

Buying American: The Berry Amendment

Jan Ferguson

Like most acquisition professionals, you have probably heard of the Buy American Act, signed into law in 1933 by President Herbert Hoover on his last day in office, but you may not be familiar with the Berry Amendment. Although both are concerned with purchase of American products, there are major differences between the two, as shown in the sidebar on the next page.

The Berry Amendment has been around since 1941, but most of us were not aware of it until the spring of 2001, when the media snagged another juicy story on the procurement methods of the federal government.

The story began the previous October, when the U.S. Army chief of staff announced that all active-duty, National Guard, and Reserve personnel would be issued black berets as part of their standard headgear—4.8 million berets, and they were needed by June 14, 2001, for the Army's 226th birthday. There was only one American manufacturer of berets, with a contract to produce a maximum of 138,052. It would obviously be impossible for one company to produce the required number within the eight-month delivery schedule, so the Defense Logistics Agency granted waivers to the Berry Amendment, which brought the issue to the attention of Congress and the public. According to a Congressional Research Service Report (RL31236), the first contract was awarded to an American company, and other contracts were awarded to several foreign manufacturing firms. Five of the foreign firms had production facilities in the People's Republic of China, Romania, Sri Lanka, and other low-wage countries.

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Compared to the other “restricted” items that DoD procures, many would argue that the berets were an insignificant purchase. However, the Army was to pay approximately \$23.8 million for them, so it is understandable that the loss of such a contract to foreign sources would be unacceptable, especially to American small businesses.

As a result of this controversy, the Berry Amendment, and more specifically H.R. 1352, was enacted into law as part of the fiscal year 2002 National Defense Authorization Act; section 832 codified the Berry Amendment at 10 U.S.C. 2533a. According to the Defense Federal Acquisition Regulation (DFARS), Part 225—Foreign Acquisition, this new code requires that we “do not acquire—

(a) any of the following items, either as end products or components, unless the items have been grown, reprocessed, reused, or produced in the United States:

- Food.
- Clothing.
- Tents, tarpaulins, or covers.
- Cotton and other natural fiber products.
- Woven silk or woven silk blends.
- Spun silk yarn for cartridge cloth.
- Synthetic fabric or coated synthetic fabric, including all textile fibers and yarns that are for use in such fabrics.
- Canvas products.
- Wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles).
- Any item of individual equipment (Federal Supply Class 8465) manufactured from or containing any of the fibers, yarns, fabrics, or materials listed in this paragraph (a).

(b) Specialty metals, including stainless steel flatware, unless the metals were melted in steel manufacturing facilities located within the United States.

(c) Hand or measuring tools, unless the tools were produced in the United States.”

There are, of course, exceptions listed in the DFARS, most notably, acquisitions at or below the simplified acquisition threshold (\$100,000), acquisitions outside the United States in support of combat operations, or acquisitions of any of the items listed above, “if the Secretary concerned determines that items grown, reprocessed, reused, or produced in the United States cannot be acquired as and when needed in a satisfactory quality and sufficient quantity at U.S. market prices.”

Buying American Raises Issues

So what’s happened in the four years since all that publicity? In spite of the advantages to American business, it appears there will always be arguments against the Berry Amendment. In *Defense Daily International*, June 24, 2005, an article points out that the Berry Amendment is the reason why body armor was delayed in getting to the troops in Iraq and Afghanistan. The lack of protective equipment and up-armored Humvees has drawn substantial criticism from the public and Congress. When the demand for the critical backing material of the armor quadrupled (from April 2002 to May 2003), the sole American source was not able to keep up. Dutch State Mines, a foreign firm headquartered in The Netherlands, could supply ballistic backing; however, the Berry Amendment prevented the Pentagon from buying directly from the company. As a result, there was a three-month delay. Fortunately, Dutch State Mines built a new production facility for a comparable backing material in Greenville, N.C., thus reducing the domestic production problems.

Another recent battle concerned the use of specialty metals like titanium, which are used in aircraft and other hardware. Large companies do not track their use of specialty metals throughout the manufacturing process, and for their commercial aircraft, large companies purchase a great deal of titanium from Russia. Problems surface when the Pentagon wants to purchase military aircraft that are modified versions of commercial airplanes. Since there are normally no requirements to purchase domestic titanium for commercial aircraft, the Berry Amendment becomes an issue. If it is en-

forced, only American companies can provide titanium for items crucial to national security. However, it was reported in *Defense Daily*, July 25, 2003, that an agreement had been reached with the House Armed Services Committee and Boeing to purchase equal amounts of Russian and American titanium that will be used to produce specific military aircraft.

The Genesis of the Berry Amendment

In the 1999 book *Buy American; The Untold Story of Economic Nationalism*, author Dana Frank points out that the “Buy American” movement began with newspaper mogul William Randolph Hearst Jr., who “marshaled his enormous resources behind a Buy American campaign ... which he blazoned across the headlines of his twenty-seven daily newspapers” in late 1932 and early 1933. The culmination was the Buy American Act of 1933. (An ironical aside: In spite of Hearst’s zeal for “Buy American,” Hearst Castle in San Simeon, Calif., whose construction began in 1919 and continued through the Great Depression, was produced with supplies from all around the world and primarily from Europe and the Mediterranean countries.)

It appears that Hearst got his “buy national” idea from the British. In November 1931, Britain had launched a massive “Buy British” campaign. Other nations followed suit. In February 1933, thousands of women and trade unionists in France demonstrated in favor of French products. Later that year, another movement was begun in Germany by pro-Hitler business leaders for “Buy German.”

Because of a growing sense of isolationism, there were many who felt that even the 1933 Buy American Act was not sufficient. The 1941 Berry Amendment, which applied only to DoD procurements, took the domestic restrictions even further than the Buy American Act. On the eve of World War II, the intent of the Berry Amendment was to ensure that American soldiers wore only American-made uniforms and ate only American food.

IG Audits Show Many Violations

In October 1998, the Office of the Inspector General published audit report No. 99-023, “Procurement of Military Clothing and Related Items by Military Organizations,” which expressed concern over the number of violations of the Buy American Act and the Berry Amendment. It was reported that of the 256 contracts reviewed, 151 (59 percent) did not include the appropriate contract clause. The House Committee on Armed Services tasked the Office of the Inspector General to

BUY AMERICAN ACT	BERRY AMENDMENT
For all federal agencies	For Department of Defense only
Enacted in 1933	1941 Appropriations Act; codified 2002
Preference for purchases of domestic end products (manufactured in the United States); the cost of domestic components must exceed 50 percent of the cost of all the components of the end product	Initially ensured U.S. troops wore American-made uniforms and ate American food; later, tents, tarps and specialty metals were added

conduct a follow-up audit to evaluate compliance by military installations during fiscal years 1998 and 1999, and to evaluate actions taken after the 1998 audit to improve compliance.

Unfortunately, the audit determined that DoD contracting officers continued to violate the Buy American Act and the Berry Amendment in procurements of military clothing and related items. Of 698 contracts reviewed, 416 (60 percent) did not include the appropriate contract clause to implement the Buy American Act or the Berry Amendment. The Office of the Inspector General concluded that

these procurement violations occurred primarily because the contracting officers were not familiar with, or did not understand, the Buy American Act, the Berry Amendment, and the FAR and DFARS implementing guidance. The audit recommended that the Acquisition Executives for the Army, Navy, Air Force, and U.S. Special Operations Command establish review procedures or additional training for solicitations and contract awards for clothing procurements.

Onus on Acquisition Professionals

As acquisition professionals, we need to be informed of changes to the FAR and DFARS so that we meet the requirements set forth in the Berry Amendment. In a recent DFARS case (2004-D035), a final rule amending the DFARS 225.7002-2(b), became effective July 26, 2005. It reflects the requirements of the following DoD memorandum:

- The deputy secretary of defense memorandum of May 1, 2001, provides that the USD(AT&L), and the secretaries of the military departments may make domestic nonavailability determinations under the Berry Amendment but may not re-delegate this authority. The memorandum also requires an analysis of alternatives and a certification as to why such alternatives are unacceptable.
- The USD(AT&L) memorandum of October 22, 2004, requires congressional notification (at least 10 days before the award of a contract) of any domestic nonavailability determinations involving titanium or products containing titanium.

PROCUREMENT VIOLATIONS OCCURRED PRIMARILY BECAUSE THE CONTRACTING OFFICERS WERE NOT FAMILIAR WITH, OR DID NOT UNDERSTAND, THE BUY AMERICAN ACT, THE BERRY AMENDMENT, AND THE FAR AND DFARS IMPLEMENTING GUIDANCE.

In an interview published in *Aviation Week & Space Technology*, September 2005, Rep. Duncan Hunter (R-Calif), chairman of the House Armed Services Committee, emphasized the importance of buying American-made products: "The best example of that was when a company in Switzerland, which makes the crystal for what is arguably our most important weapons system—the precision-munitions Joint Direct Attack Munition—refused to send it to us because the company did not agree with our foreign policy. ... I think that was an important reminder that the rule that was laid out several hundred years ago by Adam Smith in *The*

Wealth of Nations, that free trade should not extend to the critical components for your nation's defense structure, remains valid today."

Courses designed to satisfy the Defense Acquisition Workforce Improvement Act requirements have given more attention to training in the Buy American Act and Berry Amendment in recent years. However, in addition to getting formal training, we also need to make an individual effort to stay informed of policy changes. When there is a question as to whether the Berry Amendment applies, procurement officers should research the DFARS, ask legal counsel, and ensure a solid fact base for decisions. The questions to ask are "Have I included the appropriate clause(s) in the solicitation and contract?"; "Am I procuring unnecessarily with non-qualifying countries?"; and "What effect does my procurement have on the American industrial base?"

Finally, the Berry Amendment follows the money, so the requirements of the Berry Amendment apply to all procurement vehicles (including non-DoD contracts, such as Federal Supply Schedules) if the contract action is funded by money appropriated or otherwise made available to DoD. While DFARS 225.7002 and DFARS Procedures Guidance and Information 225.7002 implement the Berry Amendment, expect more training to be offered in fiscal year 2006.

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