



DEPARTMENT OF THE ARMY
U.S. ARMY SOLDIER AND BIOLOGICAL CHEMICAL COMMAND
SOLDIER SYSTEMS CENTER
NATICK, MASSACHUSETTS 01760-5035

PLY TO
ATTENTION OF:

AMSSB-OCC(N)

November 8, 2002

MEMORANDUM FOR XXXXX

SUBJECT: Application of Berry Amendment to Proposed XXXX Contract

In response to your email request of November 7, 2002, the following legal opinion regarding applicability of Berry Amendment proscriptions relating to foreign textile products incorporated into the XXXXX system is provided:

The Berry Amendment, now codified at 10 U.S.C. § 2533a, proscribes the use of appropriated (or any other) funds available to the Department of Defense for the purchase food; clothing; tents; natural and synthetic fibers, fabrics, and yarns; any item of individual equipment containing such fibers, fabrics, and yarns; specialty metals; and hand tools from foreign sources, subject to enumerated exceptions. As may be expected, the Amendment has been of historical import to operations at the Soldier Systems Center, as virtually all SSC programs are implicated by the Amendment's broad proscription.

The XXXX program represents one such gray area. The XXX Project Office has identified more than fifty items of individual equipment for use by the Special Forces warfighter, many of which are clearly covered by the Berry Amendment. However, the Project Office proposed -- and this office endorses -- an approach to acquisition of these items that provides maximum flexibility to the user while adhering to the domestic content provisions of the Amendment. The approach, outlined below, has never been tested at the GAO, ASBCA, or in Federal Court, but is a reasonable interpretation of statutory and regulatory language as well as case law addressing the Berry Amendment's reach.

The XXX Project Office proposes a prime vendor contract with XXX, a nonprofit participating agency under the Javits-Wagner-O'Day Act (JWOD), 41 U.S.C. §§ 46-48c. XXX provides rehabilitative services to blind and severely disabled persons, and has provided many items to SSC under the JWOD Act and Subpart 8.7 of the FAR. Under Subpart 8.7, agencies may contract directly with a nonprofit agency such as XXX for supplies or services on the Procurement List maintained by the Committee for Purchase from People who are Blind or Severely Disabled, see FAR ¶¶ 8.703 & 8.705

Prime vendor contracts entail a single contractor offering a number of commercial products from various sources, available for shipment within days of receipt of an order. Prime vendor contracts have been employed by the Department of Veterans' Affairs and DSCP for more than ten years, without adverse comment from GAO, *e.g.*, In Re Food Services of America, B-276860, 97-2 GPD ¶ 55 (1997); In re Support Services International Inc., B-271559, 96-2 GPD ¶

20 (1996); In Re Moore Medical Corporation, B-261758, 95-2 GPD ¶ 204 (1995). In fact, the Comptroller General views such contracts as “warehouse” contracts:

In essence, DPSC is procuring a stocked warehouse and distribution facility to provide medical and surgical items, when needed, to government medical facilities, replacing existing DPSC depots for such items.

In Re Baxter Healthcare Corporation, B-259811.4, 95-2 GPD ¶ 151 (1995)

Prime vendor contracts allow government agencies to reduce inventory and depot storage by creating a responsive prime vendor that can rapidly respond to customer orders by maintaining contracted items in warehouse stock. In most cases -- and in all reported cases -- the prime vendor supplies commercial products produced by others, offering only limited integration, packaging, and shipment.

NIB/NISH has offered prime vendor services on other DoD contracts, including several here at SSC, essentially integrating commercial products into “kits” that are packaged and shipped in accordance with military specifications. The proposed contract with XXX envisions a similar integrative service. Fifty-eight separate items are identified on the PEPSE kit, supplied by twenty-five primary vendors (and approximately twenty secondary vendors). Only sixteen of the fifty-eight are definitely subject to the Amendment (clothing items), although at least several others are “items of individual equipment” that probably contain fibers, fabrics or yarns. Two of the items are available only from foreign sources.

The contract envisions an initial order for more than 2000 PEPSE kits. Upon receipt of the order, XXX will purchase kit items from vendors, receive and catalogue shipments, then assemble items into the kits. The overall value of the initial order is approximately \$7 million, with slightly more than \$1 million provided by foreign sources. However, no single foreign-supplied item acquired by XXX under the prime vendor arrangement will exceed the simplified acquisition threshold of \$100,000.00, also an exception to the Berry Amendment, 10 U.S.C. § 2533a(h).

Accordingly, this arrangement does not violate the Berry Amendment. Were XXX not providing integrative services, SSC could acquire each of the individual items in an amount not exceeding the simplified acquisition threshold, and integrate the items into a kit here. Alternatively, we could purchase the items and provide them to another contractor as GFE to build into kits, again without running afoul of the Amendment. The mere fact that we intend to engage a contractor to both acquire and integrate the items does not bring this otherwise exempt action under the Amendment’s reach. Finally, individual Special Forces units could buy integrated kits themselves, as no single unit’s acquisition would exceed the simplified acquisition threshold. If none of these alternative procurement methods violate the Berry Amendment, it follows that a

coordinated acquisition that achieves the same end does not violate the amendment, particularly in the absence of specific statutory guidance or governing case law.

There is no doubt that simplified acquisition are exempt from the Amendment, 10 U.S.C. § 2533a(h). However, there are other potential statutory bases that might authorize this acquisition. First, the Amendment applies to “an article or item,” 2533a(b)(1), not to kits. The Comptroller General considered this distinction in a case involving the Buy American Act and a statutory provision (remarkably similar to the Berry Amendment) that prohibited GSA from acquiring foreign-made hand tools. The GAO held that tool kits, integrated domestically, could contain foreign-made hand tools, subject only to the Buy American Act’s more general proscription against foreign content, In Re Imperial Eastman Corporation; Thorsen Tool Company, B-177865, B-179812, 53 Comp. Gen. 726 (1974). See also In Re O.Ames Company, B-283943, 2000 Comp. Gen. Proc. Dec. ¶ 20, (2000) (an SSC case in which foreign tool components were assembled into hand tools domestically).

Another potential statutory basis is found at 10 U.S.C. § 2533a(I):

Applicability to contracts and subcontracts for procurement of commercial items. This section is applicable to contracts *and subcontracts* for the procurement of commercial items, notwithstanding section 34 of the Office of Federal Procurement Policy Act (41 U.S.C. § 430) (emphasis added).

This is the only mention in the Amendment of subcontracts, and is consistent with the planned acquisition in this instance. All fifty-eight items to be acquired under this contract are commercial items, and consistent with this provision of the Amendment, no non-exempt subcontracts are to be awarded. As mentioned, acquisition of foreign items will be capped at \$100,000.00 each. Any subcontracts above this threshold will be awarded to domestic suppliers in accordance with the statute.

There is little case law regarding the Berry Amendment’s reach. The principal case, In Re Department of Defense Purchase of Fuel Cells, B-246304.2 et. seq., 1992 Comp. Gen. LEXIS 884 (1992), involved the purchase of fuel cells manufactured in Italy in a manufacturing process wherein American-made nylon was laminated to rubber to form resilient and puncture resistant fuel cells. The Comptroller General reviewed the legislative history of the Amendment and determined that Congress intended the law’s proscriptions to be applied broadly:

We stated that the intent of Congress in enacting the Berry Amendment restriction was to consider an article “American” only where the raw fiber, “as well as each successive stage of manufacture,” was of domestic origin.

In Re Department of Defense Purchase of Fuel Cells, B-246304.2, citing National Graphics, Inc., 49 Comp. Gen. 606 (1970).

The decision also deemed the fuel cell to be an “item of individual equipment” under the Amendment, thereby extending the reach of the statute beyond DoD’s interpretation -- still reflected in the DFARS -- that items of individual equipment are only those identified by Federal Supply Class (FSC) 8465.

However, it must be stressed that this seminal case was very fact-specific, and manifestly the subject of intense public and Congressional interest. For example, the Comptroller General noted the following legislative history:

The Committee notes that it has long been the intent of Congress that this provision covers not only fabrics and apparel themselves but also all stages of textile production and all types of textile products, including manufactured articles. The Committee further notes that synthetic fabric fuel containers for military aircraft are included within the coverage of this provision and directs the Secretary to instruct the relevant offices within the Department of Defense to take note of this and ensure that Department procurements are consistent with the requirements of this provision.

In Re Department of Defense Purchase of Fuel Cells, B-246304.2, citing S. Rep. No. 154, 102d Cong., 1st Sess. 368 (1992).

Somewhat ironically, the Secretary of the Air Force subsequently signed a nonavailability determination under the Amendment and acquired the fuel cells from the Italian manufacturer, an action upheld even after two protests to the Comptroller General, In Re Dash Engineering, Inc.; Engineered Fabrics Corporation, B-246304.8 et. seq., 93-1 Comp. Gen. Proc. Dec. ¶ 363 (1993); In Re Dash Engineering, Inc.; Engineered Fabrics Corporation, B-246304.12 et. seq., 93-2 Comp. Gen. Proc. Dec. ¶ 184 (1993).

Another case, decided by ASBCA, held that not all components of an “article or item” covered by the Amendment were required to be manufactured domestically, if those (sub) components did not themselves contain any materials covered by the Amendment, Appeal of -- Specialty Plastic Products, Inc. Appeal of -- Accusonic Systems Corporation, ASBCA No. 42085, 95-2 B.C.A. ¶ 27,895 (1995). This decision also cites legislative history that urges a “common sense” approach to *de minimis* inclusion of covered materials in other than textile end products:

The drafters of the changed Berry Amendment expected the Defense Department to be "guided by the Federal Supply Schedule." However, the Congressional conferees emphasized that the foregoing "restriction is not intended to apply more generally to the purchase of items such as automotive or electrical equipment, which only incidentally

contain such material," and expected "similar common-sense applications of the provision as individual cases arise." H. R. Conf. Rep. No. 100-498, 100th Cong., 1st Sess. 665-66 (1987)

Specialty Plastics, ASBCA No. 42085 (1995).

There are only a handful of other cases that have considered the Amendment, *e.g.* In Re Gumsur, Ltd., B-231630, 88-2 GPD ¶ 329 (1988) (protective clothing not chemical warfare protective clothing); In Re Acton Rubber Ltd., B-253776, 93-2 GPD ¶ 186 (1993) (also related to chemical warfare protective clothing).

While this procurement may be perceived by some as violative of Congressional intent as expressed in legislative history cited herein and elsewhere, it is not at all clear that Congress actually intended to restrict the type of arrangement contemplated by this contract. The proposed acquisition is a good-faith interpretation of the statute, intended to serve warfighters at the very tip of the spear, who are even now engaged in action in a number of theaters. The XXX Office has identified the best products to support those actions, and has developed a plan to acquire these products within the statutory framework of the Berry Amendment. This office strongly recommends that this effort be approved and executed as expeditiously as possible.

Peter G. Tuttle
General Attorney