

§ 2533. Determinations of public interest under chapter 83 of title 41

(a) In determining under section 8302 of title 41 whether application of chapter 83 of such title is inconsistent with the public interest, the Secretary of Defense shall consider the following:

(1) The bids or proposals of small business firms in the United States which have offered to furnish American goods.

(2) The bids or proposals of all other firms in the United States which have offered to furnish American goods.

(3) The United States balance of payments.

(4) The cost of shipping goods which are other than American goods.

(5) Any duty, tariff, or surcharge which may enter into the cost of using goods which are other than American goods.

(6) A need to ensure that the Department of Defense has access to advanced, state-of-the-art commercial technology.

(7) The need to protect the national technology and industrial base, to preserve and enhance the national technology employment base, and to provide for a defense mobilization base.

(8) A need to ensure that application of different rules of origin for United States end items and foreign end items does not result in an award to a firm other than a firm providing a product produced in the United States.

(9) Any need—

(A) to maintain the same source of supply for spare and replacement parts for an end item that qualifies as an American good; or

(B) to maintain the same source of supply for spare and replacement parts in order not to impair integration of the military and commercial industrial base.

(10) The national security interests of the United States.

(b) In this section, the term “goods which are other than American goods” means—

(1) an end product that is not mined, produced, or manufactured in the United States; or

(2) an end product that is manufactured in the United States but which includes components mined, produced, or manufactured outside the United States the aggregate cost of which exceeds the aggregate cost of the components of such end product that are mined, produced, or manufactured in the United States.

(Added Pub. L. 100-370, §3(a)(1), July 19, 1988, 102 Stat. 855, §2501; renumbered §2506, Pub. L. 100-456, div. A, title VIII, §821(b)(1)(A), Sept. 29, 1988, 102 Stat. 2014; renumbered §2533, Pub. L. 102-484, div. D, title XLII, §4202(a), Oct. 23, 1992, 106 Stat. 2659; amended Pub. L. 103-337, div. A, title VIII, §812(a), (b)(1), Oct. 5, 1994, 108 Stat. 2815, 2816; Pub. L. 104-106, div. D, title XLIII, §4321(b)(20), Feb. 10, 1996, 110 Stat. 673; Pub. L. 105-85, div. A, title X, §1073(a)(54), Nov. 18, 1997, 111 Stat. 1903; Pub. L. 111-350, §5(b)(37), Jan. 4, 2011, 124 Stat. 3845; Pub. L. 113-291, div. A, title X, §1071(a)(9), Dec. 19, 2014, 128 Stat. 3505.)

HISTORICAL AND REVISION NOTES

Section is based on Pub. L. 93-365, title VII, §707, Aug. 5, 1974, 88 Stat. 406.

AMENDMENTS

2014—Subsec. (a). Pub. L. 113-291 substituted “chapter 83 of such title” for “such Act” in introductory provisions.

2011—Pub. L. 111-350, §5(b)(37)(A), substituted “chapter 83 of title 41” for “the Buy American Act” in section catchline.

Subsec. (a). Pub. L. 111-350, §5(b)(37)(B), substituted “section 8302 of title 41” for “section 2 of the Buy American Act (41 U.S.C. 10a)” in introductory provisions.

1997—Subsec. (a). Pub. L. 105-85 substituted “(41 U.S.C. 10a)” for “(41 U.S.C. 10a)”.

1996—Subsec. (a). Pub. L. 104-106 substituted “the Buy American Act (41 U.S.C. 10a) whether application of such Act” for “title III of the Act of March 3, 1993 (41 U.S.C. 10a), popularly known as the ‘Buy American Act’, whether application of title III of such Act”.

1994—Pub. L. 103-337, §812(b)(1), substituted “Determinations of public interest under the Buy American Act” for “Limitation on use of funds: procurement of goods which are other than American goods” as section catchline.

Subsec. (a). Pub. L. 103-337, §812(a)(1), added subsec. (a) and struck out former subsec. (a) which read as follows: “Funds appropriated to the Department of Defense may not be obligated under a contract for procurement of goods which are other than American goods (as defined in subsection (c)) unless adequate consideration is given to the following:

“(1) The bids or proposals of firms located in labor surplus areas in the United States (as designated by the Department of Labor) which have offered to furnish American goods.

“(2) The bids or proposals of small business firms in the United States which have offered to furnish American goods.

“(3) The bids or proposals of all other firms in the United States which have offered to furnish American goods.

“(4) The United States balance of payments.

“(5) The cost of shipping goods which are other than American goods.

“(6) Any duty, tariff, or surcharge which may enter into the cost of using goods which are other than American goods.”

Subsecs. (b), (c). Pub. L. 103-337, §812(a), redesignated subsec. (c) as (b) and struck out former subsec. (b) which read as follows: “Consideration of the matters referred to in paragraphs (1) through (6) of subsection (a) shall be given under regulations of the Secretary of Defense and subject to the determinations and exceptions contained in title III of the Act of March 3, 1993 (41 U.S.C. 10a, 10b), popularly known as the ‘Buy American Act’.”

1992—Pub. L. 102-484 renumbered section 2506 of this title as this section.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 2302 of this title.

§ 2533a. Requirement to buy certain articles from American sources; exceptions

(a) **REQUIREMENT.**—Except as provided in subsections (c) through (h), funds appropriated or otherwise available to the Department of Defense may not be used for the procurement of an item described in subsection (b) if the item is not grown, reprocessed, reused, or produced in the United States.

(b) **COVERED ITEMS.**—An item referred to in subsection (a) is any of the following:

(1) An article or item of—

(A) food;

(B) clothing and the materials and components thereof, other than sensors, elec-

tronics, or other items added to, and not normally associated with, clothing (and the materials and components thereof);

(C) tents (and the structural components thereof), tarpaulins, or covers;

(D) cotton and other natural fiber products, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric (including all textile fibers and yarns that are for use in such fabrics), canvas products, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles); or

(E) any item of individual equipment manufactured from or containing such fibers, yarns, fabrics, or materials.

(2) Hand or measuring tools.

(c) **AVAILABILITY EXCEPTION.**—Subsection (a) does not apply to the extent that the Secretary of Defense or the Secretary of the military department concerned determines that satisfactory quality and sufficient quantity of any such article or item described in subsection (b) grown, reprocessed, reused, or produced in the United States cannot be procured as and when needed at United States market prices.

(d) **EXCEPTION FOR CERTAIN PROCUREMENTS.**—Subsection (a) does not apply to the following:

(1) Procurements outside the United States in support of combat operations or procurements of any item listed in subsection (b)(1)(A) or (b)(2) in support of contingency operations.

(2) Procurements by vessels in foreign waters.

(3) Emergency procurements or procurements of perishable foods by, or for, an establishment located outside the United States for the personnel attached to such establishment.

(4) Procurements of any item listed in subsection (b)(1)(A) or (b)(2) for which the use of procedures other than competitive procedures has been approved on the basis of section 2304(c)(2) of this title, relating to unusual and compelling urgency of need.

(e) **EXCEPTION FOR CHEMICAL WARFARE PROTECTIVE CLOTHING.**—Subsection (a) does not preclude the procurement of chemical warfare protective clothing produced outside the United States if—

(1) such procurement is necessary—

(A) to comply with agreements with foreign governments requiring the United States to purchase supplies from foreign sources for the purposes of offsetting sales made by the United States Government or United States firms under approved programs serving defense requirements; or

(B) in furtherance of agreements with foreign governments in which both such governments agree to remove barriers to purchases of supplies produced in the other country or services performed by sources of the other country; and

(2) any such agreement with a foreign government complies, where applicable, with the requirements of section 36 of the Arms Export Control Act (22 U.S.C. 2776) and with section 2457 of this title.

(f) **EXCEPTIONS FOR CERTAIN OTHER COMMODITIES AND ITEMS.**—Subsection (a) does not preclude the procurement of the following:

(1) Foods manufactured or processed in the United States.

(2) Waste and byproducts of cotton and wool fiber for use in the production of propellants and explosives.

(g) **EXCEPTION FOR COMMISSARIES, EXCHANGES, AND OTHER NONAPPROPRIATED FUND INSTRUMENTALITIES.**—Subsection (a) does not apply to items purchased for resale purposes in commissaries, exchanges, or nonappropriated fund instrumentalities operated by the Department of Defense.

(h) **EXCEPTION FOR SMALL PURCHASES.**—Subsection (a) does not apply to purchases for amounts not greater than the simplified acquisition threshold referred to in section 2304(g) of this title.

(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 1906 of title 41.

(j) **GEOGRAPHIC COVERAGE.**—In this section, the term “United States” includes the possessions of the United States.

(k) **NOTIFICATION REQUIRED WITHIN 7 DAYS AFTER CONTRACT AWARD IF CERTAIN EXCEPTIONS APPLIED.**—In the case of any contract for the procurement of an item described in subparagraph (B), (C), (D), or (E) of subsection (b)(1), if the Secretary of Defense or of the military department concerned applies an exception set forth in subsection (c) or (e) with respect to that contract, the Secretary shall, not later than 7 days after the award of the contract, post a notification that the exception has been applied on the Internet site maintained by the General Services Administration known as FedBizOpps.gov (or any successor site).

(Added Pub. L. 107–107, div. A, title VIII, §832(a)(1), Dec. 28, 2001, 115 Stat. 1189; amended Pub. L. 108–136, div. A, title VIII, §§826, 827, Nov. 24, 2003, 117 Stat. 1548; Pub. L. 109–163, div. A, title VIII, §§831, 833, Jan. 6, 2006, 119 Stat. 3388; Pub. L. 109–364, div. A, title VIII, §842(a)(3), Oct. 17, 2006, 120 Stat. 2337; Pub. L. 111–350, §5(b)(38), Jan. 4, 2011, 124 Stat. 3845; Pub. L. 111–383, div. A, title VIII, §847, title X, §1075(b)(38), Jan. 7, 2011, 124 Stat. 4286, 4371; Pub. L. 112–81, div. A, title VIII, §821, Dec. 31, 2011, 125 Stat. 1502; Pub. L. 112–239, div. A, title X, §1076(f)(29), Jan. 2, 2013, 126 Stat. 1953.)

AMENDMENTS

2013—Subsec. (k). Pub. L. 112–239 substituted “FedBizOpps.gov” for “FedBizOps.gov”.

2011—Subsec. (b)(1)(C). Pub. L. 112–81 inserted “(and the structural components thereof)” after “tents”.

Subsec. (c). Pub. L. 111–383, §847, substituted “subsection (b)” for “subsection (b)(1)”.

Subsec. (d)(1), (4). Pub. L. 111–383, §1075(b)(38), substituted “(b)(1)(A) or (b)(2)” for “(b)(1)(A), (b)(2), or (b)(3)”.

Subsec. (i). Pub. L. 111–350 substituted “section 1906 of title 41” for “section 34 of the Office of Federal Procurement Policy Act (41 U.S.C. 430)”.

2006—Subsec. (b)(1)(B). Pub. L. 109–163, §833(b), inserted before semicolon “and the materials and compo-

nents thereof, other than sensors, electronics, or other items added to, and not normally associated with, clothing (and the materials and components thereof)".

Subsec. (b)(2), (3). Pub. L. 109-364, §842(a)(3)(A), redesignated par. (3) as (2) and struck out former par. (2) which read as follows: "Specialty metals, including stainless steel flatware."

Subsec. (c). Pub. L. 109-364, §842(a)(3)(B), struck out "or specialty metals (including stainless steel flatware)" after "subsection (b)(1)".

Subsec. (d)(3). Pub. L. 109-163, §831, inserted ", or for," after "perishable foods by".

Subsec. (e). Pub. L. 109-364, §842(a)(3)(C), struck out "Specialty Metals and" after "Exception for" in heading and "specialty metals or" after "procurement of" in introductory provisions.

Subsec. (k). Pub. L. 109-163, §833(a), added subsec. (k). 2003—Subsec. (d). Pub. L. 108-136, §826(1), struck out "Outside the United States" after "Procurements" in heading.

Subsec. (d)(1). Pub. L. 108-136, §826(2), inserted "or procurements of any item listed in subsection (b)(1)(A), (b)(2), or (b)(3) in support of contingency operations" after "combat operations".

Subsec. (d)(4). Pub. L. 108-136, §826(3), added par. (4).

Subsec. (f). Pub. L. 108-136, §827, substituted "EXCEPTIONS FOR CERTAIN OTHER COMMODITIES AND ITEMS.—Subsection (a) does not preclude the procurement of the following:

"(1) Foods"

for "EXCEPTION FOR CERTAIN FOODS.—Subsection (a) does not preclude the procurement of foods", and added par. (2).

EFFECTIVE DATE OF 2006 AMENDMENT

Pub. L. 109-364, div. A, title VIII, §842(a)(4)(B), Oct. 17, 2006, 120 Stat. 2337, provided that: "The amendments made by paragraph (3) [amending this section] shall take effect on the date occurring 30 days after the date of the enactment of this Act [Oct. 17, 2006]."

SHORT TITLE

This section is popularly known as the "Berry Amendment".

PERIODIC AUDITS OF CONTRACTING COMPLIANCE BY INSPECTOR GENERAL OF DEPARTMENT OF DEFENSE

Pub. L. 113-66, div. A, title XVI, §1601, Dec. 26, 2013, 127 Stat. 941, provided that:

"(a) REQUIREMENT FOR PERIODIC AUDITS OF CONTRACTING COMPLIANCE.—The Inspector General of the Department of Defense shall conduct periodic audits of contracting practices and policies related to procurement under section 2533a of title 10, United States Code.

"(b) REQUIREMENT FOR ADDITIONAL INFORMATION IN SEMIANNUAL REPORTS.—The Inspector General of the Department of Defense shall ensure that findings and other information resulting from audits conducted pursuant to subsection (a) are included in the semiannual report transmitted to congressional committees under section 8(f)(1) of the Inspector General Act of 1978 (5 U.S.C. App.)."

FIRE RESISTANT RAYON FIBER

Pub. L. 111-383, div. A, title VIII, §821(b), Jan. 7, 2011, 124 Stat. 4268, provided that: "No solicitation issued before January 1, 2015, by the Department of Defense may include a requirement that proposals submitted pursuant to such solicitation must include the use of fire resistant rayon fiber."

Pub. L. 110-181, div. A, title VIII, §829, Jan. 28, 2008, 122 Stat. 229, as amended by Pub. L. 111-383, div. A, title VIII, §821(a), Jan. 7, 2011, 124 Stat. 4267; Pub. L. 112-81, div. A, title VIII, §822, Dec. 31, 2011, 125 Stat. 1502, provided that:

"(a) AUTHORITY TO PROCURE.—The Secretary of Defense may procure fire resistant rayon fiber for the production of uniforms that is manufactured in a foreign country referred to in subsection (d) if the Secretary determines either of the following:

"(1) That fire resistant rayon fiber for the production of uniforms is not available from sources within the national technology and industrial base.

"(2) That—

"(A) procuring fire resistant rayon fiber manufactured from suppliers within the national technology and industrial base would result in sole-source contracts or subcontracts for the supply of fire resistant rayon fiber; and

"(B) such sole-source contracts or subcontracts would not be in the best interests of the Government or consistent with the objectives of section 2304 of title 10, United States Code.

"(b) SUBMISSION TO CONGRESS.—Not later than 30 days after making a determination under subsection (a), the Secretary shall submit to Congress a copy of the determination.

"(c) APPLICABILITY TO SUBCONTRACTS.—The authority under subsection (a) applies with respect to subcontracts under Department of Defense contracts as well as to such contracts.

"(d) FOREIGN COUNTRIES COVERED.—The authority under subsection (a) applies with respect to a foreign country that—

"(1) is a party to a defense memorandum of understanding entered into under section 2531 of title 10, United States Code; and

"(2) does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country.

"(e) NATIONAL TECHNOLOGY AND INDUSTRIAL BASE DEFINED.—In this section, the term 'national technology and industrial base' has the meaning given that term in section 2500 of title 10, United States Code."

TRAINING FOR DEFENSE ACQUISITION WORKFORCE ON THE REQUIREMENTS OF THE BERRY AMENDMENT

Pub. L. 109-163, div. A, title VIII, §832, Jan. 6, 2006, 119 Stat. 3388, provided that:

"(a) TRAINING DURING FISCAL YEAR 2006.—The Secretary of Defense shall ensure that each member of the defense acquisition workforce who participates personally and substantially in the acquisition of textiles on a regular basis receives training during fiscal year 2006 on the requirements of section 2533a of title 10, United States Code (commonly referred to as the 'Berry Amendment'), and the regulations implementing that section.

"(b) INCLUSION OF INFORMATION IN NEW TRAINING PROGRAMS.—The Secretary shall ensure that any training program developed or implemented after the date of the enactment of this Act [Jan. 6, 2006] for members of the defense acquisition workforce who participate personally and substantially in the acquisition of textiles on a regular basis includes comprehensive information on the requirements described in subsection (a)."

APPLICATION OF EXCEPTION TO SEAFOOD PRODUCTS

Pub. L. 108-287, title VIII, §8118, Aug. 5, 2004, 118 Stat. 998, as amended by Pub. L. 113-291, div. A, title X, §1071(b)(4), Dec. 19, 2014, 128 Stat. 3506, provided that: "Notwithstanding any other provision of law, section 2533a(f) of title 10, United States Code, shall hereafter not apply to any fish, shellfish, or seafood product. This section applies to contracts and subcontracts for the procurement of commercial items notwithstanding section 1906 of title 41, United States Code."

§ 2533b. Requirement to buy strategic materials critical to national security from American sources; exceptions

(a) REQUIREMENT.—Except as provided in subsections (b) through (m), the acquisition by the Department of Defense of the following items is prohibited:

(1) The following types of end items, or components thereof, containing a specialty metal