

114TH CONGRESS
1ST SESSION

S. 2167

To amend chapter 83 of title 41, United States Code (popularly referred to as the Buy American Act) and certain other laws with respect to certain waivers under those laws, to provide greater transparency regarding exceptions to domestic sourcing requirements, and for other purposes.

IN THE SENATE OF THE UNITED STATES

OCTOBER 8, 2015

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

A BILL

To amend chapter 83 of title 41, United States Code (popularly referred to as the Buy American Act) and certain other laws with respect to certain waivers under those laws, to provide greater transparency regarding exceptions to domestic sourcing requirements, 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 “21st Century Buy
5 American Act”.

1 **SEC. 2. INCREASE OF DOMESTIC CONTENT PERCENTAGE**
2 **TO 60 PERCENT.**

3 Section 8301 of title 41, United States Code, is
4 amended by adding at the end the following new para-
5 graph:

6 “(3) SUBSTANTIALLY ALL.—Articles, materials,
7 or supplies shall be treated as made substantially all
8 from articles, materials, or supplies mined, pro-
9 duced, or manufactured in the United States, if the
10 cost of the domestic components of such articles,
11 materials, or supplies exceeds 60 percent of the total
12 cost of all components of such articles, materials, or
13 supplies.”.

14 **SEC. 3. CRITERIA REQUIRED FOR USE OF OVERSEAS EX-**
15 **CEPTION.**

16 Section 8302 of title 41, United States Code, is
17 amended by adding at the end the following new sub-
18 section:

19 “(c) CRITERIA FOR USE OF OVERSEAS EXCEP-
20 TION.—

21 “(1) IN GENERAL.—The exception under sub-
22 section (a)(2)(A) for articles, materials, or supplies
23 to be acquired for use outside the United States may
24 not be used unless one of the following criteria is
25 met:

1 “(A) The articles, materials, or supplies
2 are needed urgently for national security rea-
3 sons.

4 “(B) A cost analysis described in para-
5 graph (2) demonstrates that the articles, mate-
6 rials, or supplies to be acquired (if acquired
7 from a firm manufacturing in the United
8 States) would be more than 50 percent more
9 expensive for the Federal agency acquiring the
10 articles, materials, or supplies.

11 “(2) COST ANALYSIS.—In any case in which ar-
12 ticles, materials, or supplies are to be acquired for
13 use outside the United States and are not needed
14 urgently for national security reasons, before enter-
15 ing into a contract an analysis shall be made of the
16 difference in the cost of acquiring the articles, mate-
17 rials, or supplies from a firm manufacturing the ar-
18 ticles, materials, or supplies in the United States
19 (including the cost of shipping) and the cost of ac-
20 quiring the articles, materials, or supplies from a
21 firm manufacturing the articles, materials, or sup-
22 plies outside the United States (including the cost of
23 shipping).”.

1 **SEC. 4. CRITERIA REQUIRED FOR USE OF PUBLIC INTER-**
2 **EST EXCEPTION.**

3 (a) BUY AMERICAN ACT.—Section 8302 of title 41,
4 United States Code, as amended by section 3, is further
5 amended by adding at the end the following new sub-
6 section:

7 “(d) CRITERIA FOR USE OF PUBLIC INTEREST EX-
8 CEPTION.—In determining whether a public interest ex-
9 ception shall be applied under subsection (a), the head of
10 a Federal agency shall—

11 “(1) consider the short-term and long-term ef-
12 fects of applying such exception on employment
13 within the United States, taking into account infor-
14 mation provided by entities that manufacture the ar-
15 ticles, materials, or supplies concerned in the United
16 States; and

17 “(2) determine that preserving or increasing
18 employment within the United States is consistent
19 with the public interest.”.

20 (b) FEDERAL TRANSIT ADMINISTRATION FUNDS.—
21 Section 5323(j) of title 49, United States Code, is amend-
22 ed by adding at the end the following new paragraph:

23 “(10) CRITERIA FOR USE OF PUBLIC INTEREST
24 WAIVER.—In determining whether a public interest
25 waiver shall be issued under paragraph (2)(A), the
26 Secretary shall—

1 “(A) consider the short-term and long-
2 term effects of applying such waiver on employ-
3 ment within the United States, taking into ac-
4 count information provided by entities that
5 produce the steel, iron, and goods concerned in
6 the United States; and

7 “(B) determine that preserving or increas-
8 ing employment within the United States is
9 consistent with the public interest.”.

10 (c) FEDERAL HIGHWAY ADMINISTRATION FUNDS.—

11 Section 313 of title 23, United States Code, is amended
12 by adding at the end the following new subsection:

13 “(h) CRITERIA FOR USE OF PUBLIC INTEREST FIND-
14 ING.—In determining whether a public interest finding
15 shall be made under subsection (b)(1), the Secretary
16 shall—

17 “(1) consider the short-term and long-term ef-
18 fects of making such finding on employment within
19 the United States, taking into account information
20 provided by entities that produce the materials or
21 products concerned in the United States; and

22 “(2) determine that preserving or increasing
23 employment within the United States is consistent
24 with the public interest.”.

1 (d) AMTRAK FUNDS.—Section 24305(f) of title 49,
2 United States Code, is amended by adding at the end the
3 following new paragraph:

4 “(5) In deciding whether a public interest exemption
5 shall be issued under paragraph (4)(A)(i), the Secretary
6 shall—

7 “(A) consider the short-term and long-term ef-
8 fects of issuing such exemption on employment with-
9 in the United States, taking into account informa-
10 tion provided by entities that manufacture the arti-
11 cles, material, or supplies concerned in the United
12 States; and

13 “(B) determine that preserving or increasing
14 employment within the United States is consistent
15 with the public interest.”.

16 (e) FEDERAL RAILROAD ADMINISTRATION HIGH
17 SPEED RAIL PROGRAM FUNDS.—Section 24405(a) of title
18 49, United States Code, is amended by adding at the end
19 the following new paragraph:

20 “(12) In determining whether a public interest waiver
21 shall be granted under paragraph (2)(A), the Secretary
22 shall—

23 “(A) consider the short-term and long-term ef-
24 fects of granting such waiver on employment within
25 the United States, taking into account information

1 provided by entities that produce the steel, iron, or
2 goods concerned in the United States; and

3 “(B) determine that preserving or increasing
4 employment within the United States is consistent
5 with the public interest.”.

6 (f) FEDERAL AVIATION ADMINISTRATION FUNDS.—
7 Section 50101 of title 49, United States Code, is amended
8 by adding at the end the following new subsection:

9 “(d) CRITERIA FOR USE OF PUBLIC INTEREST
10 WAIVER.—In determining whether a public interest waiver
11 shall be granted under subsection (b)(1), the Secretary
12 shall—

13 “(1) consider the short-term and long-term ef-
14 fects of granting such waiver on employment within
15 the United States, taking into account information
16 provided by entities that produce the steel or goods
17 concerned in the United States; and

18 “(2) determine that preserving or increasing
19 employment within the United States is consistent
20 with the public interest.”.

21 (g) WATER POLLUTION PREVENTION AND CONTROL
22 GRANTS FOR CONSTRUCTION OF TREATMENT WORKS.—
23 Section 215 of the Federal Water Pollution Control Act
24 (33 U.S.C. 1295) is amended—

1 (1) by inserting “(a) IN GENERAL.—” before
2 “Notwithstanding”; and

3 (2) by adding at the end the following new sub-
4 section:

5 “(b) CRITERIA FOR USE OF PUBLIC INTEREST EX-
6 CEPTION.—In determining whether a public interest ex-
7 ception shall be applied under subsection (a), the Adminis-
8 trator shall—

9 “(1) consider the short-term and long-term ef-
10 fects of applying such exception on employment
11 within the United States, taking into account infor-
12 mation provided by entities that manufacture the ar-
13 ticles, materials, or supplies concerned in the United
14 States; and

15 “(2) determine that preserving or increasing
16 employment within the United States is consistent
17 with the public interest.”.

18 **SEC. 5. TRANSPARENCY REQUIREMENTS.**

19 (a) REQUIREMENT FOR AGENCIES TO NOTIFY
20 OMB.—Each agency that applies an exception to, or
21 grants a waiver under, chapter 83 of title 41, United
22 States Code (popularly referred to as the Buy American
23 Act) shall submit to the Director of the Office of Manage-
24 ment and Budget a notification of the application of the
25 exception or the grant of a waiver and a statement de-

1 scribing the procurement and the exception being applied
2 or waiver granted.

3 (b) REQUIREMENT FOR DIRECTOR OF OMB TO POST
4 ON WEB SITE.—Within 7 days after receipt of any notifi-
5 cation under subsection (a), the Director of the Office of
6 Management and Budget shall post the notification on a
7 central, publicly accessible Web site of the Office.

8 (c) DEFINITION OF AGENCY.—In this section, the
9 term “agency” has the meaning given under section 551
10 of title 5, United States Code.

11 **SEC. 6. LOANS AND LOAN GUARANTEES TO DOMESTIC MAN-**
12 **UFACTURERS UNDER DEFENSE PRODUCTION**
13 **ACT.**

14 (a) PROGRAM AUTHORIZED.—The President, acting
15 through the Secretary of Defense, may establish and carry
16 out a program to make or guarantee loans under title III
17 of the Defense Production Act (50 U.S.C. App. 2091 et
18 seq.) to eligible entities in accordance with this section.

19 (b) ELIGIBILITY REQUIREMENTS.—The Secretary of
20 Defense shall establish eligibility requirements for pur-
21 poses of the loans or loan guarantees under this section
22 in order to provide assistance to any entity that—

23 (1) is a manufacturer in the United States;

1 (2) is a firm certified as eligible to apply for ad-
2 justment assistance under section 251(c) of the
3 Trade Act of 1974 (19 U.S.C. 2341(c)); and

4 (3) meets one of the following criteria:

5 (A) The entity mines, produces, or manu-
6 factures a nonavailable item.

7 (B) The entity is the last remaining manu-
8 facturer of an item in the United States, as de-
9 termined by the Secretary of Defense, and can
10 prove hardship because of foreign competition.

11 (C) The entity is the last remaining manu-
12 facturer of an item in the United States and
13 that item is considered to be vital for national
14 security purposes by the Department of De-
15 fense or another department or agency of the
16 United States.

17 (c) AMOUNT OF LOAN OR LOAN GUARANTEE.—The
18 amount of any loan made or guaranteed under this section
19 may not exceed \$5,000,000 per entity.

20 (d) USE OF FUNDS.—Each eligible entity receiving
21 a loan or loan guarantee under this section shall use the
22 funds of the loan made or guaranteed only for one or more
23 of the following purposes:

24 (1) Increasing its ability to compete for a Gov-
25 ernment contract for a nonavailable item.

1 (2) Increasing its ability to produce a nonavail-
2 able item.

3 (3) Increasing its capacity to produce items
4 that are vital to national security.

5 (e) APPLICATION REQUIREMENTS.—To receive a
6 loan or loan guarantee under this section, an eligible entity
7 shall submit an application to the Secretary of Defense
8 at such time, in such manner, and containing such infor-
9 mation as the Secretary may require. At a minimum, the
10 application shall include a statement regarding the num-
11 ber of direct full-time domestic jobs expected to be created
12 or retained as a result of the loan made or guaranteed,
13 but such statement shall not be the sole factor used in
14 determining the award of the loan or loan guarantee.

15 (f) ANNUAL EVALUATION OF LOAN OR LOAN GUAR-
16 ANTEE RECIPIENTS BY DEPARTMENT OF DEFENSE.—
17 The Secretary of Defense each year shall evaluate recipi-
18 ents of loans or loan guarantees under this section to de-
19 termine the proper allocation of loan funds that are loaned
20 or guaranteed.

21 (g) DEFINITION OF NONAVAILABLE ITEM.—In this
22 section, the term “nonavailable item” means any of the
23 following:

24 (1) An article, material, or supply—

1 (A) that has been determined by a Federal
2 agency, pursuant to chapter 83 of title 41,
3 United States Code (popularly referred to as
4 the Buy American Act), to not be mined, pro-
5 duced, or manufactured in the United States in
6 sufficient and reasonably available commercial
7 quantities of a satisfactory quality; or

8 (B) that is listed on the list of nonavailable
9 articles under subpart 25.104 of the Federal
10 Acquisition Regulation.

11 (2) An article or item—

12 (A) that is described in section 2533a(b) of
13 title 10, United States Code, and grown, re-
14 processed, reused, or produced in the United
15 States; and

16 (B) satisfactory quality and sufficient
17 quantity of which cannot be procured as and
18 when needed at United States market prices, as
19 determined by the Secretary of Defense or the
20 Secretary of the military department concerned,
21 pursuant to section 2533a(c) of such title.

22 (3) Compliant specialty metal—

23 (A) as defined in section 2533b(b) of title
24 10, United States Code; and

1 (B) satisfactory quality and sufficient
2 quantity of which, and in the required form,
3 cannot be procured as and when needed, as de-
4 termined by the Secretary of Defense or the
5 Secretary of the military department concerned,
6 pursuant to such section 2533b(b).

7 (4) An item listed in subsection (a) of section
8 2534 of title 10, United States Code, if the Sec-
9 retary determines, under subsection (d)(4) of such
10 section, that satisfactory quality of the item manu-
11 factured by an entity that is part of the national
12 technology and industrial base (as defined in section
13 2500(1) of such title) is not available.

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