

111TH CONGRESS  
1ST SESSION

# S. 2890

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

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## IN THE SENATE OF THE UNITED STATES

DECEMBER 16, 2009

Mr. FEINGOLD introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

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## 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”.

6       **SEC. 2. REQUIREMENTS FOR WAIVERS.**

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

9               (1) in subsection (b)—

1 (A) in paragraph (1), by striking “through  
2 2011” and inserting “through 2013”; and

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

5 (2) by adding at the end the following new sub-  
6 section:

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

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

17 “(2) CALCULATION OF DOMESTIC AND NON-DO-  
18 MESTIC BIDS.—

19 “(A) PREFERENCE.—A Federal agency en-  
20 tering into a contract shall give preference to a  
21 company submitting a bid on the contract that  
22 manufactures in the United States the article,  
23 material, or supply for which the bid is solie-  
24 ited, if—

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

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

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

15 “(C) UNREASONABLE COST DETERMINA-  
16 TION.—

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

1 “(ii) RULE OF CONSTRUCTION.—

2 Nothing in this subparagraph shall be con-  
3 strued as reducing the percentage increase  
4 required as of the date of the enactment of  
5 the Buy American Improvement Act of  
6 2009 for a determination of unreasonable  
7 cost applicable to projects under Depart-  
8 ment of Defense contracts.

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

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

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

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

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

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

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

21 “(5) EFFECT ON DOMESTIC EMPLOYMENT.—In  
22 determining whether a public interest waiver shall be  
23 granted under subsection (a), the head of a Federal  
24 agency shall—

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

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

7           “(6) TRANSPARENCY IN WAIVERS.—

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

17           “(B) WAIVERS GRANTED.—Not later than  
18 30 days after a Federal agency decides to issue  
19 a waiver under subsection (a), the head of the  
20 agency shall publish the decision and the jus-  
21 tification for the decision in the Federal Reg-  
22 ister and on a publicly available website of the  
23 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.

