

111TH CONGRESS
1ST SESSION

H. R. 4351

To amend the Buy American Act to increase the requirement for American-made content, to tighten the waiver provisions, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 16, 2009

Mr. LIPINSKI (for himself, Ms. EDWARDS of Maryland, Ms. KAPTUR, Mr. MICHAUD, Mr. MASSA, Mr. COSTELLO, Mr. GRIJALVA, Mr. STARK, Mr. BRALEY of Iowa, Mr. HARE, Mr. VISCLOSKY, Mr. SCHAUER, Ms. SHEAPORTER, Mr. MURPHY of Connecticut, Mr. DEFazio, Ms. SUTTON, Mr. KAGEN, and Ms. LINDA T. SÁNCHEZ of California) introduced the following bill; which was referred to the Committee on Oversight and Government Reform

A BILL

To amend the Buy American Act to increase the requirement for American-made content, to tighten the waiver provisions, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Buy American Im-
5 provement Act of 2009”.

1 **SEC. 2. REQUIREMENTS FOR WAIVERS.**

2 (a) IN GENERAL.—Section 2 of the Buy American
3 Act (41 U.S.C. 10a) is amended—

4 (1) in subsection (b)—

5 (A) in paragraph (1), by striking “through
6 2011” and inserting “through 2013”; and

7 (B) in paragraph (3), by striking “to the
8 maximum extent practicable”; and

9 (2) by adding at the end the following new sub-
10 section:

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

13 “(1) PUBLIC INTEREST WAIVER.—A determina-
14 tion that it is not in the public interest to enter into
15 a contract in accordance with this Act may not be
16 made after a notice of solicitation of offers for the
17 contract is published in accordance with section 18
18 of the Office of Federal Procurement Policy Act (41
19 U.S.C. 416) and section 8(e) of the Small Business
20 Act (15 U.S.C. 637(e)).

21 “(2) CALCULATION OF DOMESTIC AND NON-DO-
22 MESTIC BIDS.—

23 “(A) PREFERENCE.—A Federal agency en-
24 tering into a contract shall give preference to a
25 company submitting a bid on the contract that
26 manufactures in the United States the article,

1 material, or supply for which the bid is solie-
2 ited, if—

3 “(i) that company’s bid is substan-
4 tially the same as a bid made by a com-
5 pany that does not manufacture the arti-
6 cle, material, or supply in the United
7 States; or

8 “(ii) that company is the only com-
9 pany that manufactures in the United
10 States the article, material, or supply for
11 which the bid is solicited.

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

17 “(C) UNREASONABLE COST DETERMINA-
18 TION.—

19 “(i) IN GENERAL.—The head of a
20 Federal agency shall not determine the
21 cost of acquiring articles, materials, or
22 supplies produced or manufactured in the
23 United States to be unreasonable under
24 subsection (a) unless the acquisition of
25 such articles, materials, or supplies would

1 increase the cost of the overall project by
2 more than 25 percent.

3 “(ii) RULE OF CONSTRUCTION.—
4 Nothing in this subparagraph shall be con-
5 strued as reducing the percentage increase
6 required as of the date of the enactment of
7 the Buy American Improvement Act of
8 2009 for a determination of unreasonable
9 cost applicable to projects under Depart-
10 ment of Defense contracts.

11 “(3) USE OUTSIDE THE UNITED STATES.—

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

18 “(B) COST ANALYSIS.—In any case in
19 which the articles, materials, or supplies are to
20 be acquired for use outside the United States
21 and are not needed on an urgent basis, before
22 entering into a contract an analysis shall be
23 made of the difference in the cost of acquiring
24 the articles, materials, or supplies from a com-
25 pany manufacturing the articles, materials, or

1 supplies in the United States (including the
2 cost of shipping) and the cost of acquiring the
3 articles, materials, or supplies from a company
4 manufacturing the articles, materials, or sup-
5 plies outside the United States (including the
6 cost of shipping).

7 “(4) DOMESTIC AVAILABILITY.—The head of a
8 Federal agency may not make a determination under
9 subsection (a) that an article, material, or supply is
10 not mined, produced, or manufactured, as the case
11 may be, in the United States in sufficient and rea-
12 sonably available commercial quantities and of satis-
13 factory quality, unless the head of the agency has
14 determined that—

15 “(A) domestic production cannot be initi-
16 ated without significantly delaying the project
17 for which the article, material, or supply is to
18 be procured; and

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

23 “(5) EFFECT ON DOMESTIC EMPLOYMENT.—In
24 determining whether a public interest waiver shall be

1 granted under subsection (a), the head of a Federal
2 agency shall—

3 “(A) consider the short-term and long-
4 term effects of granting such a waiver on em-
5 ployment within the United States; and

6 “(B) determine any significant decrease in
7 domestic employment to be against the public
8 interest.

9 “(6) TRANSPARENCY IN WAIVERS.—

10 “(A) REQUESTS FOR WAIVERS.—Not later
11 than 7 days after a Federal agency receives a
12 written request for a waiver under subsection
13 (a), the head of the agency shall publish the re-
14 quest on a publicly available website of the
15 agency in an easily identifiable location and
16 shall provide the public with a reasonable period
17 of time for notice and comment before issuing
18 a waiver.

19 “(B) WAIVERS GRANTED.—Not later than
20 30 days after a Federal agency decides to issue
21 a waiver under subsection (a), the head of the
22 agency shall publish the decision and the jus-
23 tification for the decision in the Federal Reg-
24 ister and on a publicly available website of the
25 agency in an easily identifiable location.”.

1 (b) DEFINITIONS.—Section 1 of the Buy American
2 Act (41 U.S.C. 10c) is amended by adding at the end the
3 following new subsections:

4 “(c) FEDERAL AGENCY.—The term ‘Federal agency’
5 means any executive agency (as defined in section 4(1)
6 of the Office of Federal Procurement Policy Act (41
7 U.S.C. 403(1))) or any establishment in the legislative or
8 judicial branch of the Federal Government.

9 “(d) SUBSTANTIALLY ALL.—Articles, materials, or
10 supplies shall be treated as made substantially all from
11 articles, materials, or supplies mined, produced, or manu-
12 factured in the United States, if the cost of the domestic
13 components of such articles, materials, or supplies exceeds
14 75 percent of the total cost of all components of such arti-
15 cles, materials, or supplies.”.

16 (c) CONFORMING AMENDMENTS.—

17 (1) Section 2(a) of the Buy American Act (41
18 U.S.C. 10a(a)) is amended by striking “department
19 or independent establishment” and inserting “Fed-
20 eral agency”.

21 (2) Section 3 of such Act (41 U.S.C. 10b) is
22 amended—

23 (A) in subsection (a), by striking “depart-
24 ment or independent establishment” and insert-
25 ing “Federal agency”; and

1 (B) in subsection (b), by striking “depart-
2 ment, bureau, agency, or independent establish-
3 ment” and inserting “Federal agency”.

4 (3) Section 633 of the National Military Estab-
5 lishment Appropriation Act, 1950 (41 U.S.C. 10d) is
6 amended by striking “department or independent es-
7 tablishment” and inserting “Federal agency”.

8 **SEC. 3. REGULATIONS ADDRESSING USE OF PROJECT SEG-**
9 **MENTATION TO AVOID APPLICABILITY OF**
10 **BUY AMERICAN REQUIREMENTS .**

11 Not later than 90 days after the date of the enact-
12 ment of this Act, the Federal Acquisition Regulatory
13 Council established under section 25(a) of the Office of
14 Federal Procurement Policy Act (41 U.S.C. 421(a)) shall
15 amend the Federal Acquisition Regulation to ensure that
16 the requirements of section 2 of the Buy American Act
17 (41 U.S.C. 10a) apply to component projects that have
18 been disaggregated from a larger project for purposes of
19 avoiding applicability of such requirements to such larger
20 project.

21 **SEC. 4. GAO REPORT AND RECOMMENDATIONS.**

22 (a) REPORT ON SCOPE OF WAIVERS.—Not later than
23 180 days after the date of the enactment of this Act, the
24 Comptroller General of the United States shall report to
25 Congress recommendations to be used in determining, for

1 purposes of applying the waiver provision of section 2(a)
2 of the Buy American Act, whether acquiring articles, ma-
3 terials, and supplies mined, produced, or manufactured in
4 the United States would be inconsistent with the public
5 interest.

6 (b) RECOMMENDATIONS.—The report described in
7 subsection (a) shall include recommendations—

8 (1) for standards for determining inconsistency
9 with the public interest, including how to incorporate
10 the impact on domestic employment in such stand-
11 ards; and

12 (2) for establishing procedures for applying the
13 waiver provisions of the Buy American Act that can
14 be consistently applied, including how to investigate
15 waiver requests and evaluate domestic content re-
16 quirements.

17 **SEC. 5. UNITED STATES OBLIGATIONS UNDER INTER-**
18 **NATIONAL AGREEMENTS.**

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

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