

1 **ENGROSSED**

2 COMMITTEE SUBSTITUTE

3 FOR

4 **H. B. 4263**

5 (By Delegates Barker, Caputo, Martin,
6 Hamilton, Butcher and Stowers)

7 (Originating in the Committee on Finance)

8 [February 24, 2012]

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11 A BILL to amend the Code of West Virginia, 1931, as amended, by
12 adding thereto a new chapter, designated §5I-1-1, §5I-1-2,
13 §5I-1-3, §5I-1-4, §5I-1-5 and §5I-1-6, all relating to
14 creating the West Virginia Buy American Act; requiring any
15 public agency construction contracts for public buildings or
16 public works which utilize state grants or state loans in part
17 to finance all or part of the construction costs to contain a
18 provision requiring that the iron, steel, manufactured goods,
19 coal and timber used or supplied for the project be
20 manufactured or produced in the United States; permitting
21 waivers; waivers and exemptions; providing remedies for
22 intentional violations; defining terms; making findings; and
23 declaring policy.

24 *Be it enacted by the Legislature of West Virginia:*

25 That the Code of West Virginia, 1931, as amended, be amended
26 by adding thereto a new chapter, designated §5I-1-1, §5I-1-2, §5I-

1 1-3, §5I-1-4, §5I-1-5 and §5I-1-6, all to read as follows:

2 CHAPTER 5I. WEST VIRGINIA BUY AMERICAN ACT.

3 ARTICLE 1. WEST VIRGINIA BUY AMERICAN.

4 §5I-1-1. Short title.

5 This act may be cited as the "West Virginia Buy American Act."

6 §5I-1-2. Findings and declaration of policy.

7 (a) Findings. -- The Legislature finds that:

8 (1) The production of iron, steel, manufactured goods, coal
9 and timber provides jobs and family income to many individuals in
10 this state and, in turn, the jobs and family incomes of millions of
11 persons in the United States;

12 (2) The taxes paid to the state and its political subdivisions
13 by employers and employees engaged in the production and sale of
14 iron, steel, manufactured goods, coal and timber are a large source
15 of public revenues for West Virginia;

16 (3) The economy and general welfare of West Virginia and its
17 people and the economy and general welfare of the United States are
18 inseparably linked to the preservation and development of
19 manufacturing, harvesting and mineral extraction industries in this
20 state, as well as all the other states of the nation;

21 (4) The state's taxpayer dollars are better spent if
22 reinvested with its individual and employer taxpayers in order to
23 foster job retention and growth, particularly within the
24 manufacturing, harvesting and mineral extraction sectors, and to
25 ensure a broad and healthy tax base for future investments vital to

1 the state's infrastructure; and

2 (5) West Virginia's procurement policies should reflect the
3 state's and the nation's principles ensuring that the products of
4 those companies and workers who abide by our workplace safety and
5 environmental laws and regulations should be rewarded with a
6 commonsense preference in government contracting.

7 (b) Declaration of policy. -- It is the policy of West
8 Virginia that all public officials and agencies should aid and
9 promote the economy of the state and the United States by requiring
10 a preference for the procurement of iron, steel, manufactured
11 goods, coal and timber produced in the United States in all
12 contracts for the construction, reconstruction, repair, improvement
13 or maintenance of public works.

14 **§5I-1-3. Use of American materials.**

15 (a) Notwithstanding any other provision of law, each contract
16 for the construction, reconstruction, alteration, repair,
17 improvement or maintenance of a public building or public works
18 made by a public agency which is funded in part by state grants,
19 state loans or state appropriations shall contain a provision that
20 the iron, steel, manufactured goods, coal and timber used or
21 supplied as construction materials in the performance of the
22 contract or any subcontract thereto shall be manufactured or
23 produced in the United States.

24 (b) The contractor shall use only domestic construction
25 material in performing the contract, unless one of the exceptions
26 set forth in subsection (c) of this section applies.

1 (c) The application of the preference is not required if the
2 State or the public agency determines one or more of the following:

3 (1) The cost of domestic construction material would be
4 unreasonable:

5 (A) The cost of domestic iron, steel, or other manufactured
6 goods used as construction material is unreasonable when the
7 cumulative cost of such material will increase the cost of the
8 contract by more than twenty-five percent;

9 (B) The cost of unmanufactured construction material is
10 unreasonable when the cost of such material exceeds the cost of
11 foreign material by more than six percent;

12 (2) The construction material is not mined, produced or
13 manufactured in the United States in sufficient and reasonably
14 available quantities or of a satisfactory quality; or

15 (3) The application of the provisions of the West Virginia Buy
16 American Act to a particular construction material would be
17 inconsistent with the public interest.

18 **§5I-1-4. Waiver or exemption request; procedures.**

19 (a) If any contractor seeks a waiver or an exemption from the
20 requirements of the West Virginia Buy American Act, or seeks to use
21 foreign construction material on a project, it shall seek the
22 waiver or exemption from the public agency administering the
23 contract.

24 (b) (1) Any waiver or exemption request submitted by a
25 contractor shall include adequate information for the state or the
26 public agency to evaluate the request, including:

1 (A) A description of the foreign and domestic construction
2 materials;

3 (B) Unit of measure;

4 (C) Quantity;

5 (D) Cost;

6 (E) Time of delivery or availability;

7 (F) Location of the construction project;

8 (G) Name and address of the proposed supplier; and

9 (H) A detailed justification of the reason for use of foreign
10 construction materials.

11 (2) A request based on unreasonable cost must be accompanied
12 by a reasonable survey of the market and a completed cost
13 comparison table, illustrating the calculation of comparative costs
14 of using the foreign construction material and using the domestic
15 construction material on the project.

16 (3) The cost of construction material shall include all
17 delivery costs to the construction site and any applicable duty.

18 (4) Any contractor request for a waiver or exemption submitted
19 after contract award shall explain why the contractor could not
20 reasonably foresee the need for such determination and could not
21 have requested the waiver or exemption before the contract award.
22 If the contractor does not submit a satisfactory explanation, the
23 request may be summarily denied by the public agency.

24 (c) If the public agency determines after contract award that
25 an exception to the West Virginia Buy America Act applies, the
26 state or public construction contract may be modified to allow for

1 the use of the foreign construction material. However, when the
2 basis for the waiver or exemption is the unreasonable cost of a
3 domestic construction material, the cost difference may not be less
4 than one or more of the differentials established in paragraphs (A)
5 and (B), subdivision (1), subsection (c), section three of this
6 article.

7 (d) Unless the public agency determines that an exception
8 applies, use of foreign construction material on a project subject
9 to the provisions of this article to be noncompliant and in
10 violation of this article.

11 (e) Whenever a public agency grants a waiver or exemption to
12 the requirement to use domestic construction materials on a project
13 that is subject to this article, it shall:

14 (1) Publish in the State Register a detailed written
15 justification as to why the waiver or exemption was granted; and

16 (2) Receive comments and information on the granted waiver or
17 exemption.

18 (f) If the public agency finds after notice and comment that
19 the information supplied by the contractor in support of the waiver
20 or exemption request was inaccurate or misleading, it may rescind
21 the granted waiver or exemption.

22 **§5I-1-5. Violations and limitations; related penalties.**

23 (a) *Intentional Violations.* -- A person shall be ineligible to
24 receive any contract or subcontract with this state or any
25 political subdivision if a court or federal or state agency
26 determines that any person intentionally:

1 (1) Affixed a label bearing a "Made in America" or "Produced
2 in America" inscription, or any inscription with the same meaning,
3 to any product used in projects to which this section applies, sold
4 in or shipped to the United States that was not made or produced in
5 the United States; or

6 (2) Represented that any product used in projects to which
7 this section applies, sold in or shipped to the United States that
8 was not produced in the United States, was produced in the United
9 States.

10 (b) *Limitation on Applicability of Waivers or Exemptions to*
11 *Products Produced in Certain Foreign Countries.* -- Notwithstanding
12 any other provision of this article to the contrary, waivers or
13 exemptions may not be granted for products produced in a foreign
14 country if the State of West Virginia or a public agency, in
15 consultation with the United States Trade Representative,
16 determines that:

17 (1) The foreign country is a party to a trade agreement with
18 the United States; and

19 (2) The United States has determined that the foreign country
20 has violated the terms of the trade agreement it has with the
21 United States by discriminating against products covered by this
22 section that are produced in the United States and are covered by
23 the agreement.

24 **§5I-1-6. Definitions.**

25 As used in this chapter, the following terms have the meanings
26 ascribed to them in this section, unless the context in which the

1 term is used clearly requires another meaning:

2 (1) "Construction material" means an article, material or
3 supply brought to the construction site by the contractor or a
4 subcontractor for incorporation into the building or work. The
5 terms also includes an item brought to the site preassembled from
6 articles, materials or supplies. However, emergency life safety
7 systems, such as emergency lighting, fire alarm and audio
8 evacuation systems, that are discrete systems incorporated into a
9 public building or work and that are produced as complete systems,
10 are evaluated as a single and distinct construction material
11 regardless of when or how the individual parts or components of
12 those systems are delivered to the construction site. Materials
13 purchased directly by the public agency are supplies, not
14 construction material. Material costs of less than two thousand
15 five hundred dollars are not covered by this article and are to
16 considered as de minimus expenses.

17 (2) "Domestic construction material" means:

18 (A) An unmanufactured construction material mined or produced
19 in the United States; or

20 (B) A construction material manufactured in the United States.

21 (3) "Foreign construction material" means a construction
22 material other than a domestic construction material.

23 (4) "Manufactured construction material" means any
24 construction material that is not unmanufactured construction
25 material.

26 (5) "Manufactured" means:

1 (A) In the case of an iron or steel product all manufacturing
2 must take place in the United States, except metallurgical
3 processes involving the refinement of steel additives; or (B) In the
4 case of a manufactured good, a good will be considered manufactured
5 in the United States if:

6 (i) All the manufacturing processes for the product take place
7 in the United States; and

8 (ii) All of the components of the product are of United States
9 origin. A component will be considered of a product of United
10 States origin if all the manufacturing processes take place in the
11 United States, regardless of the origin of its subcomponents.

12 (6) "Public agency" or "agency" means the State of West
13 Virginia, its departments, agencies, boards, commissions, and
14 institutions, and all units and political subdivisions, including
15 local school districts.

16 (7) "Public buildings" and "public works" mean any structure,
17 building, highway, waterway, street, bridge, transit system,
18 airport or other betterment, work or improvement whether of a
19 permanent or temporary nature and whether for governmental or
20 proprietary use. The term includes, but is not limited to, any
21 railway, street railway, subway, elevated and monorail passenger or
22 passenger and rail rolling stock, self-propelled cars, gallery
23 cars, locomotives, passenger buses, wires, poles and equipment for
24 electrification of a transit system, rails, tracks, roadbeds, guide
25 ways, elevated structures, buildings, schools, hospitals, stations,
26 terminals, docks, shelters and repairs to any of the foregoing.

1 (8) "Steel" means an alloy that includes at least 50 percent
2 iron, between 0.02 and 2.00 percent carbon, and may include other
3 elements.

4 (9) "United States" means all fifty states of the United
5 States, the District of Columbia, and all territories of the United
6 States.

7 (10) "Unmanufactured construction material" means raw material
8 brought to the construction site for incorporation into the
9 building or work that has not been:

10 (A) Processed into a specific form and shape; or

11 (B) Combined with other raw material to create a material that
12 has different properties than the properties of the individual raw
13 materials.