

112TH CONGRESS
1ST SESSION

H. R. 2722

To amend chapter 83 of title 41, United States Code, to increase the requirement for American-made content, to strengthen the waiver provisions, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

AUGUST 1, 2011

Mr. LIPINSKI (for himself and Mr. ADERHOLT) introduced the following bill; which was referred to the Committee on Oversight and Government Reform

A BILL

To amend chapter 83 of title 41, United States Code, to increase the requirement for American-made content, to strengthen the waiver provisions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Buy American Improvement Act of 2011”.

SEC. 2. STRENGTHENING AND SIMPLIFYING FEDERAL PROCUREMENT POLICIES.

(a) **IN GENERAL.**—Not later than one year after the date of the enactment of this Act, the Administrator for Federal Procurement Policy, in consultation with the Federal Acquisition Regulatory Council, shall promulgate regulations to standardize and simplify how Federal agencies comply with, report on, and enforce chapter 83 of title 41, United States Code (commonly known as the Buy American Act). The regulations shall include, at a minimum, the following:

(1) Guidelines for determining, for the purposes of applying sections 8302(a) and 8303(b)(3) of such title, the circumstances under which the acquisition of articles, materials, or supplies mined, produced, or manufactured in the United States is inconsistent with the public interest.

(2) Uniform procedures for collecting, reporting, and making publicly available information about waivers under chapter 83 of such title, including—

(A) procedures for making a request for a waiver publicly available before granting the waiver; and

(B) procedures for providing the rationale for why a waiver is granted.

(3) Rules to ensure that projects are not disaggregated for purposes of avoiding the applicability of the requirements under chapter 83 of such title to such larger project.

(4) Procedures for investigating waiver requests.

(5) Rules for evaluating the percentage of domestic content in a manufactured end product.

(b) GUIDELINES RELATING TO INCONSISTENCY WITH PUBLIC INTEREST.—In the guidelines developed under subsection (a)(1), the Administrator shall consider any significant decrease in employment in the United States resulting from the granting of waivers to be inconsistent with the public interest and seek to minimize—

(1) the granting of waivers that would result in a decrease in employment in the United States in both the short- and long-term; and

(2) the granting of waivers for procurement of articles, materials, or supplies mined, produced, or manufactured in a foreign country with which the United States does not have a relevant trade agreement and which has a government that maintains, in regard to government procurement, a significant and persistent pattern or practice of discrimination against products produced in the United States.

(c) PROCEDURES RELATING TO THE PUBLICATION OF REQUESTS FOR WAIVERS.—In the procedures developed under subsection (a)(2)(A), the Administrator shall require the head of a Federal agency, after receiving a request for a waiver, to complete each of the

following:

(1) Publish the request for a waiver on a publicly available Web site of the agency in an easily identifiable location within 15 days after receiving such request.

(2) A waiver may not be issued before the expiration of the fifteen-day period beginning on the date on which the request for waiver is published pursuant to paragraph (1) to provide the public an opportunity for notice and comment.

(d) PROCEDURES RELATING TO THE PUBLICATION OF WAIVERS GRANTED.—In the procedures developed under subsection (a)(2)(B), the Administrator shall require the head of a Federal agency to publish the determination for why a waiver was granted and the rationale for such determination in the Federal Register and on a publicly available Web site of the agency in an easily identifiable location not later than 30 days after the head of the agency determines to issue such waiver.

(e) RULES RELATING TO DOMESTIC CONTENT.—In the rules developed under subsection (a)(5), the Administrator shall not consider as domestic content components of foreign origin of the same class or kind as those that are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.

(f) DEFINITIONS.—In this section:

(1) FEDERAL AGENCY.—The term “Federal agency” means any executive agency (as defined in section 133 of title 41, United States Code) or any establishment in the legislative or judicial branch of the Federal Government.

(2) RELEVANT TRADE AGREEMENT.—The term “relevant trade agreement” means—

(A) a reciprocal defense procurement memorandum of understanding, as described in section 8304 of title 41, United States Code;

(B) any trade agreement for which the President, or his delegate, has issued a blanket waiver under section 301 of the Trade Agreements Act of 1979 (19 U.S.C. 2511); and

(C) any trade agreement described in subpart 25.4 of the

Federal Acquisition Regulation.

(3) **WAIVER.**—The term “waiver” means, with respect to the acquisition of an article, material, or supply for public use, the inapplicability of chapter 83 of title 41, United States Code, to the acquisition by reason of any of the following determinations:

(A) A determination by the head of the Federal agency concerned that the acquisition is inconsistent with the public interest.

(B) A determination by the head of the Federal agency concerned that the cost of the acquisition is unreasonable.

(C) A determination by the head of the Federal agency concerned that the article, material, or supply is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.

SEC. 3. INCREASING TRANSPARENCY AND ACCOUNTABILITY IN FEDERAL PROCUREMENT.

Subsection (b) of section 8302 of title 41, United States Code, is amended to read as follows:

“(b) **REPORTS.**—

“(1) **IN GENERAL.**—

“(A) **AGENCY REPORT.**—Not later than 120 days after the end of each of fiscal years 2011 through 2016, the head of each Federal agency shall submit to the Administrator of the Office of Federal Procurement Policy a report on the amount of the acquisitions made by the agency in that fiscal year of articles, materials, or supplies purchased from entities that manufacture the articles, materials, or supplies outside of the United States. A separate report is not required by a Federal agency under this subparagraph if such agency has already submitted the information required in such report for a fiscal year through the Federal Procurement Data System (as referred to in section 1122 (a)(4)(A)) or another uniform comprehensive system prescribed by the Federal Acquisition Regulation.

“(B) **CONSOLIDATED REPORT.**—Not later than 180 days

after the end of each of fiscal years 2011 through 2016, the Administrator of the Office of Federal Procurement Policy, in consultation with the Administrator of the General Services, shall submit to the Committee on Homeland Security and Governmental Affairs of the Senate and the Committee on Oversight and Government Reform of the House of Representatives a consolidated report that includes each report and any information submitted pursuant to subparagraph (A) and the total amount of acquisitions made by Federal agencies in the relevant fiscal year of articles, materials, or supplies purchased from entities that manufacture or produce the articles, materials, or supplies outside of the United States.

“(2) CONTENTS OF REPORT.—The report required by paragraph (1)(A) shall separately include, for the fiscal year covered by the report—

“(A) the dollar value of any articles, materials, or supplies that were manufactured or produced outside the United States, in the aggregate and by country;

“(B) an itemized list of all waivers granted with respect to such articles, materials, or supplies under this chapter, and the country where such articles, materials, or supplies were manufactured or produced;

“(C) if any articles, materials, or supplies were acquired from entities that manufacture or produce articles, materials, or supplies outside the United States due to an exception (that is not the micro-purchase threshold exception described under subsection (a)(2)(C)), the specific exception that was used to purchase such articles, materials, or supplies;

“(D) if any articles, materials, or supplies were acquired from entities that manufacture or produce articles, materials, or supplies outside the United States pursuant to a relevant trade agreement, a citation to such agreement; and

“(E) a summary of—

“(i) the total procurement funds expended on articles, materials, and supplies manufactured or produced inside the United States;

“(ii) the total procurement funds expended on articles,

materials, and supplies manufactured or produced outside the United States; and

“(iii) the total procurement funds expended on articles, materials, and supplies manufactured or produced outside the United States for each country that manufactured or produced such articles, materials, and supplies.

“(3) PUBLIC AVAILABILITY.—Not later than 180 days after the end of the relevant fiscal year, the Administrator of the Office of Federal Procurement Policy shall make the consolidated report described under paragraph (1)(B) publicly available on a Web site.

“(4) EXCEPTION FOR INTELLIGENCE COMMUNITY.—This subsection shall not apply to acquisitions made by an agency, or component of an agency, that is an element of the intelligence community as specified in, or designated under, section 3 of the National Security Act of 1947 (50 U.S.C. 401a).”.

SEC. 4. STRENGTHENING THE BUY AMERICAN ACT.

(a) REQUIREMENTS FOR WAIVERS.—Section 8302 of title 41, United States Code, is amended by adding at the end the following new subsection:

“(c) SPECIAL RULES.—The following rules apply in carrying out the provisions of subsection (a):

“(1) CALCULATION OF DOMESTIC AND NON-DOMESTIC BIDS.—

“(A) EXCLUSION OF START-UP COSTS IN CALCULATING COST OF BID.—When comparing bids between domestic entities and non-domestic entities, costs related to the start-up of a project shall be excluded from a domestic bid.

“(B) UNREASONABLE COST DETERMINATION.—

“(i) IN GENERAL.—The head of a Federal agency shall not determine the cost of acquiring articles, materials, or supplies produced or manufactured in the United States to be unreasonable under subsection (a) unless the acquisition of such articles, materials, or supplies would increase the cost of the overall project by more than 25 percent.

“(ii) RULE OF CONSTRUCTION.—Nothing in this

subparagraph shall be construed as reducing the percentage increase required as of the date of the enactment of the Buy American Improvement Act of 2011 for a determination of unreasonable cost applicable to projects under Department of Defense contracts.

“(2) USE OUTSIDE THE UNITED STATES.—

“(A) IN GENERAL.—Subsection (a) shall apply without regard to whether the articles, materials, or supplies to be acquired are for use outside the United States if the articles, materials, or supplies are not needed on an urgent basis or if they are acquired on a regular basis.

“(B) COST ANALYSIS.—In any case in which the articles, materials, or supplies are to be acquired for use outside the United States and are not needed on an urgent basis, before entering into a contract an analysis shall be made of the difference in the cost of acquiring the articles, materials, or supplies from a company manufacturing the articles, materials, or supplies in the United States (including the cost of shipping) and the cost of acquiring the articles, materials, or supplies from a company manufacturing the articles, materials, or supplies outside the United States (including the cost of shipping).

“(3) DOMESTIC AVAILABILITY.—The head of a Federal agency may not make a determination under subsection (a) that an article, material, or supply is not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of satisfactory quality, unless the head of the agency has determined that—

“(A) domestic production cannot be initiated without significantly delaying the project for which the article, material, or supply is to be procured; and

“(B) a substitutable article, material, or supply is not available in reasonable quantities and of satisfactory quality from a company in the United States.”.

(b) DEFINITIONS; INCREASING DOMESTIC CONTENT REQUIREMENT.—Section 8301 of title 41, United States Code, is amended—

(1) by adding at the end the following new paragraphs:

“(3) EXCEPTION.—The term ‘exception’ means, with respect to the acquisition of an article, material, or supply for public use, the inapplicability of chapter 83 to the acquisition by reason of any of the following:

“(A) Use outside the United States (described in section 8302(a)(2)(A)).

“(B) Procured under a contract with an award value that is not more than the micro-purchase threshold (described in section 8302(a)(2)(C)).

“(C) Specifically excepted for information technology (as defined in section 11101 of title 40) that is a commercial item (as defined in section 103).

“(D) A relevant trade agreement.

“(4) FEDERAL AGENCY.—The term ‘Federal agency’ means any executive agency (as defined in section 133) or any establishment in the legislative or judicial branch of the Federal Government.

“(5) RELEVANT TRADE AGREEMENT.—The term ‘relevant trade agreement’ means—

“(A) a reciprocal defense procurement memorandum of understanding, as described in section 8304 of title 41, United States Code;

“(B) any trade agreement for which the President, or his delegate, has issued a blanket waiver under section 301 of the Trade Agreements Act of 1979 (19 U.S.C. 2511); and

“(C) any trade agreement described in subpart 25.4 of the Federal Acquisition Regulation.

“(6) SUBSTANTIALLY ALL.—Articles, materials, or supplies shall be treated as made substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States, if the cost of the domestic components of such articles, materials, or supplies exceeds 75 percent of the total cost of all components of such articles, materials, or supplies. Such percentage shall not include intellectual property rights, legal fees, and any cost not related to physical

production or transportation.

“(7) WAIVER.—The term ‘waiver’ means, with respect to the acquisition of an article, material, or supply for public use, the inapplicability of this chapter to the acquisition by reason of any of the following determinations:

“(A) A determination by the head of the Federal agency concerned that the acquisition is inconsistent with the public interest.

“(B) A determination by the head of the Federal agency concerned that the cost of the acquisition is unreasonable.

“(C) A determination by the head of the Federal agency concerned that the article, material, or supply is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.”; and

(2) by reordering paragraphs (1) and (2) and the paragraphs added by paragraph (1) of this subsection in alphabetical order based on the headings of such paragraphs and renumbering such paragraphs as so reordered.

(c) CONFORMING AMENDMENTS.—Title 41, United States Code, is amended—

(1) in section 8302(a)(1), by striking “department or independent establishment” and inserting “Federal agency”; and

(2) in section 8303—

(A) in subsection (b)—

(i) in paragraph (2), by striking “department or independent establishment” and inserting “Federal agency”; and

(ii) in paragraph (3), by striking “department or independent establishment” and inserting “Federal agency”; and

(B) in subsection (c), by striking “department, bureau, agency, or independent establishment” and inserting “Federal

agency”, each place it appears.

(d) INFLATION ADJUSTMENT EXCLUSION.—Section 1908(b)(2)(A) of title 41, United States Code, is amended by striking “chapter 67” and inserting “chapters 67 and 83”.

SEC. 5. GAO REPORT AND RECOMMENDATION.

Not later than one year after the date of the enactment of this Act, the Comptroller General shall report to Congress on the extent to which, in each of fiscal years 2007, 2008, 2009, 2010, and 2011, articles, materials, or supplies acquired by the Federal Government were manufactured, mined, or produced outside of the United States. Such report shall include for each Federal agency the following:

(1) A summary of total procurement funds expended on articles, materials, and supplies manufactured—

(A) inside the United States;

(B) outside the United States; and

(C) outside the United States—

(i) under each type of waiver (as defined under section 2(f) of this Act);

(ii) under each category of exception (as defined in section 8301 of title 41, United States Code); and

(iii) for each country that manufactured or produced such articles, materials, and supplies.

(2) An analysis of the impact of eliminating the exception for acquisitions for information technology (as defined in section 11101 of title 40) that is a commercial item (as defined in section 103).

SEC. 6. UNITED STATES OBLIGATIONS UNDER INTERNATIONAL AGREEMENTS.

This Act, and the amendments made by this Act, shall be applied in a manner consistent with United States obligations under international agreements.