

AMENDMENT NO. 8 OFFERED BY MR. KISSELL

The CHAIR. It is now in order to consider amendment No. 8 printed in part B of House Report 111-9.

Mr. KISSELL. Mr. Chairman, I rise to bring forth an amendment that will be known as the Berry Amendment Extension Act.

The CHAIR. The Clerk will designate the amendment.

The text of the amendment is as follows:

Amendment No. 8 offered by Mr. *Kissell*:

Page 111, after line 7 insert the following new section:

**SEC. 7005. PROCUREMENT FOR DEPARTMENT OF HOMELAND SECURITY.**

(a) *Requirement.*--Except as provided in subsections (c) through (e), funds appropriated or otherwise available to the Department of Homeland Security 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, if the item is directly related to the national security interests of the United States:

(1) An article or item of--

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

(B) tents, tarpaulins, or covers;

(C) 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

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

(c) *Availability Exception.*--Subsection (a) does not apply to the extent that the Secretary of Homeland Security determines that satisfactory quality and sufficient quantity of any such article or item described in subsection (b)(1) grown, reprocessed, reused, or produced in the United States cannot be procured as and when needed.

(d) *Exception for Certain Procurements Outside the United States.*--Subsection (a) does not apply to the following:

(1) Procurements by vessels in foreign waters.

(2) Emergency procurements.

(e) *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 title 10, United States Code.

(f) *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).

(g) *Geographic Coverage.*--In this section, the term "United States" includes the possessions of the United States.

(h) *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 subsection (b)(1), if the Secretary of Homeland Security applies an exception set forth in subsection (c) 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 FedBizOps.gov (or any successor site).

(i) *Training During Fiscal Year 2008.*--

(1) **IN GENERAL.**--The Secretary of Homeland Security shall ensure that each member of the acquisition workforce in the Department of Homeland Security who participates personally and substantially in the acquisition of textiles on a regular basis receives training during fiscal year 2009 on the requirements of this section and the regulations implementing this section.

(2) **INCLUSION OF INFORMATION IN NEW TRAINING PROGRAMS.**--The Secretary shall ensure that any training program for the acquisition work force developed or implemented after the date of the enactment of this Act includes comprehensive information on the requirements described in paragraph (1).

(j) *Consistency With International Agreements.*--

(1) **IN GENERAL.**--No provision of this section shall apply to the extent the Secretary of Homeland Security, in consultation with the United States Trade Representative, determines that it is inconsistent with United States obligations under an international agreement.

(2) **REPORT.**--The Secretary of Homeland Security shall submit a report each year to Congress containing, with respect to the year covered by the report--

(A) a list of each provision of this section that did not apply during that year pursuant to a determination by the Secretary under paragraph (1); and

(B) a list of each contract awarded by the Department of Homeland Security during that year without regard to a provision in this section because that provision was made inapplicable pursuant to such a determination.

(k) *Effective Date.*--This section applies with respect to contracts entered into by the Department of Homeland Security after the date of the enactment of this Act.

The CHAIR. Pursuant to House Resolution 92, the gentleman from North Carolina (Mr. *Kissell*) and a Member opposed each will control 5 minutes.

The Chair recognizes the gentleman from North Carolina.

Mr. KISSELL. Mr. Chairman, the Berry Amendment has been in effect for over 60 years and has allowed the Department of Defense to purchase uniforms and other textile apparels as needed for our military to be made and manufactured here in the United States.

We know that textiles has brought forth the industrial revolution to the United States from its very beginnings, but not any industry has been hurt any more than textile has in the last few years in terms of lost employment.

Over 60,000 jobs have been lost throughout the Nation in the last year; over 8,000 of those jobs in my home State of North Carolina, over 44 factories have closed. We have thousands of Americans that are ready, willing and able to work, and we're being asked to consider a recovery and reinvestment program to put Americans to work.

This amendment would simply extend the Berry Act to be able to have Homeland Security to purchase uniforms for the TSA to be made in the United States. It would accomplish what we're looking for in the Recovery and Reinvestment Act, it would put Americans to work, and furthermore, it would keep Americans working.

We know that we have lost so many jobs in this area. We have the people that are ready, willing and able to work. I worked in textiles for 27 years. I watched the jobs leave and good people be left wondering where their meals are coming from and how they're going to take care of their families. This is an opportunity to put Americans to work and keep them at work. And what could be better than using our money, our taxpayers' money for that purpose and to put uniforms on the people that serve us?

Mr. Chairman, I reserve the balance of my time.

Mr. LEWIS of California. Mr. Chairman, I rise to claim the time in opposition.

The CHAIR. The gentleman from California is recognized.

Mr. LEWIS of California. It is not my intention to take much of that time, but I would yield 30 seconds to Mr. *Westmoreland*.

Mr. WESTMORELAND. Mr. *Kissell*, I would yield to you. Do you think it's wise for your constituents that you're trying to help to spend \$225,000 per job that pays \$50,000?

Mr. KISSELL. That is an incorrect figure, sir; it is less than that. Americans are competitive, and if we're going to spend American taxpayers' money, let's put Americans to work.

Mr. WESTMORELAND. Mr. *Kissell*, do you think it's worth your constituents saying that your district would pay \$2 billion to create the amount of jobs----

The CHAIR. The gentleman's time has expired.

Mr. KISSELL. I recognize the gentleman from North Carolina, Mr. **DAVID PRICE**, for 1 minute.

Mr. PRICE of North Carolina. Mr. Chairman, I rise in support of the amendment of my North Carolina colleague, Mr. *Kissell*. It would apply to the Department of Homeland Security purchasing rules similar to those required of the Defense Department under the Berry Amendment, requiring DHS to purchase clothing and other textile products grown, reprocessed, reused or produced in the U.S. and its possessions.

The proposed amendment would give the Secretary of Homeland Security some flexibility to waive the domestic source requirements in cases where there are inadequate domestic sources to meet the Department's needs. The amendment also makes clear that it would not apply when inconsistent with U.S. obligations under international agreements.

I, nevertheless, have some reservations about how the amendment might restrict the Department in carrying out its Homeland Security mission. The Department is already subject to "buy American" requirements. This amendment would go significantly further in requiring 100 percent U.S. content of products, a target that could be impractical or unreasonably costly in some circumstances.

However, I appreciate my colleague's intentions with this amendment. I will be happy to support the amendment with the understanding that some modifications may be required to ensure that it does not pose an undue burden on the Department and it does not compromise the ability of the Department to carry out its Homeland Security mission. I look forward to working with the gentleman to make any needed refinements going forward.

Mr. LEWIS of California. Mr. Chairman, I yield 2 minutes to the gentleman from Pennsylvania.

Mr. TIM MURPHY of Pennsylvania. In this \$835 billion bill being described as a "jobs" bill, it's good to see Representative *Kissell* was able to offer this amendment to ensure American cloth is used for these uniforms. His arguments are compelling that we should support U.S. jobs.

I offered a similar amendment to the health information technology portion: \$20 billion spending there. It was stripped out after the Energy and Commerce Committee passed it unanimously and then rejected by the Rules Committee.

This bill also has a lot of other spending which is not protected for U.S. jobs; \$600 million for cars--no guarantee they're U.S. cars; \$400 million for fuel-efficient buses. Guarantees for Americans? Not so much. How about \$871 million for computers at the State Department, Agriculture and States? No. Nine hundred million for a new computing center for the Social Security Administration? Not there. Two hundred million for scientific equipment for the U.S. Geological Survey? Nope. Five hundred million for new detection systems for the Department of Homeland Security? Absent. How about \$6.5 billion for broadband? No guarantee made in the USA. How about \$7.7 billion for Federal building construction? Not there.

If this is an American jobs bill, shouldn't we have included "buy American" clauses for these other areas as well? It's disappointing and frustrating that what happened with this bill in the Energy and Commerce Committee was actively removed, and then it was refused by the Rules Committee.

I'm glad that we're going to be supporting American textiles. I'm happy we're going to be supporting American steel. In a jobs bill, I'm frustrated that there are no guarantees in here that so many of these other jobs aren't going to happen in the United States.

I worry that of these billions of dollars being spent, much of these parts for computers, services and materials are going to be made overseas.

That's not about American jobs.

Mr. KISSELL. Mr. Chairman, I recognize the gentleman from North Carolina, **HOWARD COBLE**, for 2 minutes.

Mr. COBLE. I thank the gentleman for yielding.

Mr. Chairman, this amendment will immediately help textile and apparel companies because it will cover all uniforms purchased by the Transportation Security Administration employees.

The program can easily be expanded by the Obama administration to cover FEMA, U.S. Customs, Border Protection, and U.S. Immigration Service, nearly 100,000 uniformed employees in all.

And as an aside, my friend from North Carolina has already mentioned it, but the apparel and textile sector has been plagued as a result of the dismal economic climate that we face now. They've lost over 60,000 jobs during the last 12 months. North Carolina alone has lost 8,000 textile and apparel jobs. Forty-four textile plants in America were closed during the past year, 14 in North Carolina.

And not unlike my friend, Mr. *Kissell*, I, too, come from a textile family. My mama was a textile worker; sewed pockets in overalls at the old Blue Bell plant in Greensboro. So I know the significance of a textile check subsidizing the family income.

I urge support of this amendment, and I urge my colleagues to support it as well.

Mr. KISSELL. Mr. Chairman, may I inquire as to the time remaining?

The CHAIR. The gentleman from North Carolina has 30 seconds.

Mr. KISSELL. I would just like to conclude by saying we're going to put Americans to work making uniforms for those who protect us. It's a good use of tax money.

- [Begin Insert]

Mr. THOMPSON of Mississippi. Mr. Chairman, first, I want to thank the Representative from North Carolina, Mr. **KISSELL** for his amendment. The original Berry amendment covering procurement for the United States Military has ensured that U.S. troops wore military uniforms made from U.S. textiles and manufactured by U.S. factories since the beginning of World War II.

As we know, things have changed dramatically since 1941. Since 2003, the Department of Homeland Security has also been working hard to provide our citizens with added security both at home and abroad. With over 100,000 uniformed employees, I believe that it is imperative that Berry amendment be extended to include uniform and textile purchases at the Department of Homeland Security and offer my overwhelming support for this amendment.

Recent press reports have shown there are numerous questions of security and safety related to the current procurement process for these items. From the case of Customs and Border Protection uniforms and badges being manufactured in Mexico, to the most recent case of Transportation Security Officers reporting allergic reactions to the formaldehyde used in the production of their new uniforms, we can see the added benefit to not only the U.S. textile and manufacturing industry, but in ensuring that these uniformed employees, receive the quality that they deserve. I, like others, am deeply concerned that we could have people crossing the border illegally wearing CBP or TSA uniforms manufactured in foreign countries.

Chairman, as you know, manufacturing as a whole has been on a steady decline. My own state of Mississippi, much like many others, such as North Carolina, have been negatively impacted by the increase in overseas production of goods. I believe that this legislation is not only about security and safety, but also a way to help those communities that rely on the textile and manufacturing industry.

While the amendment by Mr. **KISSELL** is a great step to ensuring that all DHS uniforms and textile purchases are made with U.S. components and in U.S. factories, I also believe that it should also be ultimately made permanent during the 111th Congress through the DHS Authorization process.

Thank you for the opportunity to express my support for this important amendment and I encourage all of my colleagues to support this amendment.

- [End Insert]

Mr. Chairman, I yield back the balance of my time.

Mr. LEWIS of California. Mr. Chairman, I yield back the balance of my time.

The CHAIR. The question is on the amendment offered by the gentleman from North Carolina (Mr. *Kissell*).

The amendment was agreed to.

(g)(1) In order to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors, the Federal Acquisition Regulation shall provide for -

(A) special simplified procedures for purchases of property and services for amounts not greater than the simplified acquisition threshold; and

(B) special simplified procedures for purchases of property and services for amounts greater than the simplified acquisition threshold but not greater than \$5,000,000 with respect to which the contracting officer reasonably expects, based on the nature of the property or services sought and on market research, that offers will include only commercial items.

(2) A proposed purchase or contract for an amount above the simplified acquisition threshold may not be divided into several purchases or contracts for lesser amounts in order to use the simplified procedures required by paragraph (1).

(3) In using simplified procedures, the head of an agency shall promote competition to the maximum extent practicable.

(4) The head of an agency shall comply with the Federal Acquisition Regulation provisions referred to in section 31(f) of the Office of Federal Procurement Policy Act (41 U.S.C. 427).

## § 403. Definitions

As used in this chapter:

- (1) The term “executive agency” means—

  - (A) an executive department specified in section 101 of title 5;
  - (B) a military department specified in section 102 of such title;
  - (C) an independent establishment as defined in section 104(1) of such title; and
  - (D) a wholly owned Government corporation fully subject to the provisions of chapter 91 of title 31.
  
- (2) The term “procurement” includes all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout.
  
- (3) The term “procurement system” means the integration of the procurement process, the professional development of procurement personnel, and the management structure for carrying out the procurement function.
  
- (4) The term “standards” means the criteria for determining the effectiveness of the procurement system by measuring the performance of the various elements of such system.
  
- (5) The term “competitive procedures” means procedures under which an agency enters into a contract pursuant to full and open competition.
  
- (6) The term “full and open competition”, when used with respect to a procurement, means that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement.
  
- (7) The term “responsible source” means a prospective contractor who—
  - (A) has adequate financial resources to perform the contract or the ability to obtain such resources;
  - (B) is able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and Government business commitments;
  - (C) has a satisfactory performance record;
  - (D) has a satisfactory record of integrity and business ethics;
  - (E) has the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain such organization, experience, controls, and skills;
  - (F) has the necessary production, construction, and technical equipment and facilities, or the ability to obtain such equipment and facilities; and
  - (G) is otherwise qualified and eligible to receive an award under applicable laws and regulations.
  
- (8) The term “technical data” means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer software documentation) relating to supplies procured by an agency. Such term does not include

computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration.

**(9)**

**(A)** The term “major system” means a combination of elements that will function together to produce the capabilities required to fulfill a mission need, which elements may include hardware, equipment, software or any combination thereof, but excludes construction or other improvements to real property; and

**(B)** a system shall be considered a major system if

**(i)** the Department of Defense is responsible for the system and the total expenditures for research, development, test and evaluation for the system are estimated to be more than \$75,000,000 (based on fiscal year 1980 constant dollars) or the eventual total expenditure for procurement of more than \$300,000,000 (based on fiscal year 1980 constant dollars);

**(ii)** a civilian agency is responsible for the system and total expenditures for the system are estimated to exceed \$750,000 (based on fiscal year 1980 constant dollars) or the dollar threshold for a “major system” established by the agency pursuant to Office of Management and Budget (OMB) Circular A-109, entitled “Major Systems Acquisitions”, whichever is greater; or

**(iii)** the system is designated a “major system” by the head of the agency responsible for the system.

**(10)** The term “item”, “item of supply”, or “supplies” means any individual part, component, subassembly, assembly, or subsystem integral to a major system, and other property which may be replaced during the service life of the system, and includes spare parts and replenishment spare parts, but does not include packaging or labeling associated with shipment or identification of an “item”.

**(11)** The term “simplified acquisition threshold” means \$100,000.

**(12)** The term “commercial item” means any of the following:

**(A)** Any item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and that—

**(i)** has been sold, leased, or licensed to the general public; or

**(ii)** has been offered for sale, lease, or license to the general public.

**(B)** Any item that evolved from an item described in subparagraph (A) through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Federal Government solicitation.

**(C)** Any item that, but for—

**(i)** modifications of a type customarily available in the commercial marketplace, or

**(ii)** minor modifications made to meet Federal Government requirements,

would satisfy the criteria in subparagraph (A) or (B).

**(D)** Any combination of items meeting the requirements of subparagraph (A), (B), (C), or (E) that are of a type customarily combined and sold in combination

to the general public.

**(E)** Installation services, maintenance services, repair services, training services, and other services if—

**(i)** the services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D), regardless of whether such services are provided by the same source or at the same time as the item; and

**(ii)** the source of the services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government.

**(F)** Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.

**(G)** Any item, combination of items, or service referred to in subparagraphs (A) through (F) notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

**(H)** A nondevelopmental item, if the procuring agency determines, in accordance with conditions set forth in the Federal Acquisition Regulation, that the item was developed exclusively at private expense and has been sold in substantial quantities, on a competitive basis, to multiple State and local governments.

**(13)** The term “nondevelopmental item” means any of the following:

**(A)** Any commercial item.

**(B)** Any previously developed item of supply that is in use by a department or agency of the United States, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement.

**(C)** Any item of supply described in subparagraph (A) or (B) that requires only minor modification or modification of the type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency.

**(D)** Any item of supply currently being produced that does not meet the requirements of subparagraph (A), (B), or (C) solely because the item is not yet in use.

**(14)** The term “component” means any item supplied to the Federal Government as part of an end item or of another component.

**(15)** The term “commercial component” means any component that is a commercial item.

**(16)** The term “acquisition”—

**(A)** means the process of acquiring, with appropriated funds, by contract for purchase or lease, property or services (including construction) that support the missions and goals of an executive agency, from the point at which the requirements of the executive agency are established in consultation with the chief acquisition officer of the executive agency; and

**(B)** includes—

- (i)** the process of acquiring property or services that are already in existence, or that must be created, developed, demonstrated, and evaluated;
- (ii)** the description of requirements to satisfy agency needs;
- (iii)** solicitation and selection of sources;
- (iv)** award of contracts;
- (v)** contract performance;
- (vi)** contract financing;
- (vii)** management and measurement of contract performance through final delivery and payment; and
- (viii)** technical and management functions directly related to the process of fulfilling agency requirements by contract.

**(17)** The term “Federal Acquisition Regulatory Council” means the Federal Acquisition Regulatory Council established under section [421](#) of this title.

## § 430. List of laws inapplicable to procurements of commercial items in Federal Acquisition Regulation

### **(a) List of inapplicable provisions of law**

#### **(1)** The Federal Acquisition Regulation

shall include a list of provisions of law that are inapplicable to contracts for the procurement of commercial items. A provision of law that is properly included on the list pursuant to paragraph (2) may not be construed as applicable to purchases of commercial items by an executive agency. Nothing in this section shall be construed to render inapplicable to contracts for the procurement of commercial items any provision of law that is not included on such list.

**(2)** A provision of law described in subsection (c) of this section that is enacted after October 13, 1994, shall be included on the list of inapplicable provisions of law required by paragraph (1), unless the Federal Acquisition Regulatory Council makes a written determination that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of commercial items from the applicability of the provision.

### **(b) Subcontracts**

**(1)** The Federal Acquisition Regulation shall include a list of provisions of law that are inapplicable to subcontracts under either a contract for the procurement of commercial items or a subcontract for the procurement of commercial items. A provision of law that is properly included on the list pursuant to paragraph (2) may not be construed as applicable to such subcontracts. Nothing in this section shall be construed to render inapplicable to subcontracts under a contract for the procurement of commercial items any provision of law that is not included on such list.

**(2)** A provision of law described in subsection (c) of this section shall be included on the list of inapplicable provisions of law required by paragraph (1) unless the Federal Acquisition Regulatory Council makes a written determination that it would not be in the best interest of the Federal Government to exempt subcontracts under a contract for the procurement of commercial items from the applicability of the provision.

**(3)** Nothing in this subsection shall be construed to authorize the waiver of the applicability of any provision of law with respect to any subcontract under a contract with a prime contractor reselling or distributing commercial items of another contractor without adding value.

**(4)** In this subsection, the term "subcontract" includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

### **(c) Covered law**

A provision of law referred to in subsections (a)(2) and (b) of this section is any provision of law that, as determined by the Federal Acquisition Regulatory Council, sets forth policies, procedures, requirements, or restrictions for the procurement of property or services by the Federal Government, except for a provision of law that—

**(1)** provides for criminal or civil penalties; or

**(2)** specifically refers to this section and provides that, notwithstanding this section, it shall be applicable to contracts for the procurement of commercial items.

**(d) Petition**

In the event that a provision of law described in subsection (c) of this section is not included on the list of inapplicable provisions of law as required by subsection (a) or (b) of this section, and no written determination has been made by the Federal Acquisition Regulatory Council pursuant to subsection (a)(2) or (b)(2) of this section, a person may petition the Administrator for Federal Procurement Policy to take appropriate action. The Administrator shall revise the Federal Acquisition Regulation to include the provision on the list of inapplicable provisions of law unless the Federal Acquisition Regulatory Council makes a determination pursuant to subsection (a)(2) or (b)(2) of this section within 60 days after the date on which the petition is received.