WEST VIRGINIA LEGISLATURE

ENROLLED

SENATE BILL NO. 650

(By Senator Craig, et al.)

PASSED April 13, 2001

In Effect July 1, 2001
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Senate Bill No. 650

(By Senators Craigo, McCabe, Fanning and Sharpe)

[Passed April 13, 2001; to take effect July 1, 2001.]

AN ACT to amend and reenact section two, article fifteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to including construction management within the definition of contracting for sales and use tax purposes.

Be it enacted by the Legislature of West Virginia:

That section two, article fifteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted to read as follows:

ARTICLE 15. CONSUMERS SALES AND SERVICE TAX.


1 For the purpose of this article:

2 (a) “Business” includes all activities engaged in or

3 caused to be engaged in with the object of gain or eco-
nomic benefit, direct or indirect, and all activities of the state and its political subdivisions which involve sales of tangible personal property or the rendering of services when those service activities compete with or may compete with the activities of other persons.

(b) "Communication" means all telephone, radio, light, light wave, radio telephone, telegraph and other communication or means of communication, whether used for voice communication, computer data transmission or other encoded symbolic information transfers and shall include commercial broadcast radio, commercial broadcast television and cable television.

(c) "Contracting":

(1) In general. — "Contracting" means and includes the furnishing of work, or both materials and work, for another (by a sole contractor, general contractor, prime contractor, subcontractor or construction manager) in fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof, or for removal or demolition of a building or structure, or any part thereof, or for the alteration, improvement or development of real property.

Contracting means and includes services provided by a construction manager so long as the project for which the construction manager provides the services results in a capital improvement to a building or structure or to real property.

(2) Form of contract not controlling. — An activity that falls within the scope of the definition of contracting shall constitute contracting regardless of whether the contract governing the activity is written or verbal and regardless of whether it is in substance or form a lump sum contract, a cost-plus contract, a time and materials contract,
whether or not open-ended, or any other kind of construction contract.

(3) Special rules. — For purposes of this definition:

(A) The term “structure” includes, but is not limited to, everything built up or composed of parts joined together in some definite manner and attached or affixed to real property or which adds utility to real property or any part thereof or which adds utility to a particular parcel of property and is intended to remain there for an indefinite period of time;

(B) The term “alteration” means, and is limited to, alterations which are capital improvements to a building or structure or to real property;

(C) The term “repair” means, and is limited to, repairs which are capital improvements to a building or structure or to real property;

(D) The term “decoration” means, and is limited to, decorations which are capital improvements to a building or structure or to real property;

(E) The term “improvement” means, and is limited to, improvements which are capital improvements to a building or structure or to real property;

(F) The term “capital improvement” means improvements that are affixed to or attached to and become a part of a building or structure or the real property or which add utility to real property or any part thereof, and that last or are intended to be relatively permanent. As used herein, “relatively permanent” means lasting at least a year in duration without the necessity for regularly scheduled recurring service to maintain the capital improvement. “Regular recurring service” means regularly scheduled service intervals of less than one year;

(G) Contracting does not include the furnishing of work, or both materials and work, in the nature of hookup,
connection, installation or other services if the service is incidental to the retail sale of tangible personal property from the service provider's inventory: Provided, That the hook-up, connection or installation of the foregoing is incidental to the sale of the same and performed by the seller thereof or performed in accordance with arrangements made by the seller thereof. Examples of transactions that are excluded from the definition of contracting pursuant hereto include, but are not limited to, the sale of wall-to-wall carpeting and the installation of wall-to-wall carpeting, the sale, hook-up and connection of mobile homes, window air conditioning units, dishwashers, clothing washing machines or dryers, other household appliances, drapery rods, window shades, venetian blinds, canvas awnings, free standing industrial or commercial equipment and other similar items of tangible personal property. Repairs made to the foregoing are within the definition of contracting if the repairs involve permanently affixing to or improving real property or something attached thereto which extends the life of the real property or something affixed thereto or allows or intends to allow the real property or thing permanently attached thereto to remain in service for a year or longer.

(H) The term "construction manager" means a person who enters into an agreement to employ, direct, coordinate or manage design professionals and contractors who are hired and paid directly by the owner or the construction manager. The business activities of a "construction manager" as defined herein shall constitute contracting, so long as the project for which the construction manager provides the services results in a capital improvement to a building or structure or to real property.

(d) (1) "Directly used or consumed" in the activities of manufacturing, transportation, transmission, communication or the production of natural resources means used or consumed in those activities or operations which constitute an integral and essential part of the activities, as
contrasted with and distinguished from those activities or operations which are simply incidental, convenient or remote to the activities.

(2) Uses of property or consumption of services which constitute direct use or consumption in the activities of manufacturing, transportation, transmission, communication or the production of natural resources includes only:

(A) In the case of tangible personal property, physical incorporation of property into a finished product resulting from manufacturing production or the production of natural resources;

(B) Causing a direct physical, chemical or other change upon property undergoing manufacturing production or production of natural resources;

(C) Transporting or storing property undergoing transportation, communication, transmission, manufacturing production or production of natural resources;

(D) Measuring or verifying a change in property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;

(E) Physically controlling or directing the physical movement or operation of property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;

(F) Directly and physically recording the flow of property undergoing transportation, communication, transmission, manufacturing production or production of natural resources;

(G) Producing energy for property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;
Facilitating the transmission of gas, water, steam or electricity from the point of their diversion to property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;

Controlling or otherwise regulating atmospheric conditions required for transportation, communication, transmission, manufacturing production or production of natural resources;

Serving as an operating supply for property undergoing transmission, manufacturing production or production of natural resources, or for property directly used in transportation, communication, transmission, manufacturing production or production of natural resources;

Maintenance or repair of property, including maintenance equipment, directly used in transportation, communication, transmission, manufacturing production or production of natural resources;

Storage, removal or transportation of economic waste resulting from the activities of manufacturing, transportation, communication, transmission or the production of natural resources;

Pollution control or environmental quality or protection activity directly relating to the activities of manufacturing, transportation, communication, transmission or the production of natural resources and personnel, plant, product or community safety or security activity directly relating to the activities of manufacturing, transportation, communication, transmission or the production of natural resources; or

Otherwise be used as an integral and essential part of transportation, communication, transmission, manufacturing production or production of natural resources.
(3) Uses of property or services which do not constitute direct use or consumption in the activities of manufacturing, transportation, transmission, communication or the production of natural resources include, but are not limited to:

(A) Heating and illumination of office buildings;

(B) Janitorial or general cleaning activities;

(C) Personal comfort of personnel;

(D) Production planning, scheduling of work or inventory control;

(E) Marketing, general management, supervision, finance, training, accounting and administration; or

(F) An activity or function incidental or convenient to transportation, communication, transmission, manufacturing, production or production of natural resources, rather than an integral and essential part of these activities.

e) (1) “Directly used or consumed” in the activities of gas storage, the generation or production or sale of electric power, the provision of a public utility service or the operation of a utility business means used or consumed in those activities or operations which constitute an integral and essential part of those activities or operation, as contrasted with and distinguished from activities or operations which are simply incidental, convenient or remote to those activities.

(2) Uses of property or consumption of services which constitute direct use or consumption in the activities of gas storage, the generation or production or sale of electric power, the provision of a public utility service or the operation of a utility business include only:

(A) Tangible personal property or services, including equipment, machinery, apparatus, supplies, fuel and power and appliances, which are used immediately in production
or generation activities and equipment, machinery, supplies, tools and repair parts used to keep in operation exempt production or generation devices. For purposes of this subsection, production or generation activities shall commence from the intake, receipt or storage of raw materials at the production plant site;

(B) Tangible personal property or services, including equipment, machinery, apparatus, supplies, fuel and power, appliances, pipes, wires and mains, which are used immediately in the transmission or distribution of gas, water and electricity to the public, and equipment, machinery, tools, repair parts and supplies used to keep in operation exempt transmission or distribution devices, and these vehicles and their equipment as are specifically designed and equipped for such purposes are exempt from the tax when used to keep a transmission or distribution system in operation or repair. For purposes of this subsection, transmission or distribution activities shall commence from the close of production at a production plant or wellhead when a product is ready for transmission or distribution to the public and shall conclude at the point where the product is received by the public;

(C) Tangible personal property or services, including equipment, machinery, apparatus, supplies, fuel and power, appliance, pipes, wires and mains, which are used immediately in the storage of gas or water, and equipment, machinery, tools, supplies and repair parts used to keep in operation exempt storage devices;

(D) Tangible personal property or services used immediately in the storage, removal or transportation of economic waste resulting from the activities of gas storage, the generation or production or sale of electric power, the provision of a public utility service or the operation of a utility business;

(E) Tangible personal property or services used immediately in pollution control or environmental quality or
protection activity or community safety or security directly relating to the activities of gas storage, generation or production or sale of electric power, the provision of a public utility service or the operation of a utility business.

(3) Uses of property or services which would not constitute direct use or consumption in the activities of gas storage, generation or production or sale of electric power, the provision of a public utility service or the operation of a utility business include, but are not limited to:

(A) Heating and illumination of office buildings;

(B) Janitorial or general cleaning activities;

(C) Personal comfort of personnel;

(D) Production planning, scheduling of work or inventory control;

(E) Marketing, general management, supervision, finance, training, accounting and administration; or

(F) An activity or function incidental or convenient to the activities of gas storage, generation or production or sale of electric power, the provision of public utility service or the operation of a utility business.

(f) "Drugs" includes all sales of drugs or appliances to a purchaser upon prescription of a physician or dentist and any other professional person licensed to prescribe.

(g) "Gas storage" means the injection of gas into a storage reservoir or the storage of gas for any period of time in a storage reservoir or the withdrawal of gas from a storage reservoir engaged in by businesses subject to the business and occupation tax imposed by sections two and two-e, article thirteen of this chapter.

(h) "Generating or producing or selling of electric power" means the generation, production or sale of electric power engaged in by businesses subject to the
business and occupation tax imposed by section two, two-d, two-m or two-n, article thirteen of this chapter.

(i) "Gross proceeds" means the amount received in money, credits, property or other consideration from sales and services within this state, without deduction on account of the cost of property sold, amounts paid for interest or discounts or other expenses whatsoever. Losses may not be deducted, but any credit or refund made for goods returned may be deducted.

(j) "Management information services" means, and is limited to, data processing, data storage, data recovery and backup, programming recovery and backup, telecommunications, computation and computer processing, computer programming, electronic information and data management activities, or any combination of these activities, when such activity, or activities, is not subject to regulation by the West Virginia public service commission and the activity, or activities, is for the purpose of managing, planning for, organizing or operating, any industrial or commercial business, or any enterprise, facility or facilities of an industrial or commercial business, whether the industrial or commercial business or enterprise, facility or facilities of an industrial or commercial business is located within or without this state and without regard to whether the industrial or commercial business, or enterprise, facility or facilities of an industrial or commercial business is owned by the provider of the management information services or by a "related person", as defined in Section 267(b) of the Internal Revenue Code of 1986, as amended.

(k) "Management information services facility" means a building, or any part thereof, or a complex of buildings, or any part thereof, including the machinery and equipment located therein, that is exclusively dedicated to providing management information services to the owner or operator thereof or to another person.
"Manufacturing" means a systematic operation or integrated series of systematic operations engaged in as a business or segment of a business which transforms or converts tangible personal property by physical, chemical or other means into a different form, composition or character from that in which it originally existed.

"Personal service" includes those:

1. Compensated by the payment of wages in the ordinary course of employment; and

2. Rendered to the person of an individual without, at the same time, selling tangible personal property, such as nursing, barbering, shoe shining, manicuring and similar services.

"Persons" means any individual, partnership, association, corporation, state or its political subdivisions or agency of either, guardian, trustee, committee, executor or administrator.

"Production of natural resources" means, except for oil and gas, the performance, by either the owner of the natural resources or another, of the act or process of exploring, developing, severing, extracting, reducing to possession and loading for shipment and shipment for sale, profit or commercial use of any natural resource products and any reclamation, waste disposal or environmental activities associated therewith and the construction, installation or fabrication of ventilation structures, mine shafts, slopes, boreholes, dewatering structures, including associated facilities and apparatus, by the producer or others, including contractors and subcontractors, at a coal mine or coal production facility. For the natural resources oil and gas, "production of natural resources" means the performance, by either the owner of the natural resources, a contractor or a subcontractor, of the act or process of exploring, developing, drilling, well-stimulation activities such as logging, perforating or fracturing, well-completion
activities such as the installation of the casing, tubing and
other machinery and equipment and any reclamation,
waste disposal or environmental activities associated
therewith, including the installation of the gathering
system or other pipeline to transport the oil and gas
produced or environmental activities associated therewith
and any service work performed on the well or well site
after production of the well has initially commenced. All
work performed to install or maintain facilities up to the
point of sale for severance tax purposes would be included
in the "production of natural resources" and subject to the
direct use concept. "Production of natural resources" does
not include the performance or furnishing of work, or
materials or work, in fulfillment of a contract for the
construction, alteration, repair, decoration or improve-
ment of a new or existing building or structure, or any part
thereof, or for the alteration, improvement or development
of real property, by persons other than those otherwise
directly engaged in the activities specifically set forth in
this subsection as "production of natural resources".

(p) "Providing a public service or the operating of a
utility business" means the providing of a public service or
the operating of a utility by businesses subject to the
business and occupation tax imposed by sections two and
two-d, article thirteen of this chapter.

(q) "Purchaser" means a person who purchases tangible
personal property or a service taxed by this article.

(r) "Sale", "sales" or "selling" includes any transfer of
the possession or ownership of tangible personal property
for a consideration, including a lease or rental, when the
transfer or delivery is made in the ordinary course of the
transferor's business and is made to the transferee or his or
her agent for consumption or use or any other purpose.

(s) "Service" or "selected service" includes all nonpro-
fessional activities engaged in for other persons for a
consideration, which involve the rendering of a service as
distinguished from the sale of tangible personal property,
but shall not include contracting, personal services or the
services rendered by an employee to his or her employer or
any service rendered for resale.
(t) “Tax” includes all taxes, interest and penalties levied
hereunder.
(u) “Tax commissioner” means the state tax commis-
sioner.
(v) “Taxpayer” means any person liable for the tax
imposed by this article.
(w) “Transmission” means the act or process of causing
liquid, natural gas or electricity to pass or be conveyed
from one place or geographical location to another place
or geographical location through a pipeline or other
medium for commercial purposes.
(x) “Transportation” means the act or process of convey-
ing, as a commercial enterprise, passengers or goods from
one place or geographical location to another place or
geographical location.
(y) “Ultimate consumer” or “consumer” means a person
who uses or consumes services or personal property.
(z) “Vendor” means any person engaged in this state in
furnishing services taxed by this article or making sales of
tangible personal property.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originated in the Senate.

To take effect July 1, 2001.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker House of Delegates

The within is approved this the 27th day of April, 2001.

Governor
PRESENTED TO THE
GOVERNOR

Date 4/24/01
Time 11:30am