

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.

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## 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

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## 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.

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 2011”.

6 **SEC. 2. STRENGTHENING AND SIMPLIFYING FEDERAL PRO-**  
7 **CUREMENT POLICIES.**

8 (a) IN GENERAL.—Not later than one year after the  
9 date of the enactment of this Act, the Administrator for

1 Federal Procurement Policy, in consultation with the Fed-  
2 eral Acquisition Regulatory Council, shall promulgate reg-  
3 ulations to standardize and simplify how Federal agencies  
4 comply with, report on, and enforce chapter 83 of title  
5 41, United States Code (commonly known as the Buy  
6 American Act). The regulations shall include, at a min-  
7 imum, the following:

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

14 (2) Uniform procedures for collecting, report-  
15 ing, and making publicly available information about  
16 waivers under chapter 83 of such title, including—

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

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

22 (3) Rules to ensure that projects are not  
23 disaggregated for purposes of avoiding the applica-  
24 bility of the requirements under chapter 83 of such  
25 title to such larger project.

1           (4) Procedures for investigating waiver re-  
2           quests.

3           (5) Rules for evaluating the percentage of do-  
4           mestic content in a manufactured end product.

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

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

14           (2) the granting of waivers for procurement of  
15           articles, materials, or supplies mined, produced, or  
16           manufactured in a foreign country with which the  
17           United States does not have a relevant trade agree-  
18           ment and which has a government that maintains,  
19           in regard to government procurement, a significant  
20           and persistent pattern or practice of discrimination  
21           against products produced in the United States.

22           (c) PROCEDURES RELATING TO THE PUBLICATION  
23 OF REQUESTS FOR WAIVERS.—In the procedures devel-  
24 oped under subsection (a)(2)(A), the Administrator shall

1 require the head of a Federal agency, after receiving a  
2 request for a waiver, to complete each of the following:

3           (1) Publish the request for a waiver on a pub-  
4           licly available Web site of the agency in an easily  
5           identifiable location within 15 days after receiving  
6           such request.

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

12          (d) PROCEDURES RELATING TO THE PUBLICATION  
13          OF WAIVERS GRANTED.—In the procedures developed  
14          under subsection (a)(2)(B), the Administrator shall re-  
15          quire the head of a Federal agency to publish the deter-  
16          mination for why a waiver was granted and the rationale  
17          for such determination in the Federal Register and on a  
18          publicly available Web site of the agency in an easily iden-  
19          tifiable location not later than 30 days after the head of  
20          the agency determines to issue such waiver.

21          (e) RULES RELATING TO DOMESTIC CONTENT.—In  
22          the rules developed under subsection (a)(5), the Adminis-  
23          trator shall not consider as domestic content components  
24          of foreign origin of the same class or kind as those that  
25          are not mined, produced, or manufactured in the United

1 States in sufficient and reasonably available commercial  
2 quantities of a satisfactory quality.

3 (f) DEFINITIONS.—In this section:

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

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

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

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

18 (C) any trade agreement described in sub-  
19 part 25.4 of the Federal Acquisition Regula-  
20 tion.

21 (3) WAIVER.—The term “waiver” means, with  
22 respect to the acquisition of an article, material, or  
23 supply for public use, the inapplicability of chapter  
24 83 of title 41, United States Code, to the acquisition  
25 by reason of any of the following determinations:

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

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

7 (C) A determination by the head of the  
8 Federal agency concerned that the article, ma-  
9 terial, or supply is not mined, produced, or  
10 manufactured in the United States in sufficient  
11 and reasonably available commercial quantities  
12 of a satisfactory quality.

13 **SEC. 3. INCREASING TRANSPARENCY AND ACCOUNT-**  
14 **ABILITY IN FEDERAL PROCUREMENT.**

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

17 “(b) REPORTS.—

18 “(1) IN GENERAL.—

19 “(A) AGENCY REPORT.—Not later than  
20 120 days after the end of each of fiscal years  
21 2011 through 2016, the head of each Federal  
22 agency shall submit to the Administrator of the  
23 Office of Federal Procurement Policy a report  
24 on the amount of the acquisitions made by the  
25 agency in that fiscal year of articles, materials,

1 or supplies purchased from entities that manu-  
2 facture the articles, materials, or supplies out-  
3 side of the United States. A separate report is  
4 not required by a Federal agency under this  
5 subparagraph if such agency has already sub-  
6 mitted the information required in such report  
7 for a fiscal year through the Federal Procure-  
8 ment Data System (as referred to in section  
9 1122(a)(4)(A)) or another uniform comprehen-  
10 sive system prescribed by the Federal Acquisi-  
11 tion Regulation.

12 “(B) CONSOLIDATED REPORT.—Not later  
13 than 180 days after the end of each of fiscal  
14 years 2011 through 2016, the Administrator of  
15 the Office of Federal Procurement Policy, in  
16 consultation with the Administrator of the Gen-  
17 eral Services, shall submit to the Committee on  
18 Homeland Security and Governmental Affairs  
19 of the Senate and the Committee on Oversight  
20 and Government Reform of the House of Rep-  
21 resentatives a consolidated report that includes  
22 each report and any information submitted pur-  
23 suant to subparagraph (A) and the total  
24 amount of acquisitions made by Federal agen-  
25 cies in the relevant fiscal year of articles, mate-

1           rials, or supplies purchased from entities that  
2           manufacture or produce the articles, materials,  
3           or supplies outside of the United States.

4           “(2) CONTENTS OF REPORT.—The report re-  
5           quired by paragraph (1)(A) shall separately include,  
6           for the fiscal year covered by the report—

7                   “(A) the dollar value of any articles, mate-  
8                   rials, or supplies that were manufactured or  
9                   produced outside the United States, in the ag-  
10                  gregate and by country;

11                  “(B) an itemized list of all waivers granted  
12                  with respect to such articles, materials, or sup-  
13                  plies under this chapter, and the country where  
14                  such articles, materials, or supplies were manu-  
15                  factured or produced;

16                  “(C) if any articles, materials, or supplies  
17                  were acquired from entities that manufacture or  
18                  produce articles, materials, or supplies outside  
19                  the United States due to an exception (that is  
20                  not the micro-purchase threshold exception de-  
21                  scribed under subsection (a)(2)(C)), the specific  
22                  exception that was used to purchase such arti-  
23                  cles, materials, or supplies;

24                  “(D) if any articles, materials, or supplies  
25                  were acquired from entities that manufacture or

1 produce articles, materials, or supplies outside  
2 the United States pursuant to a relevant trade  
3 agreement, a citation to such agreement; and

4 “(E) a summary of—

5 “(i) the total procurement funds ex-  
6 pended on articles, materials, and supplies  
7 manufactured or produced inside the  
8 United States;

9 “(ii) the total procurement funds ex-  
10 pended on articles, materials, and supplies  
11 manufactured or produced outside the  
12 United States; and

13 “(iii) the total procurement funds ex-  
14 pended on articles, materials, and supplies  
15 manufactured or produced outside the  
16 United States for each country that manu-  
17 factured or produced such articles, mate-  
18 rials, and supplies.

19 “(3) PUBLIC AVAILABILITY.—Not later than  
20 180 days after the end of the relevant fiscal year,  
21 the Administrator of the Office of Federal Procure-  
22 ment Policy shall make the consolidated report de-  
23 scribed under paragraph (1)(B) publicly available on  
24 a Web site.

1           “(4) EXCEPTION FOR INTELLIGENCE COMMU-  
2           NITY.—This subsection shall not apply to acquisi-  
3           tions made by an agency, or component of an agen-  
4           cy, that is an element of the intelligence community  
5           as specified in, or designated under, section 3 of the  
6           National Security Act of 1947 (50 U.S.C. 401a).”.

7 **SEC. 4. STRENGTHENING THE BUY AMERICAN ACT.**

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

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

13                  “(1) CALCULATION OF DOMESTIC AND NON-DO-  
14                  MESTIC BIDS.—

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

20                          “(B) UNREASONABLE COST DETERMINA-  
21                          TION.—

22                                  “(i) IN GENERAL.—The head of a  
23                                  Federal agency shall not determine the  
24                                  cost of acquiring articles, materials, or  
25                                  supplies produced or manufactured in the

1 United States to be unreasonable under  
2 subsection (a) unless the acquisition of  
3 such articles, materials, or supplies would  
4 increase the cost of the overall project by  
5 more than 25 percent.

6 “(ii) RULE OF CONSTRUCTION.—

7 Nothing in this subparagraph shall be con-  
8 strued as reducing the percentage increase  
9 required as of the date of the enactment of  
10 the Buy American Improvement Act of  
11 2011 for a determination of unreasonable  
12 cost applicable to projects under Depart-  
13 ment of Defense contracts.

14 “(2) USE OUTSIDE THE UNITED STATES.—

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

21 “(B) COST ANALYSIS.—In any case in  
22 which the articles, materials, or supplies are to  
23 be acquired for use outside the United States  
24 and are not needed on an urgent basis, before  
25 entering into a contract an analysis shall be

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

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

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

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

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

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

6 “(3) EXCEPTION.—The term ‘exception’ means,  
7 with respect to the acquisition of an article, mate-  
8 rial, or supply for public use, the inapplicability of  
9 chapter 83 to the acquisition by reason of any of the  
10 following:

11 “(A) Use outside the United States (de-  
12 scribed in section 8302(a)(2)(A)).

13 “(B) Procured under a contract with an  
14 award value that is not more than the micro-  
15 purchase threshold (described in section  
16 8302(a)(2)(C)).

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

21 “(D) A relevant trade agreement.

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

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

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

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

10           “(C) any trade agreement described in  
11 subpart 25.4 of the Federal Acquisition Regula-  
12 tion.

13           “(6) SUBSTANTIALLY ALL.—Articles, materials,  
14 or supplies shall be treated as made substantially all  
15 from articles, materials, or supplies mined, pro-  
16 duced, or manufactured in the United States, if the  
17 cost of the domestic components of such articles,  
18 materials, or supplies exceeds 75 percent of the total  
19 cost of all components of such articles, materials, or  
20 supplies. Such percentage shall not include intellec-  
21 tual property rights, legal fees, and any cost not re-  
22 lated to physical production or transportation.

23           “(7) WAIVER.—The term ‘waiver’ means, with  
24 respect to the acquisition of an article, material, or  
25 supply for public use, the inapplicability of this

1 chapter to the acquisition by reason of any of the  
2 following determinations:

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

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

9 “(C) A determination by the head of the  
10 Federal agency concerned that the article, ma-  
11 terial, or supply is not mined, produced, or  
12 manufactured in the United States in sufficient  
13 and reasonably available commercial quantities  
14 of a satisfactory quality.”; and

15 (2) by reordering paragraphs (1) and (2) and  
16 the paragraphs added by paragraph (1) of this sub-  
17 section in alphabetical order based on the headings  
18 of such paragraphs and renumbering such para-  
19 graphs as so reordered.

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

22 (1) in section 8302(a)(1), by striking “depart-  
23 ment or independent establishment” and inserting  
24 “Federal agency”; and

25 (2) in section 8303—

1 (A) in subsection (b)—

2 (i) in paragraph (2), by striking “de-  
3 partment or independent establishment”  
4 and inserting “Federal agency”; and

5 (ii) in paragraph (3), by striking “de-  
6 partment or independent establishment”  
7 and inserting “Federal agency”; and

8 (B) in subsection (c), by striking “depart-  
9 ment, bureau, agency, or independent establish-  
10 ment” and inserting “Federal agency”, each  
11 place it appears.

12 (d) INFLATION ADJUSTMENT EXCLUSION.—Section  
13 1908(b)(2)(A) of title 41, United States Code, is amended  
14 by striking “chapter 67” and inserting “chapters 67 and  
15 83”.

16 **SEC. 5. GAO REPORT AND RECOMMENDATION.**

17 Not later than one year after the date of the enact-  
18 ment of this Act, the Comptroller General shall report to  
19 Congress on the extent to which, in each of fiscal years  
20 2007, 2008, 2009, 2010, and 2011, articles, materials, or  
21 supplies acquired by the Federal Government were manu-  
22 factured, mined, or produced outside of the United States.  
23 Such report shall include for each Federal agency the fol-  
24 lowing:

1           (1) A summary of total procurement funds ex-  
2           pended on articles, materials, and supplies manufac-  
3           tured—

4                   (A) inside the United States;

5                   (B) outside the United States; and

6                   (C) outside the United States—

7                           (i) under each type of waiver (as de-  
8                           fined under section 2(f) of this Act);

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

12                           (iii) for each country that manufac-  
13                           tured or produced such articles, materials,  
14                           and supplies.

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

19 **SEC. 6. UNITED STATES OBLIGATIONS UNDER INTER-**  
20 **NATIONAL AGREEMENTS.**

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

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