

1 COMMITTEE SUBSTITUTE

2 FOR

3 **H. B. 4263**

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

6 (Originating in the Committee on Finance)

7 [February 24, 2012]

8  
9  
10 A BILL to amend the Code of West Virginia, 1931, as amended, by  
11 adding thereto a new chapter, designated §5I-1-1, §5I-1-2,  
12 §5I-1-3, §5I-1-4, §5I-1-5 and §5I-1-6, all relating to  
13 creating the West Virginia Buy American Act; requiring any  
14 public agency construction contracts for public buildings or  
15 public works which utilize state grants or state loans in part  
16 to finance all or part of the construction costs to contain a  
17 provision requiring that the iron, steel, manufactured goods,  
18 coal and timber used or supplied for the project be  
19 manufactured or produced in the United States; permitting  
20 waivers; waivers and exemptions; providing remedies for  
21 intentional violations; defining terms; making findings; and  
22 declaring policy.

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

24 That the Code of West Virginia, 1931, as amended, be amended  
25 by adding thereto a new chapter, designated §5I-1-1, §5I-1-2, §5I-  
26 1-3, §5I-1-4, §5I-1-5 and §5I-1-6, all to read as follows:

1                    CHAPTER 5I. WEST VIRGINIA BUY AMERICAN ACT.

2 ARTICLE 1. WEST VIRGINIA BUY AMERICAN.

3 §5I-1-1. Short title.

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

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

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

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

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

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

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

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

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

13 **§5I-1-3. Use of American materials.**

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

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

26 (c) The application of the preference is not required if the

1 State or the public agency determines one or more of the following:

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

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

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

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

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

17 **§5I-1-4. Waiver or exemption request; procedures.**

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

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

26 (A) A description of the foreign and domestic construction

1 materials;

2 (B) Unit of measure;

3 (C) Quantity;

4 (D) Cost;

5 (E) Time of delivery or availability;

6 (F) Location of the construction project;

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

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

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

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

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

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

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

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

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

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

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

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

21 **§5I-1-5. Violations and limitations; related penalties.**

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

26 (1) Affixed a label bearing a "Made in America" or "Produced

1 in America" inscription, or any inscription with the same meaning,  
2 to any product used in projects to which this section applies, sold  
3 in or shipped to the United States that was not made or produced in  
4 the United States; or

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

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

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

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

23 **§5I-1-6. Definitions.**

24 As used in this chapter, the following terms have the meanings  
25 ascribed to them in this section, unless the context in which the  
26 term is used clearly requires another meaning:

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

14       (2) "Domestic construction material" means:

15       (A) An unmanufactured construction material mined or produced  
16 in the United States; or

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

18       (3) "Foreign construction material" means a construction  
19 material other than a domestic construction material.

20       (4) "Manufactured construction material" means any  
21 construction material that is not unmanufactured construction  
22 material.

23       (5) "Manufactured" means:

24       (A) In the case of an iron or steel product all manufacturing  
25 must take place in the United States, except metallurgical  
26 processes involving the refinement of steel additives; or (B) In the



1 case of a manufactured good, a good will be considered manufactured  
2 in the United States if:

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

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

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

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

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

1       (9) "United States" means all fifty states of the United  
2 States, the District of Columbia, and all territories of the United  
3 States.

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

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

8       (B) Combined with other raw material to create a material that  
9 has different properties than the properties of the individual raw  
10 materials.