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Domestic Sourcing Requirement Doesn't Fit DOD's Gloves

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The Government Accountability Office recently issued a bid protest decision regarding the application of the Berry Amendment's domestic sourcing requirement to a U.S. Department of Defense solicitation for leather combat gloves with touchscreen capability. In that decision, the GAO found that the nonavailability exception to the Berry Amendment applied to the glove's kidskin leather even though the agency determined, through market research, that this type of leather was available domestically. Importantly, this decision provides an opportunity for stakeholders to consider the nuances associated with the Berry Amendment's nonavailability exception and to reflect upon the complex regulatory landscape of domestic sourcing requirements.

Federal Government Domestic Sourcing Regimes and the Nonavailability Exception

Over the last 100 years, the U.S. government has enacted myriad domestic sourcing laws. For example, during the Great Depression, Congress enacted the Buy American Act, or BAA, to "create jobs for American workers and protect American industry"[1] by requiring the U.S. government, under certain circumstances, to procure items that have been mined, produced or manufactured in the United States.[2] As implemented through the Federal Acquisition Regulation and agency supplemental regulations like the Defense Federal Acquisition Regulation Supplement, the BAA generally requires executive agencies to purchase "domestic end products" unless an exception or waiver applies.[3]

One common exception to the BAA is known as the nonavailability exception.[4] This exception applies when an end product is "not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality."[5] In addition to individual determinations of nonavailability made by a contracting officer, FAR 25.104 identifies certain items — like bananas, lavender oil, chromite, swords, and goat and kidskins — that are subject to a nonavailability class determination because "domestic sources can only meet 50 percent or less of total U.S. government and nongovernment demand" for those items. However, before a procuring agency can rely on the nonavailability class determination exception to the BAA, it must conduct market research to confirm that the item is, in fact, not available domestically in sufficient quantities to meet the requirements of the procurement at issue.[6]

Another example of a domestic sourcing law is the Berry Amendment, which applies just to DOD procurements. The Berry Amendment originates from legislation enacted in 1941 on the eve of World War II to ensure that U.S. troops would be supplied with food and uniforms produced in the United States.[7] The 1941 legislation was fueled by concerns that, despite the existence of the BAA, federal agencies had reportedly purchased large quantities of wool and food from foreign sources.[8] Congress modified the DOD domestic sourcing restrictions — in what generally became known as the Berry Amendment — over the next several decades through annual appropriations legislation. And the Berry Amendment was permanently codified with the passage of the FY 2002 National Defense Authorization Act, or NDAA.[9]

Today, the Berry Amendment mandates that "funds appropriated or otherwise available to" the DOD cannot be used to procure certain items — like food, clothing, tents, textiles, and hand tools — as either end products or components unless those items are "grown, reprocessed, reused, or produced in the United States."[10]

Like the BAA, there are several exceptions to the Berry Amendment. Pertinently, the Berry Amendment does not apply when the head of a military department determines than a domestic item "cannot be acquired as and when needed in a satisfactory quality and sufficient quantity at U.S. market prices," or when an item is subject to a nonavailablity class determination under FAR 25.104.[11] Accordingly, a determination of what items are, and are not, available plays a significant role in applying domestic sourcing regimes like the BAA and the Berry Amendment.

The GAO's Mechanix Wear Decision

In Mechanix Wear Inc.,[12] the Defense Logistics Agency, or DLA, issued a solicitation to procure over one million pairs of combat gloves and required that "goat/kidskin" leather be used. The solicitation included DFARS clause 252.225-7012, which implements the Berry Amendment's domestic sourcing requirements and provides for an exception for items subject to the FAR 25.104 nonavailability class determination. Although DLA initially permitted offerers to use foreign goat/kidskin leather, after conducting additional market research and determining that domestically produced goat/kidskin was available, DLA amended the solicitation to require that all goat/kidskin leather be 100 percent domestic.

Soon after the amended solicitation was issued, Mechanix Wear filed a pre-award protest, arguing that DLA's decision to prohibit the use of foreign goat/kidskin was unduly restrictive and contrary to the Berry Amendment's nonavailability exception. Mechanix Wear maintained that the Berry Amendment's domestic sourcing restriction, as implemented at DFARS 225.7002-2(c) and 252.225-7012(c)(1), did not apply to goat/kidskins because that item was subject to the FAR 25.104 nonavailability class determination. Accordingly, Mechanix Wear contended DLA's decision to add a restriction for domestic goat/kidskin simply was unreasonable and contrary to the applicable DFARS provisions.

In response, DLA argued, in part, that it needed to conduct market research to determine whether the goat/kidskin was, in fact, not available domestically. DLA pointed-out that the Berry Amendment's nonavailability exception was intertwined with the FAR 25.104 nonavailability class determination, which requires a contracting officer to perform market research before relying on the class determination. DLA also asserted that the Berry Amendment's objective of protecting domestic sources of supply and agency policy demand the need to conduct market research. Thus, after determining that sufficient goat/kidskin was available domestically, DLA believed that it was permitted to amend the solicitation to require that all goat/kidskin be 100 percent domestic.

The GAO disagreed, finding that the requirement for market research applied only to BAA restrictions and not to Berry Amendment restrictions. Because the agency lacked authority when it relied on market research to support its domestic sourcing restriction, the GAO recommended that the agency either provide further reasonable support for its requirement that all goat/kidskin be 100 percent domestic or amend the solicitation to remove the domestic sourcing restriction.

The Big Picture

On the one hand, the holding in Mechanix Wear simply is an exercise in regulatory interpretation. Based on a plain meaning analysis of the DFARS and FAR, the GAO determined that the Berry Amendment does not apply to those items specifically identified in the nonavailability class determination at FAR 25.104.

On the other hand, Mechanix Wear provides an opportunity to consider the nuances related to the Berry Amendment's nonavailability exception, and to observe the complex regulatory landscape of domestic sourcing requirements applicable to federal government procurements.

At its core, the Berry Amendment created a framework that restricts the DOD from acquiring certain items unless they are grown or produced domestically. As discussed above, the Berry Amendment's nonavailability exception applies to any item listed in the nonavailability class determination at FAR 25.104. Although this particular exception is rather unavoidable — i.e., how can a domestic item be procured or used if it is not available domestically — query whether its implementation may be too rigid.

As reflected in Mechanix Wear, the nonavailability exception to the Berry Amendment applies to any item listed at FAR 25.104, even if a DOD agency performs market research and finds that a listed item is produced domestically in sufficient quantities. This sets up a rather inflexible framework that seems at odds with the underlying purpose of the Berry Amendment — especially when compared to nonavailability class determination assessments under the BAA.[13] At the same time, this framework should result in more efficient and predictable DOD procurements, which would appear to be in sync with the directive of the Section 809 Panel — a Congressionally-directed independent advisory panel focused on streamlining DOD acquisition regulations.

Regardless of one's view, it will be interesting to see whether the nonavailability class determination for goat/kidskin may be changed as a result of DLA's market research as described in Mechanix Wear. At the very least, FAR 25.104 requires that the list of nonavailable articles be reviewed at least every five years to determine whether items should be removed based on domestic availability.[14]

It also would not be surprising if the Mechanix Wear decision grabs the attention of those in Congress interested in strengthening domestic sourcing restrictions. For example, the FY 2017 NDAA extended the Berry Amendment's domestic sourcing restrictions to the acquisition of certain athletic footwear for members of the Armed Forces[15] because of a bipartisan effort led by Sen. Angus King, I-Maine; Sen. Susan Collins, R-Maine; Rep. Bruce Poliquin, R-Maine, and Rep. Niki Tsongas, D-Mass., to protect American jobs and manufacturers located in Maine and Massachusetts. It is possible that the facts in Mechanix Wear may spur additional bipartisan action to protect American industry.

Finally, the Mechanix Wear decision presents another example of how various domestic sourcing rules often intersect, and demonstrates why contractors need to closely consider whether any waivers or exceptions apply to such rules. Understanding this complex web of rules allows government contractors

to create business development strategies, identify appropriate suppliers and, if necessary, make a compelling argument for why a solicitation should — or should not — include a domestic sourcing requirement.

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[1] United States v. Rule Industries Inc., 878 F.2d 535, 538 (1st Cir. 1989) (citation omitted).

[2] See 41 U.S.C. § 8302(a). The BAA also requires contractors to incorporate materials that have been manufactured in the United States into certain construction projects. See id. § 8303(a).

[3] See FAR Subpart 25.1; DFARS Subpart 225.1. With regard to end products, the BAA is implemented through an evaluation preference based on the unreasonable cost exception. See FAR 25.101(c), 25.105.

[4] See FAR 25.103(b). Other BAA exceptions apply when a domestic preference would be inconsistent with the public interest, when the cost of a domestic end product would be unreasonable, for commissary resales, and for information technology that is a commercial item. See FAR 25.103(a), (c)–(e). Additionally, the Trade Agreements Act waives the BAA restrictions for certain procurements that meet specified dollar thresholds. See 19 U.S.C. §§ 2501–2581; FAR 25.402.

[5] FAR 25.103(b).

[6] FAR 25.103(b)(1) (specifying that a class determination "does not apply if the contracting officer learns . . . that an article on the list is available domestically in sufficient and reasonably available commercial quantities of a satisfactory quality to meet the requirements of the solicitation").

[7] FY 1941 Fifth Supplemental National Defense Appropriations Act, Pub. L. No. 77-29 (now codified at 10 U.S.C. § 2533a).

[8] See Valerie Grasso, Cong. Research Serv., RL31236, The Berry Amendment: Requiring Defense Procurement to Come from Domestic Sources 11–15 (2014).

[9] See FY 2002 NDAA, Pub. L. No. 107-107.

[10] See 10 U.S.C. § 2533a(a). See also DFARS 225.7002 (implementing the Berry Amendment).

[11] DFARS 225.7002-1 & -2; see also DFARS 252.225-7012(c)(1).

[12] B-416704.2, Nov. 19, 2018, 2018 CPD ¶ 395 ; available at https://www.gao.gov/products/B-416704,B-416704.2#mt=e-report.

[13] The oddity is further compounded by the acknowledgement in FAR 25.103(b)(1)(i) that the determination that an item should be listed at FAR 25.104 "does not necessarily mean that there is no

domestic source for the listed items, but that domestic sources can only meet 50 percent or less of total U.S. government and nongovernment demand."

[14] Although the civilian and defense acquisition councils issue a notice every five years seeking input on whether the nonavailability list should be revised, the FAR 25.104 list was last amended in 2010 and has barely changed since the FAR Part 25 rewrite in 1999. See 64 Fed. Reg. 72,416 (Dec. 27, 1999); 69 Fed. Reg. 34,241 (June 18, 2004) (adding five items to the list); 75 Fed. Reg. 34,283 (June 16, 2010) (modifying one item and adding two items).

[15] See Section 817 of the FY 2017 NDAA, Pub. L. No. 114-328.