

**E N G R O S S E D**

COMMITTEE SUBSTITUTE

FOR

**H. B. 4263**

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

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(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. Material costs of less than two thousand five

18 hundred dollars are not covered by this article and are to  
19 considered as de minimus expenses.

20 (2) “Domestic construction material” means:

21 (A) An unmanufactured construction material mined or  
22 produced in the United States; or

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

25 (3) “Foreign construction material” means a construction  
26 material other than a domestic construction material.

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

30 (5) “Manufactured” means:

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

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

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

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

47 (7) “Public buildings” and “public works” mean any  
48 structure, building, highway, waterway, street, bridge, transit  
49 system, airport or other betterment, work or improvement  
50 whether of a permanent or temporary nature and whether for  
51 governmental or proprietary use. The term includes, but is not  
52 limited to, any railway, street railway, subway, elevated and  
53 monorail passenger or passenger and rail rolling stock, self-  
54 propelled cars, gallery cars, locomotives, passenger buses,

55 wires, poles and equipment for electrification of a transit  
56 system, rails, tracks, roadbeds, guide ways, elevated  
57 structures, buildings, schools, hospitals, stations, terminals,  
58 docks, shelters and repairs to any of the foregoing.

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

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

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

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

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