

1 COMMITTEE SUBSTITUTE

2 FOR

3 **H. B. 4168**

4 (By Delegates D. Poling, Diserio, Marshall,
5 Walker, Poore, Young and Frich)

6 (Originating in the Committee on Finance)

7 [February 21, 2014]

8
9
10 A BILL to amend the Code of West Virginia, 1931, as amended, by
11 adding thereto by adding thereto five new sections, designated
12 §5-22-3, §5-22-4, §5-22-5, §5-22-6 and §5-22-7, all relating
13 to requiring the use of items of goods and equipment
14 manufactured in the United States in government construction
15 contracts; specifying the types of public entities and the
16 types of contracts to which provisions apply; duties and
17 responsibilities of public entities and bidders on contracts;
18 providing conditions upon which provisions may be waived;
19 duties and responsibilities of the division of labor;
20 providing for violations and penalties therefor; providing
21 opportunity for hearing; and requiring rules to carry out
22 provisions.

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 five new sections, designated §5-22-3, §5-22-4,
26 §5-22-5, §5-22-6 and §5-22-7, all to read as follows:

27 **ARTICLE 22. GOVERNMENT CONSTRUCTION CONTRACTS.**

28 **§5-22-3. Definitions.**

1 As used in this article, unless the content clearly requires
2 a different meaning:

3 (1) "Item" or "Item of goods or equipment" means:

4 (A) Commodities, supplies, materials, equipment and any other
5 items provided for in the contract that will remain affixed to the
6 real property, or buildings constructed thereon, but does not mean
7 a vendor's equipment that does not remain with or otherwise become
8 the property of the state; and

9 (B) An individual item, or collection of identical items,
10 which cost \$10,000 or more, but in the case of a collection of
11 identical items shall not include any subsequent or extra purchases
12 of the identical items for less than \$10,000.

13 (2) "Manufactured in the United States" means that the item is
14 produced in the United States, manufactured in the United States or
15 assembled in the United States from component parts or materials,
16 regardless of origin.

17 (3) "Public agency" or "public entity" means the State of West
18 Virginia, its departments, agencies, boards, commissions, and
19 institutions, and all units and political subdivisions thereof,
20 including local school districts;

21 (4) "United States" means the United States of America and
22 includes all territory, continental or insular, subject to the
23 jurisdiction of the United States.

24 **§5-22-4. Use of items manufactured in the United States.**

25 (a) In any instance that a contract subject to the bidding
26 requirements of this article is estimated to exceed \$500,000, all
27 solicitations requesting bids, and any subsequent contracts, shall
28 specify and require that any item of goods or equipment used or

1 supplied in the performance of the contract or any subcontract
2 thereto shall be manufactured in the United States.

3 (b) Each public agency shall call for the use of items of
4 goods or equipment manufactured in the United States in the design
5 and engineering specifications for the projects to be performed
6 under contracts subject to the bidding requirements of this
7 article.

8 (c) Notwithstanding any provisions of subsections (a) and (b)
9 of this section, any person responding to a solicitation for bids
10 or designs may apply, with sufficient evidence in support of their
11 application, to the public entity accepting public contract bids
12 for a waiver to use foreign goods and equipment. The public entity
13 may grant the waiver under the following conditions:

14 (1) The specified goods and equipment are not produced in the
15 United States in sufficient quantity or otherwise are not
16 reasonably available to meet contract requirements;

17 (2) The item of goods or equipment manufactured in the United
18 States exceed the cost of comparable foreign-made goods or
19 equipment by more than ten percent of the cost of that item;

20 (3) The specified goods or equipment are necessary for the
21 protection and safety of the public or property, and no comparable
22 American-made products are available, including but not limited to,
23 fire suppression systems, security systems or emergency detection
24 or response systems; or

25 (4) In the case of a repair or maintenance project, the
26 specified items of goods or equipment have already been installed
27 during a previous project and replacing those items with items
28 manufactured in the United States would create an unreasonable

1 hardship.

2 (d) The public entity accepting public contract bids shall:

3 (1) Implement procedures for issuance of a final decision on
4 waiver requests pursuant to subsection (c) of this section; and

5 (2) Shall report its final decision with findings to the
6 Division of Labor.

7 (e) The public entity accepting public contract bids shall
8 have authority to request that vendors provide, within five
9 business days of the request, any documentation that the
10 contracting authority deems necessary to verify compliance with
11 this section.

12 (f) No bid shall be approved that does not comply with the
13 requirements of this section.

14 **§5-22-5. Annual lists of items available and not available.**

15 (a) The Division of Labor shall develop and publish at least
16 annually, for use by public entities accepting public contract
17 bids, the following:

18 (1) A list of items of goods or equipment deemed to qualify as
19 manufactured in the United States for purposes of this article;

20 (2) A list of items of goods or equipment which are not
21 manufactured in the United States and for which a waiver can be
22 granted pursuant to subsection (c), section four of this article.

23 (b) The annual lists developed by the Division of Labor are
24 for guidance to persons submitting bids or designs, and a person
25 may not be penalized under section six of this article for relying
26 on these annual lists. However the public entity accepting public
27 contract bids has final authority to grant or deny waivers pursuant
28 to the processes implemented under subsection (d), section four of

1 this article.

2 (c) In developing the lists or contracting for the development
3 of the lists, the Division of Labor shall implement procedures to
4 promote public input. In doing so, the Division of Labor shall
5 annually:

6 (1) Make the lists available for public review and comment not
7 less than thirty days prior to publication;

8 (2) Take into account all comments received and resolve
9 disputes raised during the public comment period;

10 (3) Invite public comments as to items' availability for which
11 no determination on availability has been made; and

12 (4) Publish the lists on the publicly accessible Internet
13 website of the state and in the West Virginia Purchasing Bulletin.

14 (d)(1) The Division of Labor shall develop the first annual
15 lists over a period not to exceed three years, provided that the
16 items of goods or equipment most commonly used in such projects to
17 be performed by contracts subject to the bidding requirements of
18 this article which are determined to be manufactured in the United
19 States are included in the first publication of the annual list;
20 and

21 (2) The Division of Labor shall develop a process to annually
22 review and amend the lists required under section in accordance
23 with the requirements for public input under subsection (c) of this
24 section.

25 **§5-22-6. Violations and Enforcement.**

26 (a) Intentional Violations. -- Any person who has responded to
27 a solicitation for bids or designs shall be subject to the
28 conditions set out in subsection (b) of this section if it is

1 determined by the Division of Labor that the person intentionally:

2 (1) Represented that any item of goods or equipment used in
3 projects to which this section applies were not manufactured in the
4 United States, when in fact the item was manufactured in the United
5 States; or

6 (2) Represented that any item of goods or equipment used in
7 projects to which this section applies were manufactured in the
8 United States, when in fact the item was not manufactured in the
9 United States.

10 (b) If a person is found to have committed a violation as
11 described in subsection (a) of this section, the person:

12 (1) On first offense, shall be suspended from bidding on any
13 other state construction projects for a period of ninety days; and

14 (2) On second offense, shall be suspended from bidding on any
15 other state construction projects for a period of one year; and

16 (3) On third or more offenses, shall be subject to debarment
17 provided for under article three, chapter five-a of this code.

18 (c) The Division of Labor shall have authority to review all
19 projects subject to the requirements of this article for any
20 violations as described in subsection (a) of this section, and:

21 (1) Upon a determination that a person has violated the
22 provision of subsection (a) of this section, the Division of Labor
23 shall issue a cease and desist order requiring the person to
24 immediately cease all practices in violation of this section; and

25 (2) After affording an opportunity for a hearing and
26 adjudicating that the person committed the violation, the Division
27 of Labor shall issue a final order indicating a violation of this
28 section, and publish the final order in sufficient manner to inform

1 all public entities accepting public contract bids of the person's
2 status with regards to suspension or debarment.

3 **§5-22-7. Rules.**

4 (a) A public entity accepting public contract bids shall adopt
5 rules, applicable to the bidding process for that public entity,
6 that are necessary to carry out the provisions of this article
7 pursuant to the provisions of the state administrative procedures
8 act.

9 (b) The Division of Labor shall propose for promulgation
10 legislative rules that are necessary to exercise its powers and
11 authority under this article pursuant to the provisions of article
12 three, chapter twenty-nine-a of this code.

13 (c) The Division of Labor or any public entity accepting
14 public contract bids may disseminate educational or any other
15 materials designed to assist persons with regards to compliance to
16 the provisions of this article.