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Section 809 Panel Recommends Changes to Domestic Purchase Preferences

The [Section 809 panel](#) is the Congressionally-mandated group that has made a number of [far-reaching recommendations](#) to change current programs that affect DOD acquisitions.

Another one of their ideas is to eliminate certain domestic purchasing preferences by having Congress create exceptions for DOD purchases and create a public interest exception for the [Berry Amendment](#). The panel's concern is that the purchasing restrictions can result in higher prices, reduced volume, or delivery delays.

The panel's motivation for altering the domestic preference acts is its belief that the "BAA [Buy American Act] and the Berry Amendment undermine DoD's ability to acquire the most innovative products at reasonable prices due to their restriction on non-U.S. components. BAA and Berry Amendment provisions are increasingly out of step with commercial practices and global supply chains across most product categories."

These programs, according to the panel, "act as a barrier to entry for supplying to DoD" and stifle innovation by reducing competition among the limited number of firms that can meet the requirements. DOD must also pay higher prices under these programs than it otherwise would

The panel provides two recommendations: "(a) adopting exceptions for DoD to domestic purchasing preference requirements for commercial products, and (b) adopting a public interest exception and procedures for the Berry Amendment identical to the ones that exist for the Buy American Act." To implement these changes, the panel recommends legislative and regulatory changes.

To understand these recommendations, a little background on these domestic purchase rules is helpful.

Currently, the BAA provides for "preferential treatment for domestic sources of supplies, manufactured goods, and construction material in federal government contracts above the micropurchase threshold." In order to be a "domestic end product," two elements

must be met: (1) the product must be manufactured in the US, and (2) greater than 50% of the cost of the components must be domestic components.

The BAA includes certain exceptions and waivers, found in FAR [25.103](#) and [25.401](#). Exceptions include public interest considerations, domestic nonavailability of sufficient quantities and quality, unreasonable cost, and products used outside the US. Generally, waivers are allowed under certain trade agreements with other countries.

DOD has additional waiver powers, such as the ability to waive the BAA for or national security purposes. DOD also employs a more stringent pricing evaluation method than that used by civilian agencies.

There is an exception to the BAA issued by the FAR Council for commercial off-the-shelf (COTS) products, under which the origin of components isn't considered, although the end product still must be manufactured domestically. An additional exception covers all commercial information technology (IT) purchases by the federal government.

The Berry Amendment requires DOD to “purchase domestically grown or sourced food, clothing, fabrics (including ballistic fibers), and hand or measuring tools.” This rule applies only to DOD and the items must be 100 percent domestic in origin. Certain exceptions apply, such as “purchases under the Simplified Acquisition Threshold (SAT), items waived through the Domestic Non-Availability Determination (DNAD) process, and acquisitions made outside the United States in support of combat operations.” But there is no public interest exception.

The proposed changes to DOD domestic purchasing preferences, if implemented, would presumably have a large impact on those who currently benefit from the domestic purchasing preferences by opening up competition for these procurements, but the flip side of that coin would be expanding the DOD market (especially for commercial items) to many other businesses.

The [definition](#) of commercial item is quite broad, so the exception proposed by the panel would reduce the applicability of these domestic purchase rules significantly. One GAO [report](#) estimated that 22 to 16 percent of DOD's total contracting obligations were conducted under commercial item procedures, which gives some indication of the scope of this proposed change.

We'll keep our readers updated on whether these proposed changes get any traction in Congress.