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DHS Publishes New Rules Expanding Berry Amendment to Most DHS Procurements

As part of the much ballyhooed Stimulus Act signed into law on February 17, 2009 (discussed in detail here), Congressman Lawrence "Larry" Kissell (D-NC) introduced an amendment titled, "the Berry Amendment Extension Act," which placed domestic source restrictions on the purchase of certain fabric and textile products by the U.S. Department of Homeland Security ("DHS"). *See* Pub. L. No. 111-5, § 604 (codified at 6 U.S.C. § 453b).

On August 17, 2009 (the effective date of the statute), DHS published interim rules with requests for comment implementing Section 604 (or "the Kissell Amendment"), requiring purchases by nearly all DHS components (with intermittent exceptions for the Transportation Security Administration ("TSA")) to comply with the new domestic source restrictions. *See* 74 Federal Register 41346 (codified at Homeland Security Acquisition Regulation ("HSAR") Subpart 3025.70 and HSAR 3052.225-70). Some months ago, we discussed the Kissell Amendment, as included in the Stimulus Act. Rather than re-hashing matters we already have discussed, this blog discusses key features of the new HSAR rules, highlighting the unique features of the Kissell Amendment, as well as how the DHS restrictions differ from other domestic source restrictions (including the Berry Amendment, which applies exclusively to purchases by the U.S. Department of Defense ("DOD")).

- **"Directly Related to National Security Interests."** The Kissell Amendment requires the purchase of certain fabric and textile products from domestic sources when those products are "directly related to national security interests." This "national security" limiting language is not included in the Berry Amendment. HSAR 3025.7001(e) ties this definition to activities relating to protecting the U.S. from internal or external threats, defining "directly related to national security interests" with emphasis on three critical components:

    1. The product must be "*intended for use*" in a DHS protective action. If an item is not acquired with the intention of being used in a manner that is related to national security interests, then it is not a covered product under the Kissell Amendment, regardless of its potential, alternative, or eventual actual uses.

    2. The product must be "*used in a DHS protective action.*" If an item will not be used in a protective action performed by DHS, it is not covered. For example,

curtains for a DHS office will not typically be covered, while textile body armor more than likely would.

3. The product must be used to "*protect the nation from internal or external threats.*" The intended DHS action must be a protective action, not a merely operational or administrative one. For example, patrolling the border is considered a protective action; however, parading for dignitaries is not.

- **Some Commercial Items Are Beyond the Scope.** Unlike the Berry Amendment, the Kissell Amendment recognizes some limited commercial item exceptions to the scope of some of the covered products (as laid out in both the statute and the regulations). For some products -- like cotton, silk, wool, and synthetic fabrics -- commercial items are excepted. However, for other products -- like tents, tarps, body armor, sleeping bags, field packs, bandages and parachutes -- there is no commercial item exception.

- **Exceptions for Free Trade Agreements.** The new rules identify a number of exceptions that would exempt DHS purchases of textiles and fabrics directly related to U.S. national security interests. Most of these exceptions are similar to those already available under the Berry Amendment (such as, for example, purchases beneath the simplified acquisition threshold, nonavailability, or waiver by DHS). However, there are some slight differences, most notably with regard to purchases from Free Trade Agreement countries.

The Kissell Amendment includes a provision requiring that it be "applied in a manner consistent with United States obligations under international agreements." No such provision exists under the Berry Amendment. Given some of the ambiguities and confusion inherent in this exception, it remains to be seen exactly how this exception will play out in practice. In particular, the HSAR rules are unclear whether they apply to the list of TAA-compliant countries (discussed here) or some other "eligible country" or "qualifying country" list (which is not separately provided for in the new HSAR regulations, even though "qualifying country" is introduced as a defined term at HSAR 2052.225-70(a)(5)).

The bottom line with regard to the FTA exception is that it is confusing, complicated, and new. Companies should carefully consider whether they comply with the exception (especially if your customer is the TSA) before assuming that a product from an FTA country will necessarily satisfy the new rules.

Conclusion

With the possible exception of the confusing "free trade agreement" exception to the Kissell Amendment, the new DHS interim rules may be about as good as it gets. Clearly, DHS put a lot of time into formulating these interim rules and, with the exception of a few wrinkles that still need to be resolved, the regulations appear to be a good and fair first step. Especially when compared to the labyrinthine regulations relating to the DOD specialty metals restrictions (discussed here) or the mashed-up restrictions relating to the DOD Berry Amendment, the new Kissell Amendment seems imminently reasonable, well considered, and ultimately do-able. Imagine that.

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