

**Department of Legislative Services**  
Maryland General Assembly  
2012 Session

**FISCAL AND POLICY NOTE**  
**Revised**

Senate Bill 432

(Senator Young, *et al.*)

Education, Health, and Environmental Affairs

Health and Government Operations

**Procurement - Maryland Buy American Steel and Manufactured Goods Act**

This bill requires a public body in the State to require a contractor or subcontractor to use or supply only American manufactured goods for public works contracts that construct or maintain a public work or buy or manufacture machinery or equipment that meets specified criteria. The bill establishes exceptions to this requirement and procedures for implementation.

**Fiscal Summary**

**State Effect:** General, special, nonbudgeted, and higher education expenditures increase – potentially significantly – to add procurement staff to implement and enforce the bill’s provisions. It is anticipated that each agency engaged in procuring and managing public works projects, most notably the Maryland Department of Transportation (MDOT), Department of General Services (DGS), Maryland Transportation Authority (MDTA), the University System of Maryland (USM), Morgan State University (MSU), and St. Mary’s College of Maryland (SMCM) could require one to two additional positions. Other agencies with public works projects may also be affected. Total combined staffing costs could exceed \$540,000 beginning in FY 2013. Out-year costs would reflect annualization and inflation. State costs for public works projects also increase in proportion to the use of manufactured goods in the State public works contracts; a reliable estimate is not feasible, in part because the bill includes several exceptions to the requirement. Although total State expenditures for public works projects likely do not increase because the capital budget is established annually through the budget process, fewer projects may receive funding due to the increase in costs for individual projects. No effect on revenues.

**Local Effect:** Local government expenditures also increase to implement and enforce the bill’s provisions for public works projects, including school construction projects.

The cost of locally funded projects increases in proportion to their use of manufactured goods without invoking the bill's exceptions. **This bill imposes a mandate on a unit of local government.**

**Small Business Effect:** Minimal. Any increased costs for American-made manufactured goods used in public works contracts are likely passed on to the public body. Small businesses may benefit, however, to the extent their products are used in public works projects.

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## Analysis

**Bill Summary:** “American manufactured goods” are defined as those for which all the manufacturing processes for the final product take place in the United States, and all of the components of the final product originate in the United States, regardless of the origin of the subcomponents. Public bodies must include a notice about the requirement to use American manufactured goods in each invitation for bids or request for proposals.

The bill's requirement does not apply if it conflicts with a federal law or grant or if the head of a public body determines that (1) the price of American manufactured goods is not reasonable; (2) American manufactured goods are not produced in sufficient quantity to meet the requirements of the contract; or (3) the purchase of American manufactured goods is not consistent with the public interest.

The Board of Public Works (BPW) must develop regulations that define a “reasonable” price for American manufactured goods. A bid or offered price is considered reasonable if it is no more than:

- 20% above the price of a similar, foreign-made item, including duty; or
- 30% above the price of a similar, foreign-made item that is produced in a “substantial labor surplus area” as defined by the U.S. Department of Labor (DOL).

### Current Law:

#### *Maryland Buy American Steel Act*

Chapter 48 of 1988 (the Maryland Buy American Steel Act) requires public bodies in the State to require contractors to use or supply only American steel products for public works construction or maintenance projects and for machinery or equipment that is composed of at least 10,000 pounds of steel and is to be installed at a public work site. The requirement does not apply if it conflicts with a federal law or grant that affects a

contract, and an exception to this requirement may be granted if the head of a public body determines that:

- the price of American steel products is not reasonable, as defined in statute;
- American steel products are not produced in sufficient quantity to meet contract requirements; or
- the purchase of American steel products is inconsistent with the public interest.

BPW must develop regulations that define a “reasonable” price for American-made steel. A bid or offered price for American steel is considered reasonable if it is no more than:

- 20% above the price of a similar, foreign-made item, including duty; or
- 30% above the price of a similar, foreign-made item that is produced in a “substantial labor surplus area” as defined by DOL.

#### *American-made Apparel*

Chapter 314 of 2011 prohibits public employers in the State from knowingly purchasing, furnishing, or requiring employees to purchase or acquire uniforms or safety equipment and protective accessories that are manufactured outside of the United States, subject to specified exemptions. BPW must adopt regulations that establish the conditions under which the Act applies with regard to the price, quality, and availability of items produced in the United States.

The prohibition in Chapter 314 against purchasing apparel and safety equipment manufactured outside the United States does not apply if:

- either the item is not manufactured or available for purchase in the United States, or is not manufactured or available in reasonable quantities;
- the price of the item manufactured in the United States exceeds the price of a similar item not manufactured in the United States by an unreasonable amount; or
- the quality of the item manufactured in the United States is substantially less than the quality of a similar item not manufactured in the United States.

**Background:** According to the National Association of State Procurement Officials, at least 20 states (including Maryland) have some form of Buy American purchasing preference, although they apply to different items. In two states (Montana and Texas), the preference generally applies only in the case of a tie between two or more firms.

The 1981 Agreement on Government Procurement (GPA) was entered into by 37 countries, including the United States, to promote three main principles:

- nondiscrimination on the basis of national origin in the procurement of goods and services;
- transparency in the laws, regulations, and procedures governing government procurement; and
- competitive contracting practices.

Initially, GPA did not apply to State procurement laws but was amended to apply to them in 1996. In general, the Maryland Buy American Steel Act and other State preference programs, in addition to procurements by several designated State agencies, including the Department of General Services, are exempt from challenge under GPA in accordance with stipulations first made by Governor William Donald Schaefer and later reaffirmed by Governor Robert Ehrlich. However, other State procurement preference programs that are adopted after GPA's effective date, such as the one required by this bill, may require similar protection or be subject to challenge by GPA member nations. A 2005 letter of advice from the Attorney General's Office explains that international trade agreements that promote nondiscrimination on the basis of national origin, including GPA, do not preempt State procurement law.

A successful challenge by a member nation before the World Trade Organization (WTO) also does not preempt State procurement law; only federal action can preempt State law. However, it would prompt the federal government to encourage the State to modify its procurement law to conform to GPA requirements. Failure on the State's part to make those modifications could subject the United States to trade sanctions imposed by WTO. If federal action were taken against Maryland and a federal court were to hold that State law was preempted by GPA, the Attorney General's Office advised that any action would only be applied prospectively.

"Labor surplus areas" in the United States are communities in which the unemployment rate exceeds the national rate by at least 20%. According to the U.S. Department of Labor, there are hundreds of labor surplus areas in the country as of October 1, 2011.

**State Fiscal Effect:** The bill's fiscal effect stems both from the cost of enforcing its provisions and from potential increases in the cost of public works projects.

#### *Administrative Costs*

The bill does not provide a mechanism to enforce its requirements regarding American-made manufactured goods; Legislative Services assumes that the requirement

to enforce the bill's requirement falls on each procurement unit that contracts for public works projects. These typically include DGS, MDOT, and MDTA. USM and other public colleges and universities, though exempt from most provisions of State procurement law, are subject to the bill.

Although DGS, MDOT, and MDTA advise that they can likely implement the bill with existing budgeted resources, Legislative Services believes that meaningful enforcement of the bill's provisions likely requires additional resources; USM advises that the bill increases both project costs and administrative costs to implement its provisions. At a minimum, enforcement requires procurement staff to identify, prior to issuing a bid request, all of the manufactured goods included in a public works contract that are subject to the bill's requirement, and verification of their origin during the performance of a contract. This requires on-site inspections and additional follow-up with contractors. Processing of waivers under the bill's exemption provisions, which may be considerable in number, may also require substantial staff time to confirm that domestic manufactured goods either are not available or are within the bill's cost limitations. To the extent that these determinations by procurement staff are contested, the prospect also exists that the bill prompts additional bid or contract protests, which require additional time and effort from procurement staff and the Office of the Attorney General.

Therefore, general, special, nonbudgeted, and higher education fund expenditures likely increase in fiscal 2013, to hire additional procurement staff to assist in procurement planning and enforcement of the bill's provisions for public works projects. Total expenditures for these positions could exceed \$540,000 as each position costs about \$54,000 in salary, benefits, and other direct costs.

The additional expenditures for procurement staff would likely be higher education funds (one staff each for MSU, SMCM, and two for USM), with the rest evenly divided among nonbudgeted (MDTA), special (MDOT), and general (DGS) funds. To the extent that additional agencies procure public works projects, personnel costs may be higher. Also, to the extent MDTA, MDOT, and DGS do not *actively enforce* the bill, existing staff *may* be able to implement the bill.

### *Procurement Costs*

The bill allows the price of American-made manufactured goods to exceed the price of comparable foreign-made goods by between 20% and 30%. The proportion of a public works contract that is devoted to manufactured goods will vary from contract to contract, so a reliable estimate of the bill's effect on the cost of those projects is not feasible. Barring frequent use of the exemptions allowed by the bill, the total cost of individual public works contracts will inevitably increase in proportion to the use of manufactured goods by the contractor. Total expenditures for public works projects likely do not

increase because the capital budget is established annually through the capital budget process. However, fewer projects likely receive funding in a given year due to an increase in costs for individual projects.

**Local Fiscal Effect:** Similar to the State, local governments also experience increased administrative and procurement costs to carry out the bill's provisions.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Calvert and Prince George's counties, cities of Frederick and Havre de Grace, Board of Public Works, Department of Budget and Management, Department of General Services, Maryland Department of Transportation, University System of Maryland, U.S. Department of Labor, Department of Legislative Services

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Analysis by: Michael C. Rubenstein

Direct Inquiries to:  
(410) 946-5510  
(301) 970-5510