Protectionist policies like the Berry Amendment unnecessarily hinder U.S. Department of Defense supply purchases in a global, commercial environment.

BY COLLEEN A. MORRIS

Rethinking Berry Amendme

"Buy American!" "Made in the U.S.A.!" These slogans evoke strong patriotic emotion from the American public, help support American businesses, and bolster the economy. Decades of protectionist policy lie in the Berry Amendment under the Buy American Act, which places domestic source restrictions on U.S. Department of Defense (DOD) purchases of supplies. The Berry Amendment has strong implications on DOD acquisitions, as seen in the purchase of U.S. Army berets in 2001.

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In this era of globalization and acquisition reform, industrial policies such as the Berry Amendment only serve to hinder the DOD, particularly when it comes to commercial acquisitions where national security is not at stake. An understanding of the legislation enacting the Berry Amendment, and an examination of the beret case and other implications on DOD supply purchases raises concerns that this law is no longer valid and should be revised for supplies purchased under commercial acquisitions, despite the political ramifications.

Berry Amendment History

Although prevalent in the press in the spring of 2001, the Berry Amendment has actually been included in the DOD Appropriations Act since 1941.[1] It essentially placed domestic source restrictions on food, clothing, specialty metals, and hand or measuring equipment.[2] The application of this amendment has become progressively broader through legislation. For example, in 1952, the amendment was modified to include "components" that go into food and clothing, as well as processing.[3] In 1993, the restrictions became permanent and were codified.[4]

Berry Amendment restrictions are covered in the Buy American Act under DFAR Subpart 225.7002, which also includes a variety of other textile products such as synthetic fabrics, silk, and chemical protective clothing. In 1994, the regulations were changed to prohibit the use of any funds available to the DOD to purchase items covered under this amendment. However, in the era of acquisition reform, the Federal Acquisition Streamlining Act (FASA) exempted simplified acquisitions (purchases under $100,0000) from the domestic source restrictions. In 1997, the DOD issued a final rule that applied the Berry Amendment to commercial items.

Although this policy has evolved over the last half of the 20th century, the Berry Amendment can be waived if supplies in sufficient quantity and quality cannot be acquired at U.S. market prices. Legislation was introduced on April 3, 2001, to scrutinize future waiver decisions, with notices

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going to congressional appropriations committees, armed services committees, and small business committees. It also imposed a 30-day cooling off period before any waived contract could be executed.[5] This legislation was a direct result of the purchase of new berets for the U.S. Army.

The Beret Case

The Defense Logistics Agency (DLA), procurement agent for DOD clothing and uniform supplies, discovered that the Berry Amendment, a seemingly innocuous policy, produced a firestorm of scrutiny, criticism, and congressional inquiry when it contracted for production of approximately 5 million berets at a cost of $30 million on behalf of the U.S. Army.[6]

On October 17, 2000, the army chief of staff announced that all army active, national guard, and reserve personnel would be issued new head gear, specifically berets, and would start wearing the berets on June 14, 2001, which was the army's first birthday of the new millenium.[7] DLA already had a small domestic contract for a maximum of 138,052 berets that was awarded under FAR Part 12 (Commercial Acquisitions). To meet the demand in the time frame required, DLA's strategy included a three-pronged approach:

(1) Increase the volume of berets under the existing contract, the only known domestic source that could meet the contract specifications;

(2) Contract out to foreign suppliers; and

(3) Procure from any other available sources.[8]

Following its plan, DLA modified its existing domestic contract with Bancroft Cap Company and increased its order ten-fold from 10,000 berets per month to 100,000 berets per month at a price of $6.30 per beret. Because it could not obtain all berets from this source to meet the entire requirement, and knew of no other domestic sources that could provide the quantity and quality desired in the specified time frame,[9] DLA justified the contract action as urgent and compelling, proceeded without full and open competition, obtained waivers to the Berry Amendment, and proceeded to award contracts to six foreign suppliers, including one in China. Foreign contract prices, inclusive of options (exercised to meet the demand), averaged $5.66 per beret, approximately 11 percent less than the domestic price.

In spring 2001, congressional interest peaked when members heard of DLA's acquisition and waiver of the Berry Amendment to procure the army berets. In his statement before the Committee on Small Business, House Representative and director of Acquisition and Sourcing Management for the General Accounting Office David Cooper testified that imposing a June 14, 2001, deadline created a high-risk contracting scenario for the DOD, which left very little time to plan for the berets' production and purchase. Consequently, DLA had to resort to other procurement alternatives, including purchasing the berets from foreign vendors.

Despite DLA's best efforts, neither the foreign contractors nor the domestic contractor could support the quantity of berets required by the deadline. In an ironic twist of fate, Bancroft Cap Company, the domestic supplier, discovered that its own contract was in violation of the Berry Amendment, when foreign wool and leather had been used in the berets delivered to the army.[10] The under secretary of defense (acquisition, technology, and logistics) approved a waiver for the purchase with the stipulation that future production must ensure U.S. domestic content.

Implications for Other DOD Procurements

As shown in the DLA beret case, even the domestic contractor, with full knowledge of the Berry Amendment and contract requirements, had difficulty manufacturing the berets for the DOD because of the domestic source and content restrictions. Because all clauses pertaining to the Buy American Act and Berry Amendment also must flow down to subcontracts policing prime contracts and subcontracts is a difficult and onerous process for affected items, particularly if the DOD is purchasing commercial items under FAR Part 12 (Commercial Acquisitions). This type of procurement does not ordinarily receive post-award monitoring from the Defense Contract Management Agency because by its nature, items have proven quality and acceptability in the commercial marketplace.

Since the Berry Amendment applies to commercial end items, it requires manufacturers to certify all "components" in the end item are from domestic sources. In the beret case, this meant all textile fibers. In the clothing industry, one where DLA procures the majority of items under commercial acquisitions, identifying the source of the yarns and textile fibers in each commercial item of clothing becomes problematic when it comes to outfitting DOD. From socks and underwear to jackets, hats, tents, and sandbags, all commercial end items purchased with DOD funds must be from a domestic source and contain domestic materials. Non-compliance with the Berry Amendment creates a violation of the Anti-Deficiency Act. Because DOD funds are appropriated for purchasing items subject to this amendment, any violation creates an anti-deficiency.

Is the Berry Amendment Necessary?

Congressmen are put in a real bind when it comes to legislating and supporting a law such as the Berry Amendment. They must support protectionist policies for their constituents to help boost local economies; it would be politically incorrect to do otherwise. However, the businesses they try to protect sometimes have a hard time meeting the source and content restrictions required by the Berry Amendment. The biggest problem is trying to identify that each component of a commercially available product is from a domestic source. Since each fiber of fabric, ball bearing, and food item must be from a domestic source, businesses may expend unnecessary resources by trying to police source restriction requirements from subcontractors. These costs are in turn passed on to DOD. Also, non-compliance may mean risking award of future DOD contracts. It is often cheaper and less troublesome to avoid DOD contracts altogether.

Acquisition reform committees saw this as a potential problem when they tried to exempt items bought under Federal Acquisition Part 12, Commercial Acquisitions under the

Federal Acquisition Streamlining and Reform Act in 1994. The Section 800 Panel examined numerous business practices and recommended a legislative change to the Buy American Act. They recommended that rule of origin tests be changed to tests of "substantial transformation" and that Congress repeal the domestic source restrictions.[11] Their reasoning was quite logical:

> Commercial sellers should be able to utilize their established facilities, technology, supplier networks, processes, employees, and other standard commercial practices in performing government contracts. The reality that global markets exist and that global markets can be responsive to mobilization needs must be recognized. It is to our strategic and economic advantage to maintain vital foreign sources during peacetime as well as domestic sources or at least have the option to do so when market conditions and the international situation so dictates.[12]

The Section 800 Panel was largely unsuccessful in their attempts, but was able to exempt items with dollar values that fall below $100,000. The Berry Amendment now applies to commercial acquisitions affecting all businesses that respond to DOD supply requirements. Despite possible impacts and pitfalls businesses might encounter when supplying DOD, some domestic vendors may be well positioned to take on the task.

One segment the Berry Amendment might positively impact is the small business community. With proper planning and careful sourcing, small businesses do not have to compete with foreign producers if domestic source restrictions in place. This enables them to help shore up and grow the economy and sustain the industrial base. In a press release on May 1, 2001, Senator Kit Bond, chairman of the Senate Committee on Small Business, said with respect to the DLA beret case, "An ongoing need to purchase over 1 million new berets annually could supply a small business or two with regular income and sustain jobs." Bond indicated in an understanding with Pentagon officials that the ongoing need for replacement berets will ensure a steady job for these small businesses.[13]

South Carolina Senator Fritz Hollings, on the Senate Appropriations Defense Sub-Committee, has been active in recent years shoring up the textile and ball bearing industries in his state through his actions in modifying key bills that force DOD to buy American products. In a press release on September 1997, Senator Hollings said,

> I will continue to do everything to protect South Carolina industries from irresponsible Department of Defense purchasing policies. We must give American companies first shot when it comes to government purchases.

Large or small, commercial or military specification items, it does take time for U.S. businesses to gear up to produce the items DOD requires. In his testimony before Congress, Major General (Ret.) Charles R. Henry, former deputy director of the DLA and advisor to the American Apparel and Footwear Association, testified that in his experience, it takes a contractor six months from the start to get a production line in operation.[14]

According to MG Henry, "The United States will go into the next war in a 'come as you are approach,' with what it has on hand and in production. As with Desert Storm, a 'warm' industrial base will be essential. The war will be over before receipt of those items will be needed and there is no warm base."

Maintaining the warm industrial base is costly and may not even meet DOD's needs, as shown in the DLA beret case when its domestic contractor could not comply with the Berry Amendment. Additionally, U.S.-based companies must "offer to sell" to DOD. It may be more lucrative for them to manufacture other textile items and sell outside DOD without the domestic source restrictions required by the Berry Amendment.

Globalization's Impact

Globalization may be the key to meeting DOD's supply needs. During the Persian Gulf War, DOD relied on commercial items to meet its needs, which reduced the lead-time and expense needed to develop new items.[15] Additionally, as shown in the beret case, world suppliers rallied to support the short-fused requirement at average prices lower than the domestic producer. The issue of maintaining a warm industrial base for commercial and other non-critical items may not be necessary or even in the DOD's best interests. Certainly, the acquisition of berets offshore did not affect the national security or readiness of the army.

Trying to identify specific components or fibers in commercial supplies or textiles seems like an unwieldy, if not impossible task, particularly in this

era of acquisition reform, where Title VIII of the Federal Streamlining Act (1994) strongly encourages acquisition of commercial items and components and adapting acquisitions to the commercial marketplace.[16] Commercial suppliers should be able to maximize use of the global commercial marketplace when performing a government contract without the additional burden of policing domestic source requirements.

U.S. policymakers cannot ignore the global commercial market. DOD recognizes the need for flexibility in logistics in the Chairman of the Joint Chiefs of Staff Instruction 3110.13A,

which states, "The DOD can best meet most military needs by leveraging the competitive and global marketplace." Global commercial acquisitions provide the rapid responsiveness and flexibility needed by DOD to support the warfighter. Domestic source restrictions required by the Berry Amendment are counterproductive in a global environment, limiting DOD's flexibility and readiness.

Free trade seems to be incompatible with national security and policies such as the Berry Amendment seem onerous, if not obsolete. However, one also must consider the impact of globalization on the U.S. economy before deciding whether to abolish decades of protectionist policy. Between 1994 and 2000, the United States lost more than 3 million jobs and job opportunities (2.3 percent of labor force), since the North American Free Trade Agreement was implemented in 1994 and the World Trade Organization was established in 1995.[17] Exports exceeded imports during this period, and job losses were highest in states with concentrations of industries such as motor vehicles, textiles, apparel, computers, and electrical appliances.[18] Nearly two out of every three jobs were lost in manufacturing. Additionally, trade deficits increased.

DOD's Transformation

Job losses in certain sectors, such as the textile, food, and steel industries, may seem insurmountable if U.S. businesses are not given the opportunity to compete for DOD businesses. However, it would seem more appropriate for Congress to stop trying to shore up industries where commercial items can be bought in the global marketplace and national security is not at stake. Opportunity costs for DOD are high for self-sufficiency, since the time, energy, and money spent to produce such items could be focused on tooth instead of tail.

While change is always difficult, DOD is now in a position to be a change agent. Transformation and change are strong elements in DOD's plan for the future. The *Quadrennial Defense Review* outlines transformational keys to supporting a more capable fighting force. One key is in its business process and regulations:[19]

> While America's business have streamlined and adopted new business models to react to fast-moving changes in markets and technology, the Department of Defense has lagged behind without an overarching strategy to improve its business practices.

Historically, DOD has been caught between regulations and processes that limit risk. However, industry's best practices are miles ahead of DOD, partly due to outdated industrial policies that do not allow DOD personnel to make the tradeoff between risk, cost, and performance. Industrial policies like the Berry Amendment hinder DOD when it comes to applying practical business judgment when it purchases commercial supplies. Future administrations must be prepared to fight the political battles with Congress that allow DOD to benefit from modern commercial practices that do not adversely affect national security.

Revision—A Must

The U.S. and DOD should accept that globalization is happening, and will continue to influence the economy. Globally, commercial items meet DOD's needs at competitive (if not lower) prices. DOD must have the flexibility to ascertain the risks involved in purchasing its commercial supplies from foreign vendors or domestic vendors with foreign components. The U.S. government should assess industries where the impact of purchasing commercial supplies truly affects national security, and promote industrial policies to support, develop, and maintain a warm industrial base for strategic emerging industries that are critical to national security.

At a minimum, a revision to the Berry Amendment to exempt commercial acquisitions under $5 million (the threshold at which contracting activities are permitted to use simplified acquisition procedures under FAR Part 12) is an absolute must. Ideally, the Berry Amendment should be abolished altogether for commercial acquisitions and DOD should focus its energies and money on encouraging and supporting small businesses and emerging industries that truly affect national security. ***CM***

Endnotes

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