U.S. Department of Defense (DoD)

Defense Procurement and
The Berry Amendment

Agenda

- The DoD Procurement Organization and Policy
- The Berry Amendment in Detail
- One Illustration to Compare and Contrast The Berry Amendment and Buy American Act
- Two Illustrations on the Use of Domestic Non-Availability Determinations (DNADs) by DoD
Fiscal Year 2016 Spending by The Department of Defense

- **Supplies & Equipment (S&E) ($147.0B)**
  - Knowledge Based Svcs ($33.7B) 23%
  - Facilities Related Svcs ($24.0B) 16%
  - Research & Development ($23.2B) 15%
  - Equip Related Svcs ($17.7B) 12%
  - Electronic & Comm Svcs ($16.1B) 11%
  - Medical Svcs ($13.3B) 9%
  - Construction Svcs ($10.2B) 7%
  - Transportation Svcs ($5.7B) 4%
  - Logistics Mgmt Svcs ($4.8B) 3%
- **Services ($148.7B)**
  - Acft, Ships/Subs, Land Vehicles ($56.5B) 39%
  - Electronic & Comm Equip ($31.2B) 21%
  - Sustainment S&E ($22.1B) 15%
  - Weapons & Ammo ($20.4B) 14%
  - Facilities S&E ($10.4B) 7%
  - Clothing, Textiles & Subsistence S&E ($6.5B) 4%
  - Miscellaneous S&E ($0.05B) 0%

Note: These numbers have not yet been certified.

Data from Business Intelligence Tool; all services obligations where DoD is contracting department, 19 Oct 16.

DoD Berry Amendment Snapshot

**Fiscal Year 2016**

<table>
<thead>
<tr>
<th>Category</th>
<th>Dollars Obligated</th>
<th>Domestic (D)/Foreign (F)</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tools</td>
<td>$121.1M</td>
<td>D</td>
<td>4</td>
</tr>
<tr>
<td>Tools</td>
<td>$637K</td>
<td>F</td>
<td>&lt;1</td>
</tr>
<tr>
<td>Clothing &amp; Textiles</td>
<td>$1.6B</td>
<td>D</td>
<td>57</td>
</tr>
<tr>
<td>Clothing &amp; Textiles</td>
<td>$5.0M</td>
<td>F</td>
<td>&lt;1</td>
</tr>
<tr>
<td>Subsistence</td>
<td>$1.1B</td>
<td>D</td>
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</tr>
<tr>
<td>Subsistence</td>
<td>$464K</td>
<td>F</td>
<td>&lt;1</td>
</tr>
</tbody>
</table>

52 – Measuring Tools
83 – Textiles, Leather, Furs, Apparel, Shoes, Tents, Flags
84 – Clothing, Individual Equipment, Insignia
89 – Subsistence (Food)

Source: [https://www.fpds.gov/](https://www.fpds.gov/)

Query Date: April 28, 2017

Defense Procurement System

- Centralized, uniform procurement policy
  - Laws, regulations, and guiding principles are the same for all defense procurement offices
- Decentralized procurement execution
  - Army, Navy, Air Force, Defense Logistics Agency, and other Defense agencies have individual commodity and procurement offices in different locations around the world.
Procurement Laws and Regulations

- Federal Acquisition Regulations (FAR): Applies to virtually all Federal procurement
- Defense Federal Acquisition Regulation Supplement (DFARS): Applies only to DoD
- Military Department Supplements: Applies only to the Military Department (e.g., Army) that issues the Supplement

The Berry Amendment Basics

- The Berry Amendment was originally passed by Congress in 1941 to promote the purchase of certain U.S. goods.
- The Amendment was included in subsequent defense appropriations acts until it was made permanent in Fiscal Year 1994 by section 8005 of Public Law 103-139.
- It was subsequently codified as 10 U.S.C. 2533a in 2002 by section 832 of Public Law 107-107.
- On October 17, 2006, the President signed the National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364). Under section 842 of this Act, the restrictions relating to specialty metals were deleted from 10 U.S.C. 2533a and placed in 10 U.S.C. 2533b.

The Berry Amendment Coverage

- The Berry Amendment restricts funds appropriated or otherwise available to Department of Defense (DoD) from being used to procure, at all tiers, the following covered items, if not grown, reprocessed, reused, or produced in the United States:
  - an article or item of 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, or 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 such fibers, yarns, fabrics, or materials;
  - hand or measuring tools.
The Berry Amendment

Exceptions

- Small purchased below the Simplified Acquisition Threshold (SAT) (usually $150,000 with certain exceptions)
- An non-availability waiver (Domestic Non-Availability Determination (DNAD)) to the Berry Amendment may be granted 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.
- Items in Federal Acquisition Regulation (FAR) at subpart 25.104, where the US Government has determined may not be available in sufficient quality or quantity in the US market place.

The Berry Amendment does not apply to the following:

- Acquisitions outside the United States in support of combat operations.

The Berry Amendment

Exceptions (continued)

- Acquisitions of food or hand or measuring tools-
  - In support of contingency operations; or
  - For which the use of other than competitive procedures has been approved on the basis of unusual and compelling urgency in accordance with FAR 6.302-2
- Acquisitions of perishable foods by, or for, activities located outside the United States for personnel of those activities.
- Emergency acquisitions by, or for, activities located outside the United States for personnel of those activities.
- Acquisitions by vessels in foreign waters.
- Acquisitions of items specifically for commissary resale.
- Acquisitions of end products incidentally incorporating cotton, other natural fibers, or wool.

The Berry Amendment

Exceptions (continued)

- Acquisitions of foods (other than fish, shellfish, or seafood) that have been manufactured or processed in the United States, regardless of where the foods (and any component if applicable) were grown or produced.
- Acquisitions of waste and byproducts of cotton or wool fiber for use in the production of propellants and explosives.
- Acquisitions of fibers and yarns that are for use in synthetic fabric or coated synthetic fabric (but not the purchase of the synthetic or coated synthetic fabric itself), if the fabric is to be used as a component of an end product that is not a textile product.
- Acquisitions of para-aramid fibers and yarns when manufactured in a qualifying country as defined in the DFARS.
- Acquisitions of chemical warfare protective clothing when the acquisition furthers an agreement with a qualifying country.
U.S. Presidential Executive Order on Buy American and Hire American (summary)

• Promote economic and national security and to help stimulate economic growth
• Support the American manufacturing and defense industrial bases
• Policy of the executive branch to use of goods, products, and materials produced in the United States
• Comply with Buy American Laws, to the extent they apply, and minimize the use of waivers, consistent with applicable law
• "Waivers" means exemptions from or waivers of Buy American Laws, or the procedures and conditions used by an executive department or agency in granting exemptions from or waivers of Buy American Laws

The Berry Amendment Supporting Information

http://www.acq.osd.mil/dpap/cpic/ic/berry_amendment_10_usc_2533a.html

DoD Procurement of Clothing and Textile Items Illustration: Athletic/Running Shoes

Statutory Requirements Placed on DoD: Procure clothing and textile items in compliance with both the Berry Amendment (10 U.S.C. 2333a) and the Buy American Act (41 U.S.C. Chapter 38)

Challenges Facing DoD in Procuring Athletic Shoes

Section 817 of the NDAA for FY 2017 (Pub. L. 114-328): Section 817 amends 37 U.S.C. 418, adding new paragraph (d), which extends domestic source requirements to acquisitions at or below the simplified acquisition threshold when acquiring athletic footwear to be furnished to enlisted members of the Armed Forces upon their initial entry into the Armed Forces.
The Berry Amendment DNAD
Rayon Fiber

Who: Under Secretary of Defense (Acquisition, Technology, and Logistics)

What: Rayon fiber is a component in a wide range of items such as clothing, individual equipment, insignias, flags, and labels. Flame Resistant (FR) Rayon is a major component in FR military uniforms

When: July 20, 2001

Where: Currently there is only one source of FR rayon fibers to support the manufacturing of FR military uniforms for the Department of Defense—an Austrian-headquartered company, Lenzing. Other types of FR rayon fibers are produced by other companies in Finland, China, and Japan, but these fibers are used for nonwoven products, such as FR fibers for mattresses. No U.S. source currently exists for the production of FR rayon for military uniforms. It is unlikely that the U.S. textile industry will develop any FR rayon production given the costs to build and maintain environmentally compliant manufacturing facilities, uncertain demand from DoD, and a limited commercial market.

Why: As the threat from Improvised Explosive Devices (IEDs) emerged during Operation Iraqi Freedom and continues today, numerous capabilities have been developed to protect the warfighter. These solutions include such items as armored vehicles, improved body armor, and flame resistant (FR) military uniforms.

How: In accordance with subsection (c) of 10 U.S.C. 2533a (the Berry Amendment) as implemented at DFARS 225.7002-2(b).

The Berry Amendment DNAD
Flame Resistant Rayon Fiber

Supply Chain Flow Chart for TenCate Defender™ M Fabric

DNAD Satisfies the Industrial Base Challenge – No Domestic Supplier of Flame Resistant Rayon Fiber

The Berry Amendment DNAD
Watertight Zipper for the Lightweight Immersion Suite for Aviation (LISA)

Who: Acting Secretary of the Army

What: YKK ProSeal 4TZN and 8TZN Zippers

When: February 2, 2017

Where: YKK U.S.A. Inc is the only known domestic manufacturer of this type of zipper that contains multiple foreign components i.e. sliders from the UK, Japan, and Philippines; neoprene coated fabric from Japan; pullers from Germany; rivets from Japan; others.

Why: The LISA is a lightweight, surface immersion, thermally protective suit for aviators engaged in moderate cold-overwater missions in rotary and fixed-wing aircraft.

How: In accordance with subsection (c) of 10 U.S.C. 2533a (the Berry Amendment) as implemented in DFARS 225.7002-2(b).

DNAD Satisfies the Industrial Base Challenge – No Domestic Suppliers of Watertight Zipper Components
QUESTIONS???

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