

115TH CONGRESS
1ST SESSION

S. 908

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.

IN THE SENATE OF THE UNITED STATES

APRIL 7, 2017

Ms. STABENOW (for herself, Mr. PETERS, and Ms. BALDWIN) 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, 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; TABLE OF CONTENTS.**

4 (a) **SHORT TITLE.**—This Act may be cited as the
5 “Make it in America Act”.

6 (b) **TABLE OF CONTENTS.**—The table of contents for
7 this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. Regulations relating to Buy American Act.

Sec. 3. Amendments relating to Buy American Act.

Sec. 4. United States obligations under international agreements.

Sec. 5. Definitions.

1 **SEC. 2. REGULATIONS RELATING TO BUY AMERICAN ACT.**

2 (a) IN GENERAL.—Not later than 1 year after the
3 date of the enactment of this Act, the Administrator for
4 Federal Procurement Policy, in consultation with the Fed-
5 eral Acquisition Regulatory Council, shall promulgate final
6 regulations to standardize and simplify how Federal agen-
7 cies comply with, report on, and enforce chapter 83 of title
8 41, United States Code (commonly known as the “Buy
9 American Act”). The regulations shall include, at a min-
10 imum, the following:

11 (1) Guidelines for Federal agencies to deter-
12 mine, for the purposes of applying sections 8302(a)
13 and 8303(b)(3) of such title, the circumstances
14 under which the acquisition of articles, materials, or
15 supplies mined, produced, or manufactured in the
16 United States is inconsistent with the public inter-
17 est.

18 (2) Uniform procedures for each Federal agen-
19 cy to make publicly available, in an easily identifi-
20 able location on the website of the agency, and with-
21 in the following time periods, the following informa-
22 tion:

1 (A) A description of the circumstances in
2 which the head of the agency may waive the re-
3 quirements of chapter 83 of such title.

4 (B) Each waiver made by the head of the
5 agency within 30 days after making such waiv-
6 er, including a detailed justification for the
7 waiver.

8 (3) Rules for Federal agencies to ensure that a
9 project is not disaggregated for purposes of avoiding
10 the applicability of the requirements under chapter
11 83 of such title.

12 (4) Procedures to investigate occurrences when
13 the head of a Federal agency improperly waives the
14 requirements of chapter 83 of such title.

15 (5) Rules for the Administrator to evaluate the
16 percentage of domestic content in a manufactured
17 end product, including providing a definition for the
18 term “manufactured end product”.

19 (b) GUIDELINES RELATING TO INCONSISTENCY
20 WITH PUBLIC INTEREST.—With respect to the guidelines
21 developed under subsection (a)(1), the Administrator shall
22 seek to minimize waivers related to contract awards that
23 result in a decrease in employment in the United States,
24 which shall be considered to be inconsistent with the public
25 interest.

1 (c) RULES RELATING TO DOMESTIC CONTENT.—

2 With respect to the rules developed under subsection

3 (a)(5), the Administrator may not treat components of

4 foreign origin of the same class or kind as those that are

5 not mined, produced, or manufactured in the United

6 States in sufficient and reasonably available commercial

7 quantities of a satisfactory quality as domestic content.

8 With respect to providing a definition for the term “manu-

9 factured end product”, the Administrator shall defer to

10 previous judicial rulings on the question of—

11 (1) whether the product is completed in the

12 final form required for use by the Federal Govern-

13 ment; and

14 (2) whether separate manufacturing stages or

15 continuous processes constitute “manufacturing”.

16 **SEC. 3. AMENDMENTS RELATING TO BUY AMERICAN ACT.**

17 (a) SPECIAL RULES RELATING TO AMERICAN MATE-

18 RIALS REQUIRED FOR PUBLIC USE.—Section 8302 of title

19 41, United States Code, is amended by adding at the end

20 the following:

21 “(c) SPECIAL RULES.—The following rules apply in

22 carrying out the provisions of subsection (a):

23 “(1) CALCULATION OF DOMESTIC AND NON-DO-

24 MESTIC OFFERS.—

1 “(A) EXCLUSION OF START-UP COSTS IN
2 CALCULATING COST OF OFFER.—When com-
3 paring offers between domestic entities and
4 non-domestic entities, costs related to the start-
5 up of a contract shall be excluded from the do-
6 mestic offer.

7 “(B) UNREASONABLE COST DETERMINA-
8 TION.—

9 “(i) IN GENERAL.—The head of a
10 Federal agency may not determine the cost
11 of acquiring articles, materials, or supplies
12 mined, produced, or manufactured in the
13 United States to be unreasonable under
14 subsection (a)(1) unless the acquisition of
15 such articles, materials, or supplies would
16 increase the cost of the overall acquisition
17 by more than 25 percent.

18 “(ii) RULE OF CONSTRUCTION WITH
19 RESPECT TO DEFENSE CONTRACTS.—With
20 respect to the percentage increase required
21 for a determination of unreasonable cost
22 applicable to projects under Department of
23 Defense contracts as of the date of the en-
24 actment of the Make it in America Act,
25 nothing in this subparagraph may be con-

1 strued as reducing such percentage in-
2 crease.

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

4 “(A) IN GENERAL.—Notwithstanding the
5 exception described in subsection (a)(2)(A),
6 subsection (a)(1) shall apply to articles, mate-
7 rials, or supplies for use outside the United
8 States if such articles, materials, or supplies are
9 not needed on an urgent basis or are acquired
10 on a regular basis.

11 “(B) COST ANALYSIS.—In any case in
12 which articles, materials, or supplies are to be
13 acquired for use outside the United States and
14 are not needed on an urgent basis or are ac-
15 quired on a regular basis, before entering into
16 a contract, an analysis shall be made of the dif-
17 ference in the cost of acquiring such articles,
18 materials, or supplies from a company mining,
19 producing, or manufacturing the articles, mate-
20 rials, or supplies in the United States (exclud-
21 ing the cost of shipping) and the cost of acquir-
22 ing such articles, materials, or supplies from a
23 company mining, producing, or manufacturing
24 the articles, materials, or supplies outside the
25 United States (including the cost of shipping).

1 “(3) DOMESTIC AVAILABILITY.—The head of a
2 Federal agency may not determine that an article,
3 material, or supply is not mined, produced, or manu-
4 factured in the United States in sufficient and rea-
5 sonably available commercial quantities and of a sat-
6 isfactory quality under subsection (a)(1) unless the
7 head of the agency first determines that—

8 “(A) domestic production cannot be initi-
9 ated without significantly delaying the project
10 for which the article, material, or supply is to
11 be acquired; and

12 “(B) a substitutable article, material, or
13 supply is not mined, produced, or manufactured
14 in the United States in sufficient and reason-
15 ably available commercial quantities and of a
16 satisfactory quality.”.

17 (b) REPORTS.—

18 (1) ANNUAL REPORT.—Subsection (b) of sec-
19 tion 8302 of title 41, United States Code, is amend-
20 ed to read as follows:

21 “(b) REPORTS.—

22 “(1) IN GENERAL.—Not later than 180 days
23 after the end of each of fiscal years 2018 through
24 2022, the Director of the Office of Management and
25 Budget, in consultation with the Administrator of

1 General Services, shall submit to the Committee on
2 Oversight and Government Reform of the House of
3 Representatives and the Committee on Homeland
4 Security and Governmental Affairs of the Senate a
5 report on the total amount of acquisitions made by
6 Federal agencies in the relevant fiscal year of arti-
7 cles, materials, or supplies acquired from entities
8 that mine, produce, or manufacture the articles, ma-
9 terials, or supplies outside the United States.

10 “(2) ADDITIONAL CONTENT.—Each report re-
11 quired under paragraph (1) shall separately include,
12 for the fiscal year covered by the report—

13 “(A) the dollar value of any articles, mate-
14 rials, or supplies that were mined, produced, or
15 manufactured outside the United States, in the
16 aggregate and by country;

17 “(B) an itemized list of all waivers made
18 under this chapter with respect to articles, ma-
19 terials, or supplies and the country where such
20 articles, materials, or supplies were mined, pro-
21 duced, or manufactured;

22 “(C) if any articles, materials, or supplies
23 were acquired from entities that mine, produce,
24 or manufacture such articles, materials, or sup-
25 plies outside the United States due to an excep-

1 tion (that is not the micro-purchase threshold
2 exception described under subsection (a)(2)(C)),
3 the specific exception that was used to purchase
4 such articles, materials, or supplies;

5 “(D) if any articles, materials, or supplies
6 were acquired from entities that mine, produce,
7 or manufacture such articles, materials, or sup-
8 plies outside the United States pursuant to a
9 reciprocal defense procurement memorandum of
10 understanding (as described in section 8304),
11 or a trade agreement or least developed country
12 designation described in subpart 25.400 of the
13 Federal Acquisition Regulation, a citation to
14 such memorandum of understanding, trade
15 agreement, or designation; and

16 “(E) a summary of—

17 “(i) the total procurement funds ex-
18 pended on articles, materials, and supplies
19 mined, produced, or manufactured inside
20 the United States;

21 “(ii) the total procurement funds ex-
22 pended on articles, materials, and supplies
23 mined, produced, or manufactured outside
24 the United States; and

1 “(iii) the total procurement funds ex-
2 pended on articles, materials, and supplies
3 mined, produced, or manufactured outside
4 the United States per country that mined,
5 produced, or manufactured such articles,
6 materials, and supplies.

7 “(3) PUBLIC AVAILABILITY.—Not later than
8 180 days after the end of each relevant fiscal year,
9 the Director of the Office of Management and Budg-
10 et shall make the relevant report required under
11 paragraph (1) publicly available on a website.

12 “(4) EXCEPTION FOR INTELLIGENCE COMMU-
13 NITY.—This subsection does not apply to acquisi-
14 tions made by an agency, or component of an agen-
15 cy, that is an element of the intelligence community
16 as specified in, or designated under, section 3 of the
17 National Security Act of 1947 (50 U.S.C. 3003).”.

18 “(2) COMPTROLLER GENERAL REPORT.—Not
19 later than 1 year after the date of the enactment of
20 this Act, the Comptroller General of the United
21 States shall report to Congress on the extent to
22 which, in each of fiscal years 2011, 2012, 2013,
23 2014, and 2015, articles, materials, or supplies ac-
24 quired by the Federal Government were mined, pro-
25 duced, or manufactured outside the United States.

1 Such report shall include for each Federal agency
2 the following:

3 (A) A summary of total procurement funds
4 expended on articles, materials, and supplies
5 mined, produced, or manufactured—

6 (i) inside the United States;

7 (ii) outside the United States; and

8 (iii) outside the United States—

9 (I) under each category of waiver
10 under chapter 83 of title 41, United
11 States Code;

12 (II) under each category of ex-
13 ception under such chapter; and

14 (III) for each country that
15 mined, produced, or manufactured
16 such articles, materials, and supplies.

17 (B) For each fiscal year covered by the re-
18 port—

19 (i) the dollar value of any articles,
20 materials, or supplies that were mined,
21 produced, or manufactured outside the
22 United States, in the aggregate and by
23 country;

24 (ii) an itemized list of all waivers
25 made under this chapter with respect to

1 articles, materials, or supplies and the
2 country where such articles, materials, or
3 supplies were mined, produced, or manu-
4 factured;

5 (iii) if any articles, materials, or sup-
6 plies were acquired from entities that
7 mine, produce, or manufacture such arti-
8 cles, materials, or supplies outside the
9 United States due to an exception (that is
10 not the micro-purchase threshold exception
11 described under section 8302(a)(2)(C) of
12 title 41, United States Code), the specific
13 exception that was used to purchase such
14 articles, materials, or supplies;

15 (iv) if any articles, materials, or sup-
16 plies were acquired from entities that
17 mine, produce, or manufacture such arti-
18 cles, materials, or supplies outside the
19 United States pursuant to a reciprocal de-
20 fense procurement memorandum of under-
21 standing (as described in section 8304 of
22 title 41, United States Code), or a trade
23 agreement or least developed country des-
24 ignation described in subpart 25.400 of the
25 Federal Acquisition Regulation, a citation

1 to such memorandum of understanding,
2 trade agreement, or designation; and

3 (v) a summary of—

4 (I) the total procurement funds
5 expended on articles, materials, and
6 supplies mined, produced, or manufac-
7 tured inside the United States;

8 (II) the total procurement funds
9 expended on articles, materials, and
10 supplies mined, produced, or manufac-
11 tured outside the United States; and

12 (III) the total procurement funds
13 expended on articles, materials, and
14 supplies mined, produced, or manufac-
15 tured outside the United States per
16 country that mined, produced, or
17 manufactured such articles, materials,
18 and supplies.

19 (C) A description of the methods used by
20 each Federal agency to calculate the percentage
21 domestic content of articles, materials, and sup-
22 plies mined, produced, or manufactured in the
23 United States.

24 (3) ANALYSIS OF DOMESTIC INFORMATION
25 TECHNOLOGY AND SEMICONDUCTOR MANUFAC-

1 TURING CAPABILITIES.—Not later than 1 year after
2 the date of the enactment of this Act, the Inter-
3 national Trade Commission shall submit to Congress
4 an industry analysis of the capabilities of the domes-
5 tic information technology and semiconductor indus-
6 try to supply the Federal Government with domesti-
7 cally manufactured information technology systems.

8 (c) DEFINITIONS.—Section 8301 of title 41, United
9 States Code, is amended by adding at the end the fol-
10 lowing new paragraphs:

11 “(3) FEDERAL AGENCY.—The term ‘Federal
12 agency’ has the meaning given the term ‘executive
13 agency’ in section 133 of title 41, United States
14 Code.

15 “(4) SUBSTANTIALLY ALL.—The term ‘substan-
16 tially all’, with respect to articles, materials, or sup-
17 plies mined, produced, or manufactured in the
18 United States, means that—

19 “(A) the cost of the domestic components
20 of such articles, materials, or supplies exceeds
21 75 percent of the total cost of all components
22 of such articles, materials, or supplies; or

23 “(B) in the event that a Federal agency
24 does not receive an offer on a contract that
25 meets such threshold, the cost of the domestic

1 components of such articles, materials, or sup-
2 plies exceeds 60 percent of the total cost of all
3 components of such articles, materials, or sup-
4 plies.

5 “(5) WAIVER.—The term ‘waiver’, with respect
6 to the acquisition of an article, material, or supply
7 for public use, means the inapplicability of this
8 chapter to the acquisition by reason of any of the
9 following determinations under section 8302(a)(1) or
10 8303(b)(3) of this title:

11 “(A) A determination by the head of the
12 Federal agency concerned that the acquisition
13 is inconsistent with the public interest.

14 “(B) A determination by the head of the
15 Federal agency concerned that the cost of the
16 acquisition is unreasonable.

17 “(C) A determination by the head of the
18 Federal agency concerned that the article, ma-
19 terial, or supply is not mined, produced, or
20 manufactured in the United States in sufficient
21 and reasonably available commercial quantities
22 of a satisfactory quality.”.

23 (d) CONFORMING AMENDMENTS.—Title 41, United
24 States Code, is amended—

25 (1) in section 8302—

1 (A) in paragraph (1) of subsection (a)—

2 (i) by striking “department or inde-
3 pendent establishment” and inserting
4 “Federal agency”; and

5 (ii) by striking “their acquisition to be
6 inconsistent with the public interest or
7 their cost to be unreasonable” and insert-
8 ing “their acquisition to be inconsistent
9 with the public interest, their cost to be
10 unreasonable, or that the articles, mate-
11 rials, or supplies of the class or kind to be
12 used, or the articles, materials, or supplies
13 from which they are manufactured, are not
14 mined, produced, or manufactured in the
15 United States in sufficient and reasonably
16 available commercial quantities and of a
17 satisfactory quality”; and

18 (B) in paragraph (2) of subsection (a)—

19 (i) in subparagraph (A), by inserting
20 “subject to subsection (c)(2)(A),” before
21 “to articles, materials, or supplies”; and

22 (ii) by amending subparagraph (B) to
23 read as follows:

24 “(B) to any articles, materials, or supplies
25 procured pursuant to a reciprocal defense pro-

1 curement memorandum of understanding (as
2 described in section 8304), or a trade agree-
3 ment or least developed country designation de-
4 scribed in subpart 25.400 of the Federal Acqui-
5 sition Regulation; and”;

6 (2) in section 8303—

7 (A) in subsection (b)—

8 (i) by striking “department or inde-
9 pendent establishment” each place it ap-
10 pears and inserting “Federal agency”;

11 (ii) by amending subparagraph (B) of
12 paragraph (1) to read as follows:

13 “(B) to any articles, materials, or supplies
14 procured pursuant to a reciprocal defense pro-
15 curement memorandum of understanding (as
16 described in section 8304), or a trade agree-
17 ment or least developed country designation de-
18 scribed in subpart 25.400 of the Federal Acqui-
19 sition Regulation; and”;

20 (iii) in paragraph (3)—

21 (I) in the heading, by striking
22 “INCONSISTENT WITH PUBLIC INTER-
23 EST” and inserting “WAIVER AU-
24 THORITY”; and

1 (II) by striking “their purchase
2 to be inconsistent with the public in-
3 terest or their cost to be unreason-
4 able” and inserting “their acquisition
5 to be inconsistent with the public in-
6 terest, their cost to be unreasonable,
7 or that the articles, materials, or sup-
8 plies of the class or kind to be used,
9 or the articles, materials, or supplies
10 from which they are manufactured,
11 are not mined, produced, or manufac-
12 tured in the United States in suffi-
13 cient and reasonably available com-
14 mercial quantities and of a satisfac-
15 tory quality”; and

16 (B) in subsection (c), by striking “depart-
17 ment, bureau, agency, or independent establish-
18 ment” each place it appears and inserting
19 “Federal agency”.

20 (e) EXCLUSION FROM INFLATION ADJUSTMENT OF
21 ACQUISITION-RELATED DOLLAR THRESHOLDS.—Sub-
22 paragraph (A) of section 1908(b)(2) of title 41, United
23 States Code, is amended by striking “chapter 67” and in-
24 serting “chapters 67 and 83”.

1 **SEC. 4. UNITED STATES OBLIGATIONS UNDER INTER-**
2 **NATIONAL AGREEMENTS.**

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

6 **SEC. 5. DEFINITIONS.**

7 In this Act:

8 (1) **FEDERAL AGENCY.**—The term “Federal
9 agency” has the meaning given the term “executive
10 agency” in section 133 of title 41, United States
11 Code.

12 (2) **WAIVER.**—The term “waiver”, with respect
13 to the acquisition of an article, material, or supply
14 for public use, means the inapplicability of chapter
15 83 of title 41, United States Code, to the acquisition
16 by reason of any of the following determinations
17 under section 8302(a)(1) or 8303(b)(3) of such title:

18 (A) A determination by the head of the
19 Federal agency concerned that the acquisition
20 is inconsistent with the public interest.

21 (B) A determination by the head of the
22 Federal agency concerned that the cost of the
23 acquisition is unreasonable.

24 (C) A determination by the head of the
25 Federal agency concerned that the article, ma-
26 terial, or supply is not mined, produced, or

1 manufactured in the United States in sufficient
2 and reasonably available commercial quantities
3 of a satisfactory quality.

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