

COMMITTEE SUBSTITUTE

FOR

H. B. 4263

(BY DELEGATES BARKER, CAPUTO, MARTIN,
HAMILTON, BUTCHER AND STOWERS)

(Originating in the Committee on Finance)
[February 24, 2012]

A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new chapter, designated §5I-1-1, §5I-1-2, §5I-1-3, §5I-1-4, §5I-1-5 and §5I-1-6, all relating to creating the West Virginia Buy American Act; requiring any public agency construction contracts for public buildings or public works which utilize state grants or state loans in part to finance all or part of the construction costs to contain a provision requiring that the iron, steel, manufactured goods, coal and timber used or supplied for the project be manufactured or produced in the United States; permitting waivers; waivers and exemptions;

providing remedies for intentional violations; defining terms; making findings; and declaring policy.

Be it enacted by the Legislature of West Virginia:

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

CHAPTER 5I. WEST VIRGINIA BUY AMERICAN ACT.

ARTICLE 1. WEST VIRGINIA BUY AMERICAN.

§5I-1-1. Short title.

1 This act may be cited as the “West Virginia Buy
2 American Act.”

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

1 (a) Findings. -- The Legislature finds that:
2 (1) The production of iron, steel, manufactured goods,
3 coal and timber provides jobs and family income to many
4 individuals in this state and, in turn, the jobs and family
5 incomes of millions of persons in the United States;
6 (2) The taxes paid to the state and its political
7 subdivisions by employers and employees engaged in the

8 production and sale of iron, steel, manufactured goods, coal
9 and timber are a large source of public revenues for West
10 Virginia;

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

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

23 (5) West Virginia's procurement policies should reflect
24 the state's and the nation's principles ensuring that the
25 products of those companies and workers who abide by our
26 workplace safety and environmental laws and regulations

27 should be rewarded with a commonsense preference in
28 government contracting.

29 (b) Declaration of policy. -- It is the policy of West
30 Virginia that all public officials and agencies should aid and
31 promote the economy of the state and the United States by
32 requiring a preference for the procurement of iron, steel,
33 manufactured goods, coal and timber produced in the United
34 States in all contracts for the construction, reconstruction,
35 repair, improvement or maintenance of public works.

§5I-1-3. Use of American materials.

1 (a) Notwithstanding any other provision of law, each
2 contract for the construction, reconstruction, alteration,
3 repair, improvement or maintenance of a public building or
4 public works made by a public agency which is funded in
5 part by state grants, state loans or state appropriations shall
6 contain a provision that the iron, steel, manufactured goods,
7 coal and timber used or supplied as construction materials in
8 the performance of the contract or any subcontract thereto
9 shall be manufactured or produced in the United States.

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

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

16 (1) The cost of domestic construction material would be
17 unreasonable:

18 (A) The cost of domestic iron, steel, or other
19 manufactured goods used as construction material is
20 unreasonable when the cumulative cost of such material will
21 increase the cost of the contract by more than twenty-five
22 percent;

23 (B) The cost of unmanufactured construction material is
24 unreasonable when the cost of such material exceeds the cost
25 of foreign material by more than six percent;

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

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

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

1 (a) If any contractor seeks a waiver or an exemption from
2 the requirements of the West Virginia Buy American Act, or
3 seeks to use foreign construction material on a project, it shall
4 seek the waiver or exemption from the public agency
5 administering the contract.

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

9 (A) A description of the foreign and domestic
10 construction materials;

11 (B) Unit of measure;

12 (C) Quantity;

13 (D) Cost;

14 (E) Time of delivery or availability;

15 (F) Location of the construction project;

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

17 (H) A detailed justification of the reason for use of
18 foreign construction materials.

19 (2) A request based on unreasonable cost must be
20 accompanied by a reasonable survey of the market and a
21 completed cost comparison table, illustrating the calculation
22 of comparative costs of using the foreign construction
23 material and using the domestic construction material on the
24 project.

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

28 (4) Any contractor request for a waiver or exemption
29 submitted after contract award shall explain why the
30 contractor could not reasonably foresee the need for such
31 determination and could not have requested the waiver or
32 exemption before the contract award. If the contractor does
33 not submit a satisfactory explanation, the request may be
34 summarily denied by the public agency.

35 (c) If the public agency determines after contract award
36 that an exception to the West Virginia Buy America Act
37 applies, the state or public construction contract may be
38 modified to allow for the use of the foreign construction
39 material. However, when the basis for the waiver or
40 exemption is the unreasonable cost of a domestic construction
41 material, the cost difference may not be less than one or more
42 of the differentials established in paragraphs (A) and (B),
43 subdivision (1), subsection (c), section three of this article.

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

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

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

54 (2) Receive comments and information on the granted
55 waiver or exemption.

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

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

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

5 (1) Affixed a label bearing a “Made in America” or
6 “Produced in America” inscription, or any inscription with
7 the same meaning, to any product used in projects to which
8 this section applies, sold in or shipped to the United States
9 that was not made or produced in the United States; or

10 (2) Represented that any product used in projects to
11 which this section applies, sold in or shipped to the United
12 States that was not produced in the United States, was

13 produced in the United States.

14 (b) *Limitation on Applicability of Waivers or Exemptions*
15 *to Products Produced in Certain Foreign Countries.* --

16 Notwithstanding any other provision of this article to the
17 contrary, waivers or exemptions may not be granted for
18 products produced in a foreign country if the State of West
19 Virginia or a public agency, in consultation with the United
20 States Trade Representative, determines that:

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

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

§5I-1-6. Definitions.

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

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

18 (2) “Domestic construction material” means:

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

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

23 (3) Foreign construction material” means a construction
24 material other than a domestic construction material.

25 (4) “Manufactured construction material” means any
26 construction material that is not unmanufactured construction
27 material.

28 (5) “Manufactured” means:

29 (A) In the case of an iron or steel product all
30 manufacturing must take place in the United States, except
31 metallurgical processes involving the refinement of steel
32 additives; or (B) In the case of a manufactured good, a good
33 will be considered manufactured in the United States if:

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

36 (ii) All of the components of the product are of United
37 States origin. A component will be considered of a product of
38 United States origin if all the manufacturing processes take
39 place in the United States, regardless of the origin of its
40 subcomponents.

41 (6) “Public agency” or “agency” means the State of West
42 Virginia, its departments, agencies, boards, commissions, and
43 institutions, and all units and political subdivisions, including
44 local school districts.

45 (7) “Public buildings” and “public works” mean any
46 structure, building, highway, waterway, street, bridge, transit
47 system, airport or other betterment, work or improvement
48 whether of a permanent or temporary nature and whether for
49 governmental or proprietary use. The term includes, but is not
50 limited to, any railway, street railway, subway, elevated and
51 monorail passenger or passenger and rail rolling stock, self-
52 propelled cars, gallery cars, locomotives, passenger buses,
53 wires, poles and equipment for electrification of a transit
54 system, rails, tracks, roadbeds, guide ways, elevated
55 structures, buildings, schools, hospitals, stations, terminals,
56 docks, shelters and repairs to any of the foregoing.

57 (8) “Steel” means an alloy that includes at least 50
58 percent iron, between 0.02 and 2.00 percent carbon, and may
59 include other elements.

60 (9) “United States” means all fifty states of the United
61 States, the District of Columbia, and all territories of the
62 United States.

63 (10) “Unmanufactured construction material” means raw
64 material brought to the construction site for incorporation
65 into the building or work that has not been:

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

67 (B) Combined with other raw material to create a material
68 that has different properties than the properties of the
69 individual raw materials.