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**Infrastructure
Funding Diversion**

Last week marked the half-way point in this year's 60-day legislative session and much of the time has been spent on hearings and developing bills to address the storage tank leak that shut down water service in a nine-county region. Lawmakers will have to work the next two weeks to get other legislation through the legislative committee process. Bills must be out of committees in their house of origin by the 47th day, February 23, to ensure three full days for reading. Members should look for CAWV Legislative Alerts in the coming days on issues that affect the contracting industry.

[S.B. 461](#), a bill that would put a portion of oil and natural gas severance tax revenue in a special account for future use, was introduced by Senate President Jeff Kessler, D-Marshall. The bill creates the Future Fund which would be funded by depositing 25 percent of oil and natural gas severance tax revenues more than \$175 million into the account. The interest received on the account can be spent on economic development projects, infrastructure and educational enhancement. In order to build up the principal there is a delay rider that provides that nothing shall be expended for a period of six years. After six years, the Future Fund account could be significant. President Kessler has introduced the bill before and patterned it off of a North Dakota law which has generated billions from their oil and natural gas revenues. The bill passed the Senate Economic Development Committee and now goes to Senate Finance.

HOUSE COMMITTEE PASSES BUY AMERICAN BILL

The House Industry and Labor Committee February 5 voted out [H.B. 4168](#), the Buy American bill. The bill was amended to include many of the onerous requirements that had been previously removed from the introduced bill. The committee substitute requires all public agencies to require a Buy American Provision (BAP) in contracts over \$500,000. Contractors would have to get a waiver, "with sufficient evidence in support of their application," to use foreign products. The waiver would be granted only if the product is not produced in sufficient quantity in the United States or exceeds the cost of a comparable foreign-made product by more than 10 percent of the cost of the item. The public entity accepting bids shall have the authority to request that vendors provide, "within 5 business days of the request, any documentation that the contracting authority deems necessary to verify compliance with the law." The WV Division of Labor, which has no experience in designing, advertising, awarding or administration of public construction contracts, will be the agency administering the Buy American law. The bill now goes to the House Finance Committee.

The industry's objections to the bill include:

[H.B. 4168](#), the West Virginia Buy American Act, requires each construction contract made by a public agency to contain a provision that the iron, steel, manufactured goods, coal and timber used or supplied as construction materials shall be manufactured or produced in the United States. The legislation is well intended but creates many problems for public owners, contractors, subcontractors and suppliers.

There are exemptions to the bill. The Buy American Provision (BAP) does not apply when the WV Division of Labor (WVDOL) finds:

- The use of the manufactured good would be inconsistent with the public interest;
- The product is not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality;
- The cost of the product is unreasonable;
- If the project is less than \$500,000.

The WVDOL would publish a list of products that can be used on school, highway, water and sewer and other public projects. Anyone that intentionally violates the BAP shall be subject to debarment. Contractors will have five days to provide documentation that products meet BAP requirements.

Talking Points Include:

1. WV Code 5-19 currently requires domestic steel, aluminum and glass be used in all public projects. It has worked well for years.
2. BAP was in stimulus projects funded by the American Recovery and Reinvestment Act (ARRA) of 2009. The provision proved very difficult to implement. Projects were being held up and costs were increasing on ARRA projects as a result of the BAP.
3. A task force met from June to December 2012 and concluded that many products in public construction projects are manufactured or assembled in America. H.B. 4168 would add additional bureaucratic burden to the public construction process though it was not determined a problem exists.
4. There will probably be very few waivers granted. That is because the public agency has discretion, but they may not have the time or expertise to properly demonstrate whether a waiver needs to be granted. The key issues are how “sufficient” quantities and “satisfactory” quality will be interpreted. By their nature, both terms are subjective and most governmental agencies will not have time prior to bid to make this determination.
5. While the concept behind H.B. 4168 is good, the implementation will have a negative impact on West Virginia’s economy. There is no question that this legislation will increase the cost of construction due to both the administrative burden and the increased material costs. Even a minor increase will mean less school, road and infrastructure construction. This will negatively impact both quality of life and employment issues.
6. **Specifically, there is a significant potential for job loss of West Virginia design professionals and construction workers**

if construction costs rise, causing agencies to perform less construction or maintenance. There are also potential job losses if West Virginia suppliers are shut out of supplying their product lines on public construction projects. We do not think it is wise to sacrifice West Virginia jobs with the hope of adding manufacturing jobs elsewhere in the country.

CAWV members will receive a CAWV Legislative Alert outlining the numerous objections to this bill, and particularly to the punitive language included in the bill. All members are requested to contact their legislators. Members also should contact delegates on the House Finance Committee and every Senator.

OSHA 10-HOUR BILL CONTINUES TO BE MODIFIED

The Senate continues to work on [S.B. 376](#), the OSHA 10-Hour safety program bill, to address industry's concerns. The bill has passed the Senate Labor Committee. The language addresses many of the concerns raised by the CAWV over the past four years, including phasing in the requirement through 2014, making the training a one-time certification not annually, putting the requirement on completion of the class on the employee not employer, and not requiring employees to have training prior to starting a project. The bill now goes to the Senate Judiciary Committee.

FALSE CLAIMS ACT STILL IN HOUSE JUDICIARY

The House has spent some time on [H.B. 4001](#), the False Claims Act, which was introduced the first day of the session and passed out of the House Judiciary Committee on the second day of the session. The business community objected to the quick timeline that did not give legislators or interested parties the opportunity to study the impact of the bill. The House leadership did recommit the bill to the committee and there was a hearing that gave proponents, mostly out of state law firms, time to promote the bill. The business community spoke at the hearing, but they were clearly outnumbered. The bill was added to the House Judiciary's agenda Thursday but was again pulled back.

The WV Business and Industry Council (BIC) and WV Chamber of Commerce are continuing to oppose the bill. As the bill currently stands, whistleblowers would be able to initiate lawsuits against companies doing business with state government. Additionally, these whistleblowers and their attorneys stand to receive a part of the penalties/settlement, even though the government was the victim. There are no caps on attorney fees, no limit on what constitutes fraud, no requirement to exhaust administrative remedies and a retroactivity provision that can extend back ten years.

MECHANICS' LIEN BILL RAISES CONCERNS

[H.B. 4347](#) is a bill that has garnered much attention since its introduction. The bill's description says it provides for "affirmative defenses" to a mechanics lien. However, amendments to the bill in House Judiciary Committee have greatly expanded the scope of the bill. Del. John Shott, R-Mercer, told the CAWV he introduced the legislation at the request of some homeowners whose homebuilding

contractor left them with unpaid subcontractor and supplier bills. Del. Shott said his original bill was patterned off of Virginia's statute. CAWV members who have reviewed the modified version believe the bill unfairly punishes innocent subs and suppliers while aiding the contractor who actually harmed the owner. H.B. 4347 is still in House Judiciary Committee.

INFRASTRUCTURE FUNDING DIVERSION BILLS STILL IN COMMITTEE

[S.B. 334](#) and [S.B. 385](#), introduced by Gov. Tomblin, divert funds from highway and water and sewer funding to help make up the approximate \$150 million deficit projected for the state's general fund. S.B. 334 reduces funding for the State Road Fund for two years. It puts a moratorium on the Consumer Sales Tax paid on highway construction materials from being transferred from the state's general fund to the State Road Fund. This is about \$13 million or \$26 million over two years. S.B. 385 reduces that amount of annual appropriations to the West Virginia Infrastructure Fund 50 percent, from \$40 million to \$20 million. This would result in a \$60 million loss in funds over the next three years for water, sewer and economic development grants and loans. There is not a lot of support among legislators to take money from these accounts and the bills remain in committees. Legislators and the administration are continuing to look at all options to address the expected fiscal year budget deficit.

Below is a list of bills that have been introduced this week that have an impact on the construction industry or some CAWV members. Anyone needing further information can contact Mike Clowser at (304) 342-1166 or email mclowser@cawv.org.

House Bills

<i>Bill #</i>	<i>Proposal</i>	<i>Sponsors</i>	<i>Committees</i>
HB4392	Regulating persons who perform work on heating, ventilating and cooling systems and fire dampers	Dels. Morgan, Diserio, Jones, D. Poling, Barker	2/3/14 - Government Organization then Judiciary
HB4396	Relating to a trial suspension in certain border counties of the Motor Fuel Excise Tax	Dels. Ellington, Kump, Gearheart, Stephens, Faircloth, Householder, Folk, Shott, Frich, Storch, White	2/4/14 - Finance

Senate Bills

<i>Bill #</i>	<i>Proposal</i>	<i>Sponsors</i>	<i>Committees</i>
SB 473	Providing property not desirable for highway purposes be offered first to public service districts or municipalities	Sens. Sypolt, Blair, Cookman, Williams	2/3/14 - Transportation and Infrastructure then Govt. Organization
SB 476	Providing standards for conversion and retrofits of alternative-fuel motor vehicles	Sen. Plymale	2/3/14 - Transportation and Infrastructure then Judiciary

<u>SB 485</u>	Exempting DOH from certain permitting requirements of Natural Stream Preservation Act	Sens. Kirkendoll, Beach, D. Hall, Miller, Snyder	2/4/14 - Natural Resources then Judiciary
<u>SB 491</u>	Exempting sales of motor fuel from unfair trade practices	President Kessler, Sen. Snyder, Blair, Cookman, Unger	2/5/14 - Judiciary
<u>SB 516</u>	Modifying guidelines for medical treatment to injured workers	Sen. Yost	2/10/14 - Labor then Judiciary
<u>SB 517</u>	Providing liberal weighing of evidence for workers's compensation claims	Sen. Yost	2/10/14 - Banking and Insurance then Judiciary
<u>SB 519</u>	Relating to workers' compensation benefits for occupational pneumoconiosis	Sen. Yost	2/10/14 - Judiciary
<u>SB 520</u>	Declaring remedial component of workers' compensation laws receive liberal construction	Sen. Yost	2/10/14 - Judiciary then Finance



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