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Buying American: The Berry and Kissell Amendments

Two U.S. laws require the Department of Defense (DOD) and some agencies of the Department of Homeland Security (DHS) to purchase only domestic products for certain military and nonmilitary purposes. These laws are known as the Berry Amendment and the Kissell Amendment. Congress typically debates the Berry Amendment in the context of the annual National Defense Authorization Act.

The laws are controversial. Their supporters argue they help preserve the U.S. industrial base and create domestic manufacturing jobs. Opponents believe the laws give monopolies to certain companies and raise the government's procurement costs.

The Berry Amendment

The Berry Amendment (10 U.S.C. §2533a) is the popular name of a 1941 law enacted as part of the Fifth Supplemental National Defense Appropriations Act (P.L. 77-29). It became a permanent part of the *U.S. Code* when it was codified by the FY2002 National Defense Authorization Act (P.L. 107-107).

The Berry Amendment requires certain items purchased by DOD be 100% domestic in origin. The requirement generally extends to inputs into the purchased items. The items covered by the law have varied over the years. At present, the Berry Amendment affects DOD purchases of textiles, clothing, footwear, food, and hand and measuring tools. These must be "entirely grown, reprocessed, reused, or produced in the United States." Unless exemptions laid out in the law apply, the entire production process of affected products, from the production of raw materials to the manufacture of all components to final assembly, must be performed in the United States.

The Berry Amendment mandates a much higher level of domestic content than the Buy American Act of 1933, which generally governs the procurements of other federal agencies. Under the Buy American Act, the final product must be mined, produced, or manufactured in the United States, and if manufactured, either at least 50% of the costs of its components must be manufactured in the United States or the end product must be a commercially available off-the-shelf item.

Sales to DOD in the five Berry-applicable product categories totaled $3.1 billion in FY2018. DOD expenditures on Berry Amendment products accounted for roughly 1% of the department's spending on products and services in FY2018, according to figures from the Federal Procurement Data System-Next Generation (FPDS-NG), the primary source for federal procurement data.

The Kissell Amendment

The Kissell Amendment (6 U.S.C. §453b) was enacted as Section 604 of the American Recovery and Reinvestment Act of 2009 (P.L. 111-5). It is modeled on the Berry Amendment. Since August 2009, it has prohibited the Department of Homeland Security from using appropriated funds to buy foreign-made textiles, clothing, and footwear. Food, hand tools, and measuring tools are excluded.

Although the Kissell Amendment as enacted applies to all agencies of DHS, in practice its restrictions apply only to the Coast Guard and the Transportation Security Administration (TSA). The reason for this is that, prior to the Kissell Amendment's passage, the United States had entered into commitments under the World Trade Organization Agreement on Government Procurement, and under various free-trade agreements, to open U.S. government procurement to imported goods. The Kissell Amendment applies only where it does not contravene those commitments.

Procurement by other DHS agencies, including the Secret Service and Customs and Border Protection, is subject to the less-stringent Buy American Act. For these DHS agencies, the Buy American Act is also waived pursuant to the Trade Agreements Act (P.L. 96-39). Thus, they can purchase textiles and apparel products from more than 100 countries if certain conditions are met.

Exceptions

The Berry Amendment includes various exceptions. For example, DOD can buy from non-U.S. sources when

- products are unavailable from American manufacturers at satisfactory quality and sufficient quantity at U.S. market prices;
- foods are generally not produced domestically, as is the case with bananas, coffee, and many spices and herbs;
- items are used in support of combat operations or contingency operations;
- products are intended for resale at retail stores such as military commissaries or post exchanges; and
- the purchase is part of a contract whose value is below the Simplified Acquisition Threshold (SAT), generally $150,000, in which case the item can be sourced overseas.

The Kissell Amendment has some similar exceptions, but one notable difference. Manufacturers in Mexico, Canada, and Chile can be treated as "American" sources under Kissell because of existing trade agreements.

Manufacturing Affected by Berry

Most of DOD's procurement contract obligations for Berry-applicable items are related to food and apparel, according to data from the Federal Procurement Data System-Next Generation. Of all DOD's reported contracts for Berry-related items, roughly $1 billion per year fall below the SAT, and are therefore not subject to Berry requirements.

Food

The Berry Amendment requires DOD to purchase most food for military services from sources that manufacture,

grow, or process food in the United States. DLA reported about $1.2 billion in contract obligations in FY2018 to feed U.S. troops worldwide, buying everything from meat and seafood to snack foods and beverages. DLA's leading food suppliers include Tyson Foods, Kraft Heinz, Trident Seafoods, Pepsico, and General Mills. The most restrictive Berry-related provision applies to seafood; it requires that DOD purchase only fish, shellfish, and seafood taken from the sea in U.S.-flagged vessels or caught in U.S. waters and processed in the United States or on a U.S.-flagged ship.

Meals ready-to-eat (MREs) form a major part of DOD food sourced under the Berry Amendment. AmeriQual, SoPakCo, and Wornick are the largest suppliers of MREs. The DOD market for Berry-compliant MREs was roughly $900 million in FY2018.

Textiles, Apparel, and Footwear

At nearly $1.9 billion in FY2018, DOD's procurement of clothing, textiles, and footwear made up a large share of DOD's contract obligations subject to the Berry Amendment.

One of the largest military-apparel contractors is the Federal Prison Industries (FPI), also known as UNICOR, which supplies prison-manufactured apparel. DOD's awarding of clothing contracts to this government-owned supplier has proven controversial in both Congress and the apparel industry. Critics have voiced concern that prison industrial programs pose a threat to private enterprise and to the jobs of residents who are not incarcerated. Among other issues, critics have challenged FPI/UNICOR's mandatory source provision, which could require DOD to purchase from FPI/UNICOR factories if they can provide the desired product, within the required time frame, and at a competitive price. In FY2018, DOD accounted for about 90% of FPI/UNICOR's textile and apparel sales.

Other large contractors of military apparel are the National Industries for the Blind, M&M Manufacturing, Ceradyne, and American Apparel. The Berry Amendment requires the manufacture of DOD apparel in the United States, Puerto Rico, or other U.S. territories.

In the National Defense Authorization Act for Fiscal Year 2017 (P.L. 114-328), Congress extended the Berry Amendment by requiring DOD to provide 100% U.S.-made running shoes for recruits entering basic training. Previously, DOD provided vouchers to recruits to purchase athletic footwear, which did not have to be domestic in origin. DLA estimates potential demand for as many as 250,000 pairs of running shoes annually. The new requirement took effect in March 2017.

DOD's direct purchases of footwear, such as combat boots and military dress shoes, in FY2018 totaled about $208 million. Some manufacturers claim they have remained viable because they make millions of pairs of shoes annually for the military. While the United States is a major manufacturer of safety footwear, about 99% of shoes sold domestically are imported.

Hand or Measuring Tools

Hand or measuring tools make up a relatively small share of DOD's total Berry-applicable contract procurement obligations, at about $90 million in FY2018. Leading vendors are Federal Resources Supply and Kipper Tool.

Manufacturing Affected by Kissell

The Kissell Amendment is more limited than Berry because it applies only to textile, apparel, and footwear products. In FY2018, the Coast Guard and TSA combined purchased more than $30 million of apparel for Kissell-related items above the SAT. Purchases subject to the Berry and Kissell Amendments represented around 3% of the $65 billion of textile and apparel shipments from U.S. factories in 2017.

Congressional Debate

Some Members of Congress have defended the Berry and Kissell Amendments as means of protecting U.S. jobs and ensuring continued DOD access to basic supplies in the event wars or other events interfere with imports. Some lawmakers also have asserted that production of government uniforms outside the United States raises national security concerns.

Critics argue the two amendments increase government procurement costs and, by offering guaranteed markets, may diminish domestic manufacturers' incentives to improve productivity. They also point out the amendments are inconsistent with modern practices in manufacturing, which often involve supply chains that source components and raw materials from multiple countries.

The Berry and Kissell Amendments raise several issues for Congress: If the United States does not produce a solely domestic item, or if U.S. manufacturers are at maximum production capability, should DOD or DHS restrict procurement from foreign sources? And to what extent do U.S. national security interests and industrial base concerns justify these laws?

Legislation

Over the years, changes have been proposed to the Berry and Kissell Amendments. One recent proposal would have reinstated the Berry Amendment's domestic sourcing requirement for stainless steel flatware. Another would have expanded the Kissell Amendment's domestic content requirements to additional agencies within DHS. Other lawmakers have offered bills that would have eliminated FPI/UNICOR's federal contract mandate and made changes to the SAT threshold, such as raising the Berry and Kissell SAT thresholds to $500,000. The higher limit would reduce the number of purchases covered by the Berry and Kissell amendments, making foreign suppliers eligible to bid on more DOD and DHS procurement contracts.

CRS Product

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