the purchase or transfer. Resale or transfer of ownership of the motor vehicle or equipment prior to an elapsed period of one year may be made only by reason of certified unserviceability.

(e) The division shall report to the Legislative Auditor, semiannually, all sales of commodities or expendable commodities made during the preceding six months to eligible organizations. The report shall include a description of the commodities sold, the price paid by the eligible organization that received the commodities, and to whom each commodity was sold.
(f) The proceeds of the sales or transfers shall be deposited in the State Treasury in the
special revenue account created in subsection (a) of this section.

(g)(1) For purposes of this section, “cannibalization” means the removal of parts from one
commodity to use in the creation or repair of another commodity.

(2)(A) If the division intends to cannibalize an asset, the division shall document: (i) The
commodity identification number; (ii) the commodity’s acquisition date; (iii) the commodity’s
acquisition cost; (iv) a description of the commodity; (v) whether the commodity is operable and,
if so, how well it operates; (vi) how the division will dispose of the remaining parts of the
commodity; and (vii) who will cannibalize the commodity and how the person is qualified to remove
and reinstall the parts.

(B) If the division has immediate plans to use the cannibalized parts, the division shall
document for the commodity or commodities that will receive the cannibalized part or parts: (i)
The commodity identification number; (ii) the commodity’s acquisition date; (iii) the commodity’s
acquisition cost; (iv) a description of the commodity; (v) whether the commodity is operable; (vi)
whether the part restores the commodity to an operable condition; and (vii) the cost of the parts
and labor to restore the commodity to an operable condition without cannibalization.

(C) If the division intends to retain the cannibalized parts for future use, it shall document
that said parts have been retained for future use.

(D) The division shall develop procedures for the disposal of the residual components of
cannibalized property.

(3) Whenever the division disposes of a commodity in a landfill, or by other lawful means
of waste disposal, the division shall notate this on the inventory for the commodity and shall
document the reasons why it was disposed of in such manner.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

[Signatures]

Chairman, Senate Committee

Chairman, House Committee

Originated in the Senate.

In effect from passage.

[Signatures]

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within _______ approved _______ this the _______ Day of _______. _______. 2019.

[Signature]

Governor