

## Recommendation 64: Update socioeconomic laws to encourage purchasing from nontraditional suppliers by (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.

### Problem

Domestic purchasing preferences—notably the Buy American Act and the Berry Amendment—can undermine DoD’s ability to field the most innovative technologies to the warfighter in a rapid, costly, and efficient manner.<sup>1</sup> Although they are intended to prioritize U.S. manufacturing, domestic purchasing preferences often result in premium pricing for products that may not be the most state-of-the-art items available in the commercial market. Given the diminished capacity of U.S. manufacturing in some industrial sectors, supply chain constraints may also affect delivery volumes and schedules. Through universal applications of the Buy American Act and the Berry Amendment, DoD is currently unable to balance its requirements to both access commercial innovation and to protect critical technology.

### Background

#### *The Buy American Act*

The 1933 Buy American Act (BAA) provides preferential treatment for domestic sources of supplies, manufactured goods, and construction material in federal government contracts above the micropurchase threshold. BAA imposes a two-part test for a product to be considered a *domestic end product*:

- The end product must be manufactured in the United States.
- More than 50 percent of the cost of all the components must be manufactured in the United States.

Exceptions and waivers to BAA exist, which are implemented by FAR 25.103 and FAR 25.401(a)(2). Exceptions include public interest considerations, domestic nonavailability, unreasonable cost, and products used outside the United States. Waivers to BAA are traditionally granted under authority of the Trade Agreements Act and are related to acquisitions under the World Trade Agreement Government Procurement Act or any Free Trade Agreement.<sup>2</sup> BAA does not apply to services.

DoD regulations covering BAA are found in DFARS 225 and differ from civilian agencies in several ways. DoD may waive BAA for national security purposes through the public interest exception procedures established by 10 U.S.C. § 2533 and DFARS Subpart 225.103(a)(ii). DoD also uses a separate, more stringent pricing evaluation method known as the Balance of Payments Program, implemented

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<sup>1</sup> American Materials Required for Public Use, 41 U.S.C. § 8302. Requirement to Buy Certain Articles from American Sources; Exceptions, 10 U.S.C. § 2533a.

<sup>2</sup> National Security Objectives for National Technology and Industrial Base, 19 U.S.C. § 2501.

through DFARS Subpart 225.75, whereas civilian agencies apply between a 6 percent and 12 percent price preference to domestic sources. Using the Balance of Payment calculation regulations, DoD's price preference for U.S. products is 50 percent and does not discriminate between large and small businesses. Additionally, the FAR Council issued a partial waiver to the two-part test for all commercial off-the-shelf (COTS) products. This waiver requires that a COTS item be manufactured in the U.S. but does not track the origin of components. An additional exception to BAA exists for all commercial information technology (IT) purchases by the federal government.<sup>3</sup>

### **The Berry Amendment**

The Berry Amendment requires DoD to purchase domestically grown or sourced food, clothing, fabrics (including ballistic fibers), and hand or measuring tools. The Berry Amendment was enacted in 1941 to protect the U.S. industrial base during times of war. The Berry Amendment differs from BAA in two ways: It applies only to DoD, and it requires items to be 100 percent domestic in origin.

There are a number of exceptions to the Berry Amendment, which are listed in DFARS 225.7002-2. Most notably, exceptions to the Berry Amendment include 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.<sup>4</sup> There is no public interest exception to the Berry Amendment. Regulations covering the Berry Amendment are found in DFARS 225.7002. Administrative procedures are described in PGI 225.7002-1.

### **Discussion**

The negative consequences of domestic purchasing preferences include increased costs, barriers to entry for some U.S. business, and disincentives to innovate. Products purchased under both BAA and the Berry Amendment can result in premium pricing for DoD. The domestic origin requirements of both laws are out of sync with modern, global supply chains. If U.S. commercial companies operate in these globalized markets, their products may not be compliant or eligible to compete for federal government contracts. Maintaining solely domestic supply sources is not possible or profitable for many U.S. companies; thus, the regulations act as a barrier to entry for supplying to DoD. Finally, U.S. companies able to meet domestic sourcing requirements can face minimal competition, which can directly affect innovation. Although incentives to innovate under domestic purchasing preference are mixed, DoD must be able to access the most innovative products in a timely and cost effective manner.

DoD's 50-percent price preference for domestic goods under BAA means that U.S. products may be 49 percent more expensive than the market price and still be considered *reasonable*. For example, the Secretary of Defense released a 1989 report, *The Effect of the Buy American Restrictions Affecting Defense Procurement*, acknowledging that BAA imposed higher costs on the federal government. In this report

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<sup>3</sup> Per recurring general provision in the annual General Government Appropriations Act, originally enacted by section 535(a) of the Transportation, Treasury, and Independent Agencies Appropriations Act, 2004 (division F of Pub. L. No. 108-199; 118 Stat. 345) and most recently enacted by section 615 of the Financial Services and General Government Appropriations Act, 2018 (division E of Pub. L. No. 115-141). Because the Commercial IT exception does not currently exist in U.S. Code, the Panel recommends codifying this recurring appropriations provision in Title 41 (See, Implementation section).

<sup>4</sup> "Berry Amendment FAQ," Defense Pricing and Contracting, accessed October 25, 2018, [https://www.acq.osd.mil/dpap/cpic/ic/berry\\_amendment\\_faq.html](https://www.acq.osd.mil/dpap/cpic/ic/berry_amendment_faq.html).

the Navy noted that as a result of domestic sourcing restrictions, it was spending 30 percent above market price in the mooring chain industry and 40 percent above market price in the anchor chain industry.<sup>5</sup> Furthermore, the 100 percent domestic sourcing requirements of the Berry Amendment place a substantial burden on DoD acquisitions of textiles, apparel, and footwear in particular. The U.S. textile, apparel, and footwear industry has declined sharply in the last 25 years, leaving a limited number of domestic manufacturers and an eroded U.S.-based supply chain.<sup>6</sup> DoD must pay premium prices for 100 percent U.S. origin products, which often lack genuine competition at some point in the supply chain; many components in this industry are single or sole sources. The reduced industrial capacity for Berry Amendment-compliant goods may cause delivery delays or other issues.

BAA and Berry Amendment provisions are increasingly out of step with commercial practices and global supply chains across most product categories. The direct result is a reduction in viable suppliers and less competition. For example, in a 2002 memorandum to the Defense Acquisition Regulations Council, Leslie G. Sarasin of the American Frozen Food Institute stated that,

*“[t]he Berry Amendment required DOD to procure foods, entirely of U.S. origin ingredients. Often, DOD was forced to reject multi-ingredient, commercially available food items processed in the United States because the domestic origin of all ingredients and components of the product could not be demonstrated. This policy put DOD at odds with common commercial practice in the food industry, which typically follows U.S. tariff law in determining questions of foreign origin, and limited its access to the widest possible selection of products.”<sup>7</sup>*

The overall effect of BAA’s domestic sourcing requirements on innovation is negative, and the effect of 100 percent domestic sourcing requirements on innovation remains mixed. Critics of domestic preferential systems and other protectionist legislation argue that they do not incentivize U.S. firms to innovate. The federal government loses out on innovation both from domestic companies lacking the incentive to innovate and from foreign businesses not allowed to compete.<sup>8</sup> Proponents of the Berry Amendment believe that a stable customer base allows U.S. manufacturers to invest in research and development—especially for defense-unique goods—knowing that their relationships with DoD are long-term.

## Conclusions

Domestic sourcing preferences add a layer of complication and inefficiency to defense acquisition, but also serve broader political and security goals. The national security reasons to retain domestic sourcing preferences include protecting the U.S. supply base and its innovations and ensuring the security of critical goods and their components. The national security reasons to reject domestic

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<sup>5</sup> Keith A. Hirschman, *The Costs and Benefits of Maintaining the Buy American Act*, Naval Postgraduate School Thesis, June 1998, 58, accessed October 25, 2018, <http://www.dtic.mil/dtic/tr/fulltext/u2/a350159.pdf>.

<sup>6</sup> See, for example, Stamen Borisson and Elizabeth Oakes, “Defense Industrial Base Assessment of the U.S. Textiles and Apparel Industry,” U.S. Dept. of Commerce, Bureau of Industry and Security, 2017.

<sup>7</sup> Valerie Bailey Grasso, *The Berry Amendment: Requiring Defense Procurement to Come from Domestic Sources*, Congressional Research Service, April 21, 2005, 8, accessed October 25, 2018, <http://www.dtic.mil/dtic/tr/fulltext/u2/a462469.pdf>.

<sup>8</sup> “Why Restrictions on Domestic Sourcing Hurts the American Government, Jobs and the Economy,” A.R. “Trey” Hodgkins, IT Alliance for Public Sector, September 19, 2017, accessed on October 25, 2018, <https://itaps.itic.org/news-events/techwonk-blog/why-restrictions-on-domestic-sourcing-hurts-the-american-government-jobs-and-the-economy>.

sourcing preferences include enabling DoD to access the most advanced technologies in the quickest manner at the most reasonable prices and reduced administrative burden. From this national security perspective, DoD must strike a balance in achieving these goals. By granting exceptions to domestic purchasing preferences for commercial goods, DoD is able to open its market research to certain new, innovative products regardless of their origin while still working to protect its defense-unique acquisitions.

Allowing DoD to grant public interest exceptions to the Berry Amendment will ensure that it can access advanced, state-of-the-art technology. The public interest exception and procedures to the Buy American Act—found in 10 U.S.C. § 2533 and DFARS Subpart 225.103(a)(ii)—should be replicated for the Berry Amendment. The program manager or requiring agency should directly contribute to the contracting officer’s determination for a public interest exception.

## **Implementation**

### ***Legislative Branch***

- Amend 41 U.S.C. § 8302 to include an exception to the Buy American Act for DoD purchases of commercial products.
- Amend 10 U.S.C. § 2335a to include an exception to the Berry Amendment for DoD purchases of commercial products.
- Amend 10 U.S.C. § 2335a to include a public interest exception, identical to the exception established under BAA in 41 U.S.C. § 8302 and 10 U.S.C. § 2533.
- Amend 41 U.S.C. § 8302(b)(2) to codify the commercial IT exception.

### ***Executive Branch***

- Add an exception for commercial goods to DFARS 225.103 (regarding BAA) and an exception for commercial goods for DFARS 225.7002-2 (regarding the Berry Amendment).
- Add a public interest exception to DFARS 225.7002-2 (regarding the Berry Amendment) to mirror the public interest exception found in DFARS 225.103(a)(ii).
- Modify DFARS references to align with the changes to U.S. Code described under Legislative Branch above.

### ***Implications for Other Agencies***

- There are no cross-agency implications for this recommendation.

## RECOMMENDED REPORT LANGUAGE

### SEC. \_\_\_\_. MODIFICATIONS TO DOMESTIC PURCHASING PREFERENCE REQUIREMENTS.

This section would amend section 2375 title 10, United States Code, by adding a new paragraph to exclude Department of Defense purchases of commercial products from the Buy American Act requirements of section 8302, title 41, United States Code. This section would further amend title 10, United States Code, by including an exception to the Berry Amendment for Defense Department purchases of commercial products at section 2533a. Such section would be further amended to include a public interest exception identical to the exception established under the Buy American Act in title 41, United States Code, section 8302, and in title 10, United States Code, section 2533.

The committee is aware that domestic purchasing preferences, notably the Buy American Act and the Berry Amendment, can undermine the Department of Defense's ability to field the most innovative technologies to the warfighter in a rapid, cost-effective, and efficient manner. Granting exceptions to domestic purchasing preferences for commercial goods will enable the Department to expand opportunities to obtain new and innovative products from commercial and non-traditional suppliers while continuing to protect its defense-unique acquisitions. Additionally, the committee notes that allowing the Defense Department to grant public interest exceptions to the Berry Amendment will ensure that it can access advanced, state-of-the-art technology.

This section would also make an amendment to section 8302(b)(2), title 41, United States Code, to codify the commercial information technology (IT) exception.

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1 **SEC. \_\_\_\_ . MODIFICATIONS TO DOMESTIC PURCHASING PREFERENCE**  
2 **REQUIREMENTS.**

3 (a) EXCEPTIONS FOR DEPARTMENT OF DEFENSE PURCHASES OF COMMERCIAL ITEMS.—

4 (1) BUY AMERICAN ACT.—Section 2375(a) of title 10, United States Code, is  
5 amended by adding at the end the following new paragraph:

6 “(4)(A) No contract for the procurement of a commercial item or (effective January 1,  
7 2020) a commercial product entered into by the Secretary of Defense or the Secretary of a  
8 military department shall be subject to section 8302 of title 41.

9 “(B) No subcontract under a contract described in subparagraph (A) entered into by the  
10 Secretary of Defense or the Secretary of a military department shall be subject to section 8302 of  
11 title 41.”.

12 (2) BERRY AMENDMENT.—

13 (A) EXCEPTION FOR COMMERCIAL ITEMS.—Subsection (i) of section 2533a  
14 of such title is amended to read as follows;

15 “(i) EXCEPTION FOR COMMERCIAL ITEMS.—Subsection (a) does not apply to contracts and  
16 subcontracts for the procurement of commercial items.”.

17 (B) CONFORMING AMENDMENT.—Subsection (a) of such section is  
18 amended by striking “Except as provided in subsections (c) through (h),” and  
19 inserting “Except as provided in subsections (c) through (i),”.

20 (b) PUBLIC INTEREST EXCEPTION TO BERRY AMENDMENT.—Section 2533a of such title,  
21 as amended by subsection (a)(2), is further amended—

22 (1) by striking “(c) AVAILABILITY EXCEPTION.—” and inserting “(2)  
23 AVAILABILITY EXCEPTION.—”;

1 (2) by realigning paragraph (2), as so designated, two ems to the right; and

2 (3) by inserting immediately before that paragraph the following:

3 “(c) PUBLIC INTEREST AND AVAILABILITY EXCEPTIONS.—

4 “(1) PUBLIC INTEREST EXCEPTION.—Subsection (a) does not apply to the  
5 procurement of an item described in subsection (b) to the extent that the Secretary of  
6 Defense or the Secretary of the military department concerned determines that  
7 applicability of subsection (a) to that procurement would be inconsistent with the public  
8 interest.”.

9 (c) CODIFICATION OF RECURRING APPROPRIATIONS PROVISION.—Section 8302(b)(2) of  
10 title 41, United States Code, is amended—

11 (1) by striking “and” at the end of subparagraph (B);

12 (2) by striking the period at the end of subparagraph (C) and inserting “; and”; and

13 (3) by adding at the end the following new subparagraph:

14 “(D) to information technology (as defined in section 11101 of title 40)  
15 that is a commercial item (as defined in section 103 of this title) or, effective  
16 January 1, 2020, that is a commercial product or commercial service (as defined  
17 in sections 103 and 103a, respectively, of this title).”.