

1 COMMITTEE SUBSTITUTE

2 FOR

3 **Senate Bill No. 381**

4 (By Senators Miller, Yost, Klempa, Wills, Laird, D. Facemire,
5 Chafin, Foster, Kessler (Mr. President), Plymale and Jenkins)

6 _____
7 [Originating in the Committee on Government Organization;
8 reported February 23, 2012.]

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11 A BILL to amend and reenact §5-19-1, §5-19-2, §5-19-3 and §5-19-4
12 of the Code of West Virginia, 1931, as amended; and to amend
13 said code by adding thereto three new sections, designated §5-
14 19-5, §5-19-6 and §5-19-7, all relating to creating the West
15 Virginia Buy American Act; defining terms; requiring public
16 agency construction contracts for public buildings or public
17 works which utilize state grants or state loans to finance all
18 or part of the construction costs contain a provision
19 requiring that the iron, steel, manufactured goods, coal and
20 timber used or supplied for the project be manufactured or
21 produced in the United States; permitting waivers; exceptions;
22 violations; and limitations.

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

24 That §5-19-1, §5-19-2, §5-19-3 and §5-19-4 of the Code of West

1 Virginia, 1931, as amended, be amended and reenacted; and that said
2 code be amended by adding thereto three new sections, designated
3 §5-19-5, §5-19-6 and §5-19-7, all to read as follows:

4 **ARTICLE 19. WEST VIRGINIA BUY AMERICAN.**

5 **§5-19-1. Short title.**

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

7 **§5-19-2. Legislative findings.**

8 (a) The Legislature finds that:

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

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

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

22 (4) The state's taxpayer dollars are better spent if
23 reinvested with its individual and employer taxpayers in order to
24 foster job retention and growth, particularly within the

1 manufacturing, harvesting and mineral extraction sectors, and to
2 ensure a broad and healthy tax base for future investments vital to
3 the state's infrastructure; and

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

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

16 **§5-19-3. Definitions.**

17 As used in this article, the following terms have the meanings
18 ascribed to them in this section, unless the context in which the
19 term is used clearly requires another meaning:

20 (1) "Construction material" means an article, material or
21 supply brought to the construction site by the contractor or a
22 subcontractor for incorporation into the building or work. The
23 terms also includes an item brought to the site preassembled from
24 articles, materials or supplies. However, emergency life safety

1 systems, such as emergency lighting, fire alarm and audio
2 evacuation systems, that are discrete systems incorporated into a
3 public building or work and that are produced as complete systems,
4 are evaluated as a single and distinct construction material
5 regardless of when or how the individual parts or components of
6 those systems are delivered to the construction site. Materials
7 purchased directly by the public agency are supplies, not
8 construction material.

9 (2) "Domestic construction material" means:

10 (A) An unmanufactured construction material mined or produced
11 in the United States; or

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

13 (3) "Foreign construction material" means a construction
14 material other than a domestic construction material.

15 (4) "Manufactured construction material" means any
16 construction material that is not unmanufactured construction
17 material.

18 (5) "Manufactured" means:

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

22 (B) In the case of a manufactured good, a good will be
23 considered manufactured in the United States if:

24 (i) All the manufacturing processes for the product take place

1 in the United States; and

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

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

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

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

24 (9) "United States" means all 50 states of the United States,

1 the District of Columbia, and all territories of the United States.

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

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

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

9 **§5-19-4. Use of American materials.**

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

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

22 (c) The application of the preference shall not be required if
23 the State or the public agency determines one or more of the
24 following:

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

3 (A) The cost of domestic iron, steel, or other manufactured
4 goods used as construction material is unreasonable when the
5 cumulative cost of such material will increase the cost of the
6 contract by more than 20 percent; or

7 (B) The cost of unmanufactured construction material is
8 unreasonable when the cost of such material exceeds the cost of
9 foreign material by more than 6 percent;

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

13 (3) The construction material mined, produced or manufactured
14 in the United States is not of satisfactory quality; or

15 (4) 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 **§5-19-5. Waiver or exemption request; procedures.**

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

24 (b) (1) Any waiver request submitted by a contractor must

1 include adequate information for the public agency to evaluate the
2 request, including:

3 (A) A description of the foreign and domestic construction
4 materials;

5 (B) Unit of measure;

6 (C) Quantity;

7 (D) Cost;

8 (E) Time of delivery or availability;

9 (F) Location of the construction project;

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

11 (H) A detailed justification of the reason for use of foreign
12 construction materials.

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

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

20 (4) Any contractor request for a waiver or exemption submitted
21 after a contract is awarded shall explain why the contractor could
22 not reasonably foresee the need for such determination and could
23 not have requested the waiver before the contract was awarded. If
24 the contractor does not submit a satisfactory explanation, the

1 request may be summarily denied by the public agency.

2 (c) If the public agency determines after the contract was
3 awarded that an exception to this article applies, the public
4 construction contract may be modified to allow for the use of the
5 foreign construction material. However, when the basis for the
6 waiver or exception is the unreasonable cost of a domestic
7 construction material, the cost difference may not be less than the
8 differential established in paragraph one, subsection (c), section
9 four of this article.

10 (d) Unless the public agency determines that an exception
11 applies, use of foreign construction material on a project subject
12 to the provisions of this article is in violation of this article.

13 (e) Whenever a public agency grants an exception to the
14 requirement to use domestic construction materials on a project
15 that is subject to this article, it shall:

16 (1) Publish, in the State Register, a detailed written
17 justification as to why the waiver was granted; and

18 (2) Receive comments and information on the granted waiver.

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

23 **§5-19-6. Violations.**

24 A person shall be ineligible to receive any contract or

1 subcontract with a public agency if a court or federal or public
2 agency determines that a person intentionally:

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

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

12 **§5-19-7. Limitation on applicability of waivers.**

13 The waiver procedures and exceptions granted under this
14 article do not apply to products produced in a foreign country if
15 the head of the public agency, in consultation with the United
16 States Trade Representative, determines that:

17 (1) The foreign country is a party to an agreement with the
18 United States and pursuant to that agreement the head of the public
19 agency has waived the requirements of this article; and

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