

GAO

Report to the Honorable
David Pryor, U.S. Senate

September 1987

ARMY PROCUREMENT

Compliance With Restriction on Foreign Products



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**National Security and
International Affairs Division**

B-226033

September 18, 1987

The Honorable David Pryor
United States Senate

Dear Senator Pryor:

In response to your letter of January 6, 1987, we reviewed the U.S. Army Troop Support Command's (TROSCOM) compliance with a Department of Defense (DOD) Appropriations Act restriction known as the Berry Amendment. With some exceptions, this amendment prohibits the purchase of specified products from foreign sources. Specifically, we reviewed TROSCOM's implementation of the Berry Amendment on two contracts you identified as being awarded to foreign manufacturers. Both contracts were for collapsible water storage tanks constructed of coated synthetic fabric, a product protected by the amendment.

We found that TROSCOM had not complied with DOD's regulations for implementing the Berry Amendment restriction on these two contracts. As a result, award decisions were not based on a preference for domestic sources, as required by the amendment. When we brought this matter to TROSCOM's attention, the Command immediately responded with a series of actions designed to ensure its full compliance with DOD's regulations. Further, the Army Materiel Command (AMC), TROSCOM's parent command, has evaluated available guidance and plans to propose changes to DOD regulations that will aid buying commands in implementing the amendment in the future.

Background

Under the 1987 DOD Appropriations Act, the Berry Amendment requires agencies to purchase certain products from U.S. producers. The Berry Amendment provides in part that none of the 1987 DOD appropriation may be used for the procurement of any article made of synthetic fabric or coated synthetic fabric (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles) not grown, reprocessed, reused, or produced in the United States or its possessions. The amendment includes an exception that permits the Secretary of a department to waive this restriction if it is determined that satisfactory quality and sufficient quantity of an item cannot be procured, as and when needed, at U.S. market prices.

Essentially the same language can be found in the DOD appropriation acts for the years relevant to the contracts you asked us to review. Protection for synthetic fabric and coated synthetic fabric has been included in every DOD appropriation act since fiscal year 1968.

TROSCOM Has Not Complied With DOD Regulations Implementing the Berry Amendment

The focus of our review was to determine if TROSCOM was following DOD's regulations for implementing the Berry Amendment on two contracts for collapsible water tanks. These contracts, identified by numbers DAAJ10-84-C-A226 and DAAJ10-85-C-A119, were awarded for \$1,378,620 and \$1,140,384, respectively. The first contract was for the purchase of 50,000-gallon collapsible pillow-type drinking water tanks, while the second was for the purchase of 3,000-gallon collapsible water storage tanks, often referred to as "onion" tanks.

We found that TROSCOM had not followed DOD's regulations for implementing the Berry Amendment on either purchase. The current DOD Federal Acquisition Regulation Supplement (along with the earlier applicable versions of defense regulations) requires that all solicitations for products covered by the Berry Amendment include a clause notifying bidders or offerors that a restriction on the use of foreign supplies exists. The restriction applied to the two contracts we reviewed because they involved the purchase of tanks constructed of coated synthetic fabric and were over \$10,000 in amount. However, we found that TROSCOM officials had failed to include the appropriate clause, as required. TROSCOM officials attribute this omission to inadvertence rather than design. As a result, awards were made to the lowest responsible bidders/offerors without considering (1) whether both the fabric and the end item were to be produced domestically and (2) whether a waiver of the amendment would be appropriate if this first condition was not met.

After we brought the lack of compliance with DOD guidance on the Berry Amendment to its attention, TROSCOM took immediate action to (1) identify other contracts that might be affected, (2) resolve the potential non-compliance with the Berry Amendment, and (3) issue local guidance for implementing the Berry Amendment on future procurements.

TROSCOM advised us that its review of all active contracts disclosed no other instances of products that were made of coated synthetic fabric being procured from foreign sources. TROSCOM said that all deliveries under the tank contract awarded in fiscal year 1984 have been made. Accordingly, no further action on this contract is considered warranted.

The fiscal year 1985 tank contract is currently being performed. Because deliveries under this contract are considered urgent, TROSCOM's Director of Procurement and Production requested a post-award waiver of the Berry Amendment from the Deputy Assistant Secretary of the Army (Acquisition). The waiver request was still under review at the time we completed our work.

To ensure compliance on future awards, the Chief, Policy and Management Division, TROSCOM, issued implementing guidance to all TROSCOM contracting personnel. This guidance details TROSCOM procedures for ensuring that the required contract clause, "Preference for Domestic Commodities," is inserted in all solicitations over \$10,000. We verified that this guidance was followed on a recent solicitation for the purchase of 3,000-gallon water storage tanks, which are similar to those procured in fiscal year 1985.

AMC Proposing Changes to DOD's Regulations

As a result of TROSCOM's review, questions have been raised at AMC concerning the utility of existing guidance for implementing the Berry Amendment. Specifically, AMC's Assistant Deputy Chief of Staff for Procurement is concerned that while the DOD regulation wording is consistent with the Berry Amendment language, buyers unfamiliar with the legislative intent could interpret the regulation differently. AMC also believes that guidance specifically directed at synthetic fabric is needed to clarify and ensure consistent compliance with DOD policy.

AMC officials told us that they plan to request that DOD's Federal Acquisition Regulatory Council address this matter and provide any additional guidance determined to be necessary. To facilitate DOD's review, AMC will provide a "case" based on the Army's experience in dealing with the amendment.

Conclusion

TROSCOM did not follow DOD's regulations for implementing the Berry Amendment on the two contracts we reviewed. When advised that DOD's regulations were not being followed on purchases of coated synthetic fabric products, TROSCOM took immediate corrective action to ensure Command-wide compliance. Further, AMC officials are working to resolve the problems they have identified in interpreting the Berry Amendment. Accordingly, we are making no recommendations.

Objective, Scope, and Methodology

Our objective was to assess whether DOD's regulations for implementing the Berry Amendment were followed by TROSCOM on two contract awards. To determine what actions were required, we reviewed (1) the legal provisions in effect at the time of the awards, (2) the legislative history of the amendment, (3) all applicable Comptroller General decisions, and (4) applicable court cases. We also reviewed existing guidance in the Federal Acquisition Regulation, its Defense Supplement, and earlier applicable defense regulations. We found no further guidance in either the AMC or TROSCOM supplements to the Federal Acquisition Regulation.

At TROSCOM, St. Louis, Missouri, we reviewed the available files on the two contract awards and interviewed responsible command officials. Once we established that DOD's regulations were not being followed, we visited TROSCOM again to determine the scope of the problem and the status of corrective actions initiated by the Command. We also met with officials at AMC, Alexandria, Virginia, and the Office of the Secretary of Defense to apprise them of our findings at TROSCOM and to obtain their views on how the amendment should be interpreted.

We performed our review from February to July 1987 in accordance with generally accepted government auditing standards.

We discussed the issues in this report with Army officials and have incorporated their comments, where appropriate. As requested by your office, we did not obtain official agency comments.

We are sending copies of this report to the Chairmen, Senate Committee on Governmental Affairs, House Committee on Government Operations, and Senate and House Committees on Appropriations and on Armed Services, and to the Secretaries of Defense and Army. Copies will be made available to others on request.

Sincerely yours,



Henry W. Connor
Senior Associate Director

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