

115TH CONGRESS
1ST SESSION

S. 2196

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

DECEMBER 6, 2017

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 “(14) 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. WAIVER TRANSPARENCY AND STREAMLINING**
19 **THROUGH THE ESTABLISHMENT OF**
20 **BUYAMERICAN.GOV WEBSITE.**

21 (a) IN GENERAL.—Not later than 180 days after the
22 date of the enactment of this Act, the Administrator of
23 General Services shall establish an Internet website with
24 the address BuyAmerican.gov that will be publicly avail-
25 able and free to access. The website shall include informa-

1 tion on all waivers of and exceptions to Buy American laws
2 that have been requested, are under consideration, or have
3 been granted by executive agencies and be designed to en-
4 able manufacturers and other interested parties to easily
5 identify waivers, and shall provide publicly available con-
6 tact information for the contracting agencies.

7 (b) COLLECTION OF INFORMATION.—The President,
8 in consultation with the heads of relevant agencies, shall
9 develop a mechanism to collect information on requests to
10 waive Buy American laws and other domestic content re-
11 strictions, utilizing existing reporting requirements when-
12 ever possible, for purposes of providing early notice to pos-
13 sible waivers via the website established under subsection
14 (a). The heads of executive agencies shall report to the
15 Administrator as quickly as possible waivers requested or
16 under consideration and waivers granted due to the non-
17 availability of procured items or service providers for pur-
18 poses of posting such information on the website estab-
19 lished under such subsection.

20 (c) WAIVER TRANSPARENCY AND STREAMLINING.—
21 Not less than 20 days prior to waiving, under his or her
22 statutory authority, any applicable Buy American Law,
23 the head of an executive agency shall submit to the Ad-
24 ministrator of General Services a copy of the request and
25 information available to the executive agency concerning

1 the request. Not later than 5 days after receiving this in-
2 formation from the head of an executive agency, the Ad-
3 ministrator of General Services shall make available to the
4 public, by posting on the website established under sub-
5 section (a), a copy of the request and information available
6 to the executive agency concerning the request, and shall
7 allow for informal public comment on the request for at
8 least 15 days prior to making a finding based on the re-
9 quest.

10 (d) INFORMATION AVAILABLE TO THE EXECUTIVE
11 AGENCY CONCERNING THE REQUEST.—

12 (1) REQUIREMENT.—No requested waiver of an
13 applicable Buy American Law may be granted if, in
14 contravention of subsection (c)—

15 (A) the request was not made available to
16 the public;

17 (B) the information available to the execu-
18 tive agency concerning the request was not
19 made available to the public; or

20 (C) no opportunity for public comment
21 concerning the request was granted.

22 (2) SCOPE.—Information made available to the
23 public under this section concerning the request
24 shall properly and adequately document and justify

1 the statutory basis cited for the requested waiver.

2 Such information shall include—

3 (A) a detailed justification for the use of
4 goods, products, or materials mined, produced,
5 or manufactured outside the United States;

6 (B) for requests citing unreasonable cost
7 as the statutory basis of the waiver, a compari-
8 son of the cost of the domestic product to the
9 cost of the foreign product or a comparison of
10 the overall cost of the project with domestic
11 products to the overall cost of the project with
12 foreign-origin products or services, pursuant to
13 the requirements of the applicable Buy Amer-
14 ican law, except that publicly available cost
15 comparison data may be provided in lieu of pro-
16 prietary pricing information;

17 (C) for requests citing availability, quan-
18 tity, or quality as the statutory basis for the
19 waiver, information from a reasonable number
20 of domestic suppliers concerning a product's
21 availability, quantity, or quality, documentation
22 of the procurement official's or assistance re-
23 cipient's efforts to procure from domestic
24 sources and relevant excerpts from project
25 plans, specifications, and permits indicating the

1 required quantity and quality of the relevant
2 products;

3 (D) for requests citing the public interest
4 as the statutory basis for the waiver, a detailed
5 written statement, which shall include all appro-
6 priate factors, justifying why the requested
7 waiver is in public interest; and

8 (E) a certification that the procurement of-
9 ficial or assistance recipient made a good faith
10 effort to solicit bids for domestic products sup-
11 ported by terms included in requests for pro-
12 posals, contracts, and communications with the
13 prime contractor.

14 (e) COMPTROLLER GENERAL REPORT.—Not later
15 than two years after the date of the enactment of this Act,
16 the Comptroller General of the United States shall submit
17 to Congress a report describing the implementation of this
18 section, including recommendations for any legislation to
19 improve the collection and reporting of information re-
20 garding waivers of and exceptions to Buy American laws.

21 (f) DEFINITIONS.—In this section:

22 (1) BUY AMERICAN LAW.—The term “Buy
23 American Law” means any law, regulation, Execu-
24 tive order, regulation, or rule relating to Federal
25 contracts or grants that requires or provides a pref-

1 erence for the purchase or use of goods, products, or
2 materials mined, produced, or manufactured in the
3 United States, including—

4 (A) chapter 83 of title 41, United States
5 Code (commonly referred to as the “Buy Amer-
6 ican Act”);

7 (B) section 5323(j) of title 49, United
8 States Code (commonly referred to as the “Buy
9 America Act”);

10 (C) section 2533a of title 10, United
11 States Code (commonly referred to as the
12 “Berry Amendment”);

13 (D) section 2533b of title 10, United
14 States Code; and

15 (E) section 604 of the American Recovery
16 and Reinvestment Act of 2009 (6 U.S.C. 453b).

17 (2) EXECUTIVE AGENCY.—The term “executive
18 agency” has the meaning given the term in section
19 133 of title 41, United States Code.

20 **SEC. 6. LOANS AND LOAN GUARANTEES TO DOMESTIC MAN-**
21 **UFACTURERS UNDER DEFENSE PRODUCTION**
22 **ACT.**

23 (a) PROGRAM AUTHORIZED.—The President, acting
24 through the Secretary of Defense, may establish and carry
25 out a program to make or guarantee loans under title III

1 of the Defense Production Act (50 U.S.C. App. 2091 et
2 seq.) to eligible entities in accordance with this section.

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

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

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

11 (3) meets one of the following criteria:

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

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

18 (C) The entity is the last remaining manu-
19 facturer of an item in the United States and
20 that item is considered to be vital for national
21 security purposes by the Department of De-
22 fense or another department or agency of the
23 United States.

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

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

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

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

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

14 (e) APPLICATION REQUIREMENTS.—To receive a
15 loan or loan guarantee under this section, an eligible entity
16 shall submit an application to the Secretary of Defense
17 at such time, in such manner, and containing such infor-
18 mation as the Secretary may require. At a minimum, the
19 application shall include a statement regarding the num-
20 ber of direct full-time domestic jobs expected to be created
21 or retained as a result of the loan made or guaranteed,
22 but such statement shall not be the sole factor used in
23 determining the award of the loan or loan guarantee.

24 (f) ANNUAL EVALUATION OF LOAN OR LOAN GUAR-
25 ANTEE RECIPIENTS BY DEPARTMENT OF DEFENSE.—

1 The Secretary of Defense each year shall evaluate recipi-
2 ents of loans or loan guarantees under this section to de-
3 termine the proper allocation of loan funds that are loaned
4 or guaranteed.

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

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

9 (A) that has been determined by a Federal
10 agency, pursuant to chapter 83 of title 41,
11 United States Code (popularly referred to as
12 the Buy American Act), to not be mined, pro-
13 duced, or manufactured in the United States in
14 sufficient and reasonably available commercial
15 quantities of a satisfactory quality; or

16 (B) that is listed on the list of nonavailable
17 articles under subpart 25.104 of the Federal
18 Acquisition Regulation.

19 (2) An article or item—

20 (A) that is described in section 2533a(b) of
21 title 10, United States Code, and grown, re-
22 processed, reused, or produced in the United
23 States; and

24 (B) satisfactory quality and sufficient
25 quantity of which cannot be procured as and

1 when needed at United States market prices, as
2 determined by the Secretary of Defense or the
3 Secretary of the military department concerned,
4 pursuant to section 2533a(c) of such title.

5 (3) Compliant specialty metal—

6 (A) as defined in section 2533b(b) of title
7 10, United States Code; and

8 (B) satisfactory quality and sufficient
9 quantity of which, and in the required form,
10 cannot be procured as and when needed, as de-
11 termined by the Secretary of Defense or the
12 Secretary of the military department concerned,
13 pursuant to such section 2533b(b).

14 (4) An item listed in subsection (a) of section
15 2534 of title 10, United States Code, if the Sec-
16 retary determines, under subsection (d)(4) of such
17 section, that satisfactory quality of the item manu-
18 factured by an entity that is part of the national
19 technology and industrial base (as defined in section
20 2500(1) of such title) is not available.

○