

GAO

Report to the Committee on Armed
Services, House of Representatives

September 2005

**DEFENSE
PROCUREMENT**

**Air Force Did Not
Fully Evaluate
Options in Waiving
Berry Amendment for
Selected Aircraft**





Highlights of [GAO-05-957](#), a report to the Committee on Armed Services, House of Representatives

Why GAO Did This Study

In April 2004, the Secretary of the Air Force approved a permanent waiver of the requirements of the Berry Amendment for 23 commercial derivative aircraft systems, representing more than 1,200 aircraft in the Air Force's inventory. The Berry Amendment generally requires the Department of Defense (DOD) to purchase certain domestically grown or produced items, including specialty metals used in defense systems such as aircraft. Waivers to the Berry Amendment can be granted under certain circumstances. GAO was asked to evaluate the supporting evidence and analysis that the Air Force relied on to waive the Berry Amendment. GAO did not conduct a legal analysis of the waiver.

What GAO Recommends

GAO recommends that the Department of Defense direct the Air Force to (1) conduct an analysis of each commercial derivative aircraft system in the waiver to consider opportunities to achieve compliance with the Berry Amendment requirements or document why such compliance is not possible and (2) assess, on a periodic basis, whether changes have occurred in the supplier base for each aircraft system in the waiver that would provide opportunities to procure domestically produced items as required by the Berry Amendment. DOD and the Air Force agreed with both of GAO's recommendations.

www.gao.gov/cgi-bin/getrpt?GAO-05-957.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Ann Calvaresi-Barr at (202) 512-4841 or calvaresibarra@gao.gov.

DEFENSE PROCUREMENT

Air Force Did Not Fully Evaluate Options in Waiving Berry Amendment for Selected Aircraft

What GAO Found

The Air Force did not follow established policy when evaluating the need for a waiver of the Berry Amendment for 23 commercial derivative aircraft systems. Specifically, the Air Force did not thoroughly analyze the opportunities for compliance with the Berry Amendment on a system-by-system basis, thereby diminishing the persuasiveness of the waiver's support.

The Air Force's review of its compliance with the Berry Amendment regarding these systems began in early 2003 when it became aware that some aircraft manufacturers could not meet the Berry Amendment requirements. Faced with this problem, a senior Air Force acquisition official visited an aircraft manufacturer, two of its subcontractors (including a titanium producer), and an engine manufacturer. The Air Force's conclusion, based on these visits and knowledge of the aerospace industry, was that other contractors involved in the Air Force's acquisition and support of commercial derivative aircraft systems would also have difficulty complying with the Berry Amendment. In September 2003, the Secretary of the Air Force signed a temporary waiver that was initiated at the headquarters level and covered 19 systems. That was followed in April 2004 with a permanent waiver of the Berry Amendment for these 19 systems plus another 4.

Air Force policy calls for certain actions before issuing a waiver, including conducting market research and conducting an analysis of what alternatives are available and why they are not acceptable. In this instance, the Air Force did not conduct market research for each system, as it believed no company could produce compliant parts—a position not explained in the waiver's supporting documents. The Air Force documented an analysis of alternatives for only 1 aircraft system in the waiver. Memos representing 18 other aircraft systems state that alternatives to the waiver had been considered and rejected as not feasible but did not identify what the alternatives were, while memos for 3 additional aircraft systems make no reference to whether alternatives had been considered. The Air Force provided no documentation about its analysis of alternatives for the 1 remaining aircraft system in the waiver. After discussions with representatives for all 23 aircraft systems, GAO concluded that the Air Force did not document alternatives or thoroughly review possible options to achieve compliance with the Berry Amendment for many of the aircraft systems.

GAO has identified several instances that highlight the Air Force's lack of thoroughness in its waiver process for the 23 aircraft systems. For example, the Air Force did not question contractors' inability to provide compliant spare parts when they were military unique and therefore not the same as the parts used in commercial aircraft. Also, the Air Force included some aircraft systems in the waiver that were already covered under other regulatory exceptions to the Berry Amendment.

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Abbreviations

AWACS	Airborne Warning and Control System
DFARS	Defense Federal Acquisition Regulation Supplement
DOD	Department of Defense
FAR	Federal Acquisition Regulation

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United States Government Accountability Office
Washington, DC 20548

September 23, 2005

The Honorable Duncan L. Hunter
Chairman
The Honorable Ike Skelton
Ranking Minority Member
Committee on Armed Services
House of Representatives

Congress enacted the Berry Amendment in 1941 to maintain a healthy industrial base and encourage domestic production of items deemed essential to meet defense needs. It generally requires the Department of Defense (DOD) to purchase certain domestically grown or produced items, including food, clothing, fabrics, and specialty metals such as titanium and titanium alloys, but allows a waiver of these requirements when goods cannot be found in satisfactory quality or sufficient quantity at U.S. market prices.¹ Citing this provision, in April 2004 the Secretary of the Air Force permanently waived the Berry Amendment for the purchase and support of 23 commercial derivative aircraft systems—representing over 1,200 aircraft in the Air Force inventory.² These are commercial aircraft, modified for military use, that provide support for critical mission areas such as cargo and passenger airlift, medical evacuations, aerial refueling, VIP transport, embassy support, surveillance, counterdrug enforcement, and pilot training.³ Appendix I provides information on the 23 aircraft systems included in the April 2004 waiver.

Because of the broad and permanent nature of the waiver, you asked us to evaluate the supporting evidence and analysis that the Air Force relied on to waive the Berry Amendment for certain commercial derivative aircraft systems in its inventory. In response, this report evaluates the process the Air Force followed as well as its rationale for waiving the Berry

¹A waiver refers to a domestic nonavailability determination made under the Berry Amendment.

²Specifically, the waiver applies to (1) future aircraft deliveries under contract as of the April 2004 waiver and (2) current and future support contracts for replenishment spare parts and aircraft modifications.

³For example, the VC-25, or Air Force One, is a commercial Boeing 747 that has been modified for use by the U.S. government.

Amendment for these aircraft. Our review focused on the Air Force's adherence to DOD and Air Force policy. We did not conduct a legal analysis of the waiver.

In evaluating the Air Force's process and rationale for waiving the Berry Amendment, we reviewed the statute, regulations, and DOD and Air Force policies that implement the Berry Amendment and provide guidance for the waiver process. In addition, we analyzed documentation and conducted interviews with senior Air Force acquisition officials as well as Air Force officials in the field for each aircraft system on the waiver. We also interviewed officials from the Office of the Secretary of Defense, the Defense Logistics Agency, the Defense Contract Management Agency, and the Department of Commerce to identify any additional guidance for issuing a Berry Amendment waiver and to understand each organization's role in the Air Force's waiver, if any. Finally, we conducted interviews and site visits with representatives from three companies, accounting for 17 out of the 23 aircraft systems in the waiver, to better understand the information provided to the Air Force about the companies' difficulty in complying with the Berry Amendment. We did not address whether the waiver was legally valid, that is, whether the waiver was a proper exercise of discretion by the Secretary of the Air Force under the Berry Amendment.

We performed our review from October 2004 to September 2005 in accordance with generally accepted government auditing standards.

Results in Brief

The Air Force did not follow established policy when it evaluated the need for a broad, permanent waiver of the Berry Amendment for 23 commercial derivative aircraft systems, in that it did not thoroughly analyze the opportunities for compliance on a system-by-system basis. The Air Force initiated the waiver at the headquarters level after it became aware in mid-2003 that many of its contracts lacked the required contract clause to implement the Berry Amendment specialty metals provision and that contractors were citing difficulty in complying with this requirement. In evaluating the need for the waiver, the Air Force did not conduct market research as called for in its policy, thoroughly review alternatives, or include an explanation as to why it believed that alternatives did not exist for each of the systems in the waiver. Instead, Air Force officials stated that they did not consider it necessary to conduct market research for each system or believe that compliant alternatives existed based on their knowledge of the aerospace industry. We identified several instances that highlight the Air Force's lack of thoroughness, such as not assessing

possible compliant options. In addition, the Air Force did not recognize that some systems were already covered under regulatory exceptions to the Berry Amendment, further illustrating the Air Force's lack of thorough analysis.

On the basis of these findings, we recommend that DOD direct the Air Force to thoroughly analyze opportunities to achieve compliance for each system in the waiver and periodically assess changes in the supplier base to see whether new opportunities for compliance with the Berry Amendment have become available. In comments on the draft report, DOD concurred with our recommendations and the Air Force agreed to implement them.

Background

The Berry Amendment generally prohibits DOD from using appropriated or other available funds for the procurement of certain items that have not been grown, reprocessed, reused, or produced in the United States. Enacted in a 1941 defense appropriations act, the restriction initially ensured that American troops wore uniforms and ate food grown or produced in the United States. For more than 50 years, the Berry Amendment consistently appeared in annual appropriations acts. The scope of the restriction has changed over time to include additional items and exceptions. The current version, codified in 2001, restricts DOD purchases of food, clothing, certain fabrics, specialty metals, and certain tools.⁴

The specialty metals requirement was added to the Berry Amendment in 1972. DOD implemented the specialty metals requirement by applying it to all contracts where the specialty metal is purchased directly by the government or the prime contractor and to all subcontract tiers for six major classes of programs—aircraft, missiles, ships, tank-automotive, weapons, and ammunition.⁵ For these programs, the prime contractor

⁴The complete list of items appears at 10 U.S.C. § 2533a(b)(1)-(3) and includes: (1) An article or item of (A) food; (B) clothing; (C) tents, 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) Specialty metals, including stainless steel flatware. (3) Hand or measuring tools.

⁵DOD chose these six classes of programs because they accounted for the most specialty metals procured by or for DOD based on 1972 materials estimates.

must include a clause that requires all subcontractors to comply with the Berry Amendment's specialty metals requirement. In addition, the Defense Federal Acquisition Regulation Supplement (DFARS) identifies those metals considered to be specialty metals, to include titanium, certain types of steel, and other assorted metals and alloys.⁶ In 1996, Congress made clear that the Berry Amendment does apply to all commercial item purchases.⁷

The Berry Amendment includes a number of exceptions to the requirement to buy certain domestically produced articles. For example, the requirement 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 an item cannot be procured as and when needed at U.S. market prices. Since May 2001, DOD policy specifies that the authority to approve a Berry Amendment waiver is not delegable below the Secretarial level, and the waiver is to include an analysis of alternatives and a certification as to why such alternatives are unacceptable.⁸ Additional exceptions to the Berry Amendment are allowed for items already determined to be unavailable in the United States⁹ and specialty metals purchased from a qualifying country, i.e., one that has signed a memorandum of understanding with the United States.¹⁰

The Berry Amendment does not include explicit criteria to be used or requirements to be met to support and document a waiver.¹¹ The Air

⁶DFARS 252.225-7014.

⁷See 10 U.S.C. § 2533a(i).

⁸The DFARS has recently been amended to reflect this requirement. See 70 Fed. Reg. 43073–43074 (July 26, 2005). The revision also requires that the congressional defense committees be notified at least 10 days before the award of a contract for titanium or titanium products involving a waiver. This reflects the requirements of an October 22, 2004, memorandum from the Under Secretary of Defense for Acquisition, Technology, and Logistics that was issued after the April 2004 Air Force waiver.

⁹DFARS 225.7002-2(c).

¹⁰Specifically, the Berry Amendment includes an exception for the procurement of specialty metals outside the United States if such a procurement is necessary 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. See 10 U.S.C. § 2533a(e)(1)(B), which is implemented in DFARS 225.7002-2(n).

¹¹The implementing regulation, DFARS 225.7002, was revised in July 2005 to provide direction on delegation, analysis of alternatives, and congressional notification.

Force's internal policy, the Air Force Federal Acquisition Regulation Supplement, provides instruction as to what information the Air Force decision makers would generally expect to be provided if asked to approve a Berry Amendment waiver.¹² The Air Force policy calls for the contracting officer to conduct market research to determine if an article or suitable substitute is available from a domestic source. If the article or substitute is not available, the contracting officer contacts Air Force headquarters, which in turn confers with the Department of Commerce (Commerce) to request a list of possible domestic sources. If Air Force headquarters notifies the contracting officer that domestic sources have not been identified by Commerce, Air Force policy then specifies that the contracting officer shall submit a determination and finding in a specified format for the Secretary of the Air Force's approval. This format is to describe

- the market research performed,
- any alternatives/substitutes considered and why these alternatives/substitutes are not satisfactory,
- the total estimated cost of the item(s) being acquired,
- the circumstances precluding the buying of a domestic end item, and
- the impact if the waiver is not approved.

Air Force Waiver Lacked Thorough Analysis

The Air Force did not conduct a thorough analysis of opportunities for compliance with the Berry Amendment on a system-by-system basis in approving a broad, permanent waiver covering 23 commercial derivative aircraft systems. The Air Force initiated the waiver at the headquarters level after it became aware of problems with implementing the Berry Amendment. In supporting the waiver, the Air Force did not conduct market research as called for in its policy, thoroughly review alternatives, or include an explanation as to why it believed that alternatives did not exist for each of the systems in the waiver. We identified several instances that highlight the Air Force's lack of thoroughness in its analysis to support the waiver.

¹²Air Force Federal Acquisition Regulation Supplement 5325.7002-2 and its related Mandatory Procedure 5325.7002-2.

Air Force initiated waiver after identifying problems with Berry Amendment implementation

According to a senior Air Force official, the Deputy Assistant Secretary (Contracting) and several Air Force officials met with titanium industry representatives in November 2002 to discuss their concerns that some aircraft manufacturers were not meeting the Berry Amendment requirement for domestic specialty metals. Subsequently, the Air Force formed an Integrated Product Team in March 2003 to study the history and requirements of the Berry Amendment's specialty metals provision and to review the Air Force's compliance. This team conducted a review of Air Force Materiel Command contracts and uncovered a number of contracts that lacked the clause that implements the Berry Amendment. The Air Force buying commands attempted to negotiate with contractors to add the required contract clause to those contracts. However, many commercial derivative aircraft contractors refused to accept the specialty metals provision that would require all contracts and subcontracts related to aircraft programs to be compliant with the Berry Amendment. In the summer of 2003, the Air Force official who led the waiver effort told us he visited an aircraft manufacturer, two of its subcontractors (including a titanium producer), and an engine manufacturer to evaluate the difficulty of complying with the Berry Amendment specialty metals requirement. Following these visits, the Air Force official concluded that other contractors involved in the Air Force's acquisition and support of commercial derivative aircraft systems would also have difficulty complying with the Berry Amendment.

According to Air Force officials, they initiated the waiver process at the headquarters level instead of following the established procedure of receiving individual requests from field contracting officers involved in acquiring or supporting these systems. Officials stated that this method was intended to ensure a consistent and comprehensive approach to supporting the waiver. Air Force headquarters collected supporting documentation that included letters from contractors and memos from the military users of commercial derivative aircraft systems. These companies indicated it would be "commercially impracticable" or otherwise not possible to comply with the Berry Amendment. In addition, memos from representatives of the military users of the aircraft indicated that the alternatives presented to them were not feasible.

In September 2003, the Secretary of the Air Force signed a temporary Berry Amendment waiver, effective through April 1, 2004, which covered future aircraft deliveries under current acquisition contracts, as well as current and future support contracts, for 19 commercial derivative aircraft systems. In doing so, the Secretary of the Air Force made several findings, including the following:

-
- Contractors stated they could not comply with the Berry Amendment’s specialty metals restriction “without substantial changes to their manufacturing and supplier management processes,” which would “cause substantial, largely unquantifiable, cost and schedule impacts.”
 - Pursuing Berry Amendment compliance could make contractors’ commercial products less competitive in the worldwide market.
 - The systems at issue are produced on the same production lines used to support the commercial marketplace and generally comprise a minute portion of the contractors’ overall commercial business.
 - Several contractors informed the Air Force they would no longer accept contracts if the provisions implementing the Berry Amendment were included.

On the basis of these findings, the Secretary of the Air Force determined compliant commodities for certain commercial derivative aircraft systems could not be acquired as and when needed in satisfactory quality and sufficient quantity at U.S. market prices, the waiver was needed to sustain ongoing operations of these systems and avoid major mission impacts, and the waiver would be of limited duration while Congress considered changes to the Berry Amendment in the fiscal year 2004 legislative cycle. However, these legislative changes did not occur, and in April 2004 the Secretary signed a permanent waiver that covered 23 commercial derivative aircraft systems—which included 4 additional systems—exempting all of them from the Berry Amendment requirements. The permanent waiver relied on the same findings as the temporary waiver.

Air Force Analysis Lacked Market Research and a Thorough Review of Alternatives

The Air Force policy identifies the need to conduct market research prior to proceeding with a Berry Amendment waiver. According to the policy, the Air Force is to request a list of possible domestic sources from the Department of Commerce and draft a market research report indicating what companies were contacted. The Air Force acquisition official who drafted the policy told us that market research also includes advertising in official government sources for contracting opportunities. Officials from Commerce’s Bureau of Industry and Security and International Trade Administration informed us that there was no record of the Air Force requesting Commerce’s assistance in identifying domestic sources for the support of commercial derivative aircraft on the waiver.

While this waiver encompasses 23 different aircraft systems and certain related acquisition and support contracts, the Air Force did not conduct market research on each system included in the waiver. A senior Air Force acquisition official told us that it was unnecessary to conduct market

research for each system because Air Force officials were knowledgeable about the aerospace industry and did not need to contact the Department of Commerce for assistance. Another senior official who led the waiver effort indicated that the original aircraft manufacturer owned the technical data rights and, in some cases, was the primary supplier of these spare parts. Therefore, this official believed that in some instances it would be difficult and costly to purchase technical data rights so suppliers other than the original aircraft manufacturer and its subcontractors could produce the parts. Moreover, this same Air Force official became convinced that no company could provide compliant spare parts after site visits to an aircraft manufacturer, which accounted for 11 systems in the waiver, and two of its suppliers (including a titanium producer) as well as an engine manufacturer. However, these findings were not documented in the waiver.

DOD and Air Force policies also specify the need to identify alternatives and explain why such alternatives are unacceptable. In May 2001, the Deputy Secretary of Defense directed that each military department's Secretary ensure that alternatives that do not require a waiver under the Berry Amendment are presented to the relevant military users before requesting a waiver. The military users must certify in writing why such alternatives are unacceptable before the Secretary may approve a waiver. The Air Force policy calls for similar information.

To address DOD and Air Force policy requirements, the Air Force included 13 memos from military user representatives in the waiver's supporting documentation, representing 22 of the 23 aircraft systems on the waiver. As specified in Air Force policy, most of these memos address the impact on the system if the waiver is not approved and state that the compliant alternatives had been considered. Specifically, memos representing 18 aircraft systems state that they had considered compliant alternatives and rejected them as not feasible, without stating what those alternatives were. Memos for 3 aircraft systems make no reference to whether alternatives had been considered. Only 1 memo representing a single aircraft system contains an assessment of a potential alternative and the delay it would cause to the aircraft's mission if selected, although other Air Force documentation indicated that the alternative would not satisfy the Berry Amendment requirement. Though most of the memos state that alternatives had been considered, we found that in several instances military users and their representatives who prepared the memos were not presented with alternatives. A senior Air Force official who led the waiver effort acknowledged that the military users' memos

contain boilerplate language about the consideration and rejection of alternatives that would be compliant with the Berry Amendment.

Air Force program management officials, contracting officers, military users, and a senior acquisition official told us that the Air Force did not identify and pursue compliant alternatives because they did not believe there were any available. For example, in many instances, contracting officers and program managers stated that the only realistic option was to pursue a Berry Amendment waiver. However, the waiver documentation lacked an explanation as to why the Air Force did not believe any alternatives were available.

Air Force Did Not Consider Possible Compliant Options

The Air Force missed opportunities to assess possible compliant options. For instance, the Air Force and Boeing have entered into a contract, referred to as the Rights Guard agreement, that could allow the Air Force to order technical data for military derivatives of the Boeing 707, 727, 737, and 747 commercial aircraft and to use that data to facilitate the competitive procurement of replenishment spare parts.¹³ This contract was in effect at the time the waiver was being considered and covered 8 of the 23 systems on the waiver, representing 636 (or 51 percent) of the commercial derivative aircraft in the waiver. The senior Air Force official who led the waiver effort, and a field contracting official who oversaw support contracts for almost 90 percent of the aircraft on the Rights Guard agreement, told us they did not consider this contract as a means to acquire parts that would be compliant with the Berry Amendment. Further, this senior acquisition official was unaware that the contract applied to several Boeing models included in the waiver. While this contract would not have resolved the compliance issues for all of the aircraft systems listed on the waiver, this official acknowledged it might have allowed the Air Force to achieve compliance for a limited number of spare parts procurements for certain systems.

The Air Force also did not question the contractors' inability to be compliant on military unique spare parts. For example, we previously reported on the Air Force award of a \$7.9 million contract to Boeing in September 2003 for 24 engine cowlings used on the E-3 Airborne Warning

¹³There have been versions of this contract in place since the early 1970s. The Air Force and Boeing are negotiating a new version of this contract, as the current contract will expire on September 30, 2005.

and Control System (AWACS), a Boeing 707 aircraft modified for military use.¹⁴ These engine cowlings were similar to those used on the commercial 707, but were modified to meet military requirements. Boeing proposed to manufacture these engine cowlings rather than subcontracting the work as it did in the original E-3 AWACS production contracts. This required the company to include in its contract proposal the cost of acquiring production equipment to manufacture these parts. The temporary waiver of the Berry Amendment that included the E-3 AWACS was issued at the same time that the Air Force awarded the engine cowlings contract. However, it did not question Boeing's inability to produce compliant cowlings in-house. The waiver documentation did not include any discussion or other indication that the Air Force questioned company assertions that it could not meet Berry requirements, specifically for military unique items.

In addition, the Air Force did not fully evaluate the cost of bringing contractors into compliance. Although one company's representatives said that compliance would be costly, the Air Force did not validate what the actual costs would be and did not assess whether the cost of complying would be similar for the other manufacturers of commercial derivative aircraft. For example, Gulfstream officials said that they performed a high-level review—which was provided to Air Force contracting officers—that showed that about 0.2 percent of the total value of aircraft parts on the C-37A originates in countries not exempt from the Berry Amendment. However, the Air Force did not validate this estimate or determine the cost or effort necessary for Gulfstream or any other similarly situated contractor to achieve compliance.

Finally, the Air Force did not consider its leverage as the primary customer of the T-6 aircraft, given that the U.S. government accounts for 364 out of 435 aircraft ordered as of August 2005, with planned purchases of an additional 782 aircraft through 2015.¹⁵ The Air Force will also need to purchase spare parts for the life of the aircraft system. According to Raytheon, the company selects and establishes a supplier base during the design, development, and testing of its commercial aircraft, resulting in

¹⁴GAO, *Contract Management: The Air Force Should Improve How It Purchases AWACS Spare Parts*, [GAO-05-169](#), (Washington, D.C.: Feb. 15, 2005).

¹⁵The T-6 Joint Primary Aircraft Training System is a joint program of the Air Force and the Navy. The Air Force is responsible for administering the production contracts for this aircraft.

suppliers being certified by the Federal Aviation Administration. However, the Air Force did not ask Raytheon what steps it would need to take and what costs would be involved in complying with the Berry Amendment requirement.

Air Force Did Not Recognize Some Systems Were Already Covered under Other Regulatory Exceptions

By not conducting a system-by-system review, the Air Force was unaware that some systems were already covered under other regulatory exceptions to the Berry Amendment. For example, one of the exceptions allows specialty metals to be procured from a qualifying country. The TG-15 support contract was already exempt from the Berry Amendment specialty metal restriction because this training glider was manufactured in Germany, a qualifying country. In another example, the senior Air Force officials were not aware that the TG-10 and TG-14 support contracts were already covered under the regulatory exception for certain foreign manufactured equipment. This exception allows DOD to purchase spare and replacement parts for foreign manufactured equipment when domestic parts are deemed unavailable.¹⁶ Air Force contracting officials in the field previously determined that spare parts for these two training gliders were unavailable domestically, as these aircraft are manufactured in the Czech Republic and Brazil. The support contract for these systems was modified to cite this exception 6 months before they were added to the permanent waiver.

Air Force officials did not consider any of these other regulatory exceptions prior to including these training gliders in the waiver. Only after we identified that these training gliders were already exempted did the acquisition officials consult with contracting officials at Oklahoma City Air Logistics Center—those responsible for managing the support contract—to determine whether these exceptions had ever been considered. Had the Air Force done so before finalizing the permanent waiver, it may have discovered that these training gliders were already covered through other regulatory exceptions. This illustrates the Air Force's lack of thoroughness by not coordinating the waiver with all of the appropriate contracting officials in the field.

Conclusions

The Berry Amendment was enacted to strengthen the industrial base to ensure that it could produce essential items for defense purposes.

¹⁶FAR 25.104(a).

Although the Department of Defense relies on commercial products to satisfy some of its military requirements, it remains responsible for assessing opportunities to satisfy the requirements of the Berry Amendment. The Air Force's failure to follow established policies and its decision to combine 23 aircraft systems in one waiver diminished the persuasiveness of the waiver's support. By not thoroughly analyzing each system on the waiver, the Air Force treated all systems as if they had the same compliance problems, when in fact several of the systems had unique circumstances that should have been considered and documented before approving a waiver. Additionally, the Air Force did not fully document its position on the lack of alternatives and has limited the possibility of future review concerning these systems through the execution of a permanent waiver.

Recommendation for Executive Action

Because the Air Force did not thoroughly analyze each system on the waiver or fully document its position on the lack of alternatives, we are making two recommendations to DOD so that it can improve the waiver's support or modify it as necessary. Specifically, we recommend that the Secretary of Defense direct the Secretary of the Air Force to take the following two actions:

- Conduct an analysis of each commercial derivative aircraft system included in the waiver to consider opportunities to achieve compliance with the Berry Amendment requirements or to document why such compliance is not possible. This should include
 - conducting market research, including consultation with the Department of Commerce, and
 - assessing alternatives such as obtaining technical data rights to manufacture compliant parts, identifying compliant suppliers for military unique parts, determining the cost or effort for bringing contractors into compliance, and considering if systems are already exempted under other regulatory exceptions.
- Assess, on a periodic basis, whether changes have occurred in the supplier base for each aircraft system included in the waiver that would provide opportunities to procure domestically produced items as required by the Berry Amendment.

Agency Comments and Our Evaluation

In written comments on a draft of this report, DOD concurred with both of our recommendations. In response, DOD will direct the Air Force to conduct an analysis of each commercial derivative aircraft system

included in the Berry Amendment waiver and to periodically assess whether changes have occurred in the supplier base that would provide opportunities to procure domestically produced items. In addition, DOD provided comments from the Air Force, which indicated the Air Force's concurrence with our recommendations and its intent to develop a plan to review the current waiver and rescind or modify it as appropriate. DOD and Air Force responses are reprinted in appendix II. We incorporated the Air Force's technical comments in the report as appropriate.

In its general comments, the Air Force stated that the waiver is reasonable and necessary and that the draft report fails to acknowledge the circumstances and rationale that compelled it to execute the waiver. The Air Force also indicated that the report did not clearly articulate the scope of the current waiver, which covers future spare parts purchases, but does not include future aircraft purchases.

While the Air Force stated that the waiver is reasonable and necessary, our report shows that the Air Force did not follow established policy when it did not thoroughly analyze the opportunities for compliance on a system-by-system basis. Had it conducted market research and thoroughly reviewed alternatives for each system on the waiver, the Air Force could have strengthened the persuasiveness of the waiver's support. We are encouraged that the Air Force has concurred with our recommendation to reevaluate the support for each of the systems on the waiver.

The Air Force also stated that our report did not acknowledge the circumstances and rationale for the waiver. We disagree with this assertion. Our first finding discusses at length the reasons the Air Force considered a waiver necessary and outlines the waiver's rationale based on the Air Force's supporting documentation. While we agree that it was necessary for the Air Force to promptly address Berry Amendment compliance issues, this should not have precluded the Air Force from conducting a thorough analysis on how to achieve compliance on a system-by-system basis, especially during the 6-month period that the temporary waiver was in force.

In addition, the Air Force indicated that the report did not clearly articulate the scope of the current waiver. Although the draft report correctly described the scope of the waiver, we made changes throughout the report to specify and emphasize that the scope of the waiver covers future aircraft deliveries under current acquisition contracts and current and future support contracts. The waiver does not apply to commercial

derivative aircraft systems not listed on the waiver or future contracts for systems on the waiver entered into after the waiver's effective date.

We are sending copies of this report to the Honorable Donald H. Rumsfeld, Secretary of Defense; the Honorable Preston M. Geren, Acting Secretary of the Air Force; and interested congressional committees. We will also provide copies to others on request. In addition, the report will be available at no charge on GAO's Web site at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-4841 or calvaresibarra@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made major contributions to this report are listed in appendix III.

A handwritten signature in black ink that reads "Ann Calvaresi-Barr". The signature is written in a cursive style with a large initial "A" and "C".

Ann Calvaresi-Barr, Director
Acquisition and Sourcing Management

Appendix I: Commercial Derivative Aircraft Included in the Air Force Waiver

Table 1: Commercial Derivative Aircraft Included in the Air Force’s Permanent Waiver

Aircraft designation	Original equipment manufacturer	Derived from	Mission	Air Force inventory
C-9A/C Nightingale	Boeing (McDonnell Douglas)	DC-9	Transportation for Vice President, First Lady, and other senior officials	7
C-12C/D/F/J Huron	Raytheon Aircraft (Beech)	Beechcraft Super King Air (C-12C/D/F) Beechcraft King Air (C-12J)	Military airlift, embassy support	28
C-20B/H	Gulfstream Aerospace	Gulfstream III and IV	Transportation for President, Vice President, and other senior officials	10
C-21A	Bombardier Aerospace (Learjet)	Learjet 35A business jet	Short-range cargo and passenger airlift, including medical evacuations	76
C-26B Metroliner	M7 Aerospace (Fairchild Aircraft)	Fairchild Metro 23	Counterdrug enforcement	11
C-32A Air Force Two	Boeing	Boeing 757-200	Transportation for Vice President and other senior officials	4
C-37A	Gulfstream Aerospace	Gulfstream V	Transportation for Vice President and other senior officials	9
C-38A	Gulfstream Aerospace (Israel Aircraft Industries-Galaxy Aerospace)	Astra SPX business jet	Transportation for distinguished visitors, medical evacuations, counter-drug efforts, and combat and disaster assistance	2
C-40B/C	Boeing	Boeing 737-700	Transportation for combatant commanders-in-chief and other senior officials	7
C-135 all variants	Boeing	Boeing 367-80 (707 prototype)	KC-135 provides aerial refueling; other variants perform specialized missions	567
CFM-56-2b (F108) Engine	CFM International	CFM-56-2a engine	Commercial engine used on KC-135R, RC-135, E-6, and C-40	1,853
E-3 Sentry (Airborne Warning and Control System, AWACS)	Boeing	Boeing 707-320C	Airborne surveillance, command, control, and communications system	33
E-4B (National Airborne Operations Center, NAOC)	Boeing	Boeing 747-200	Airborne command, control, and communications center for President, Secretary of Defense	4
E-6 Mercury (Take Charge and Move Out, TACAMO)	Boeing	Boeing 707-320B	Airborne command post for fleet ballistic missile submarines	0 ^a
E-8C (Joint Surveillance Target Attack Radar System, JSTARS)	Boeing (airframe) Northrop Grumman (electronics modifications)	Boeing 707-300	Provides real-time surveillance and targeting information	15
KC-10A Extender	Boeing (McDonnell Douglas)	Boeing DC-10	Aerial refueling, airlift support	59

**Appendix I: Commercial Derivative Aircraft
Included in the Air Force Waiver**

Aircraft designation	Original equipment manufacturer	Derived from	Mission	Air Force inventory
T-1A Jayhawk	Raytheon Aircraft (Beech)	Beech 400A	Advanced trainer for Air Force student pilots on airlift, bomber, or tanker aircraft	179
T-6A Texan II (Joint Primary Aircraft Training System, JPATS)	Raytheon Aircraft (Beech)	Beech/Pilatus PC-9 Mk II	Entry-level trainer for Air Force and Navy student pilots	180 ^b
T-43A	Boeing	Boeing 737-200	Trainer for navigators of strategic and tactical aircraft	8
TG-10B/C/D Merlin (B), Kestrel (C), Peregrine (D)	Letecke Zavody Aircraft Corporation (Czech Republic)	Super Blanik L-23 (TG-10B) Blanik L-13AC (TG-10C) Blanik L-33 Solo (TG-10D)	Air Force Academy training gliders: Basic Soaring Trainer (TG-10B), Aerobatic & Spin Trainer (TG-10C), Cross-Country & Spin Trainer (TG-10D)	21
TG-14A Ximango	Grupo Aeromot Aircraft Corporation (Brazil)	AMT-200S Super Ximango	Air Force Academy cross-country training glider	14
TG-15A/B	Schempp-Hirth (Germany)	Duo Discus (TG-15A), Discus 2b (TG-15B)	Air Force Academy advanced cross-country training glider	5
VC-25A Air Force One	Boeing	Boeing 747-200B	Transportation for President	2

Source: GAO analysis.

^aThe Air Force was responsible for administering the contracts for this aircraft through January 2005. Currently it has no E-6 aircraft in its inventory. However, the Navy has 16.

^bThe Air Force and Navy plan future purchases of 454 aircraft and 328 aircraft respectively for a total of 782 aircraft through 2015.

Appendix II: Comments from the Department of Defense and the Air Force



ACQUISITION
TECHNOLOGY
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

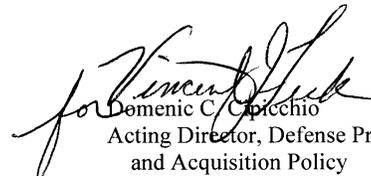
SEP 14 2005

Ms. Ann Calvaresi-Barr
Director, Acquisition and Sourcing Management
U.S. Government Accountability Office
441 G Street, N.W.
Washington, DC 20548

Dear Ms. Calvaresi-Barr:

This is the Department of Defense (DoD) response to the GAO draft report, "DEFENSE PROCUREMENT: Air Force Did Not Fully Evaluate Options in Waiving Berry Amendment for Selected Aircraft," dated August 15, 2005 (GAO Code 120390/GAO-05-957). Enclosed is my response to your recommendations which are listed on pages 11 and 12 of your report. Additionally, I have attached the Air Force's comments. My point of contact for this effort is Ms. Nancy Dowling, (703) 679-9352 or nancy.dowling@osd.mil.

Sincerely,


Domenic C. Capicchio
Acting Director, Defense Procurement
and Acquisition Policy

Enclosure:
As stated



Now on p. 12.

GAO Draft Report - Dated August 15, 2005
GAO Code 120390/GAO-05-957

**“DEFENSE PROCUREMENT: Air Force Did Not Fully Evaluate Options in Waiving
Berry Amendment for Selected Aircraft”**

Department Of Defense Comments to the Recommendations

RECOMMENDATION 1: The GAO recommended that the Secretary of Defense direct the Secretary of the Air Force to conduct an analysis of each commercial derivative aircraft system included in the Berry Amendment waiver in order to consider opportunities to achieve compliance with the Berry Amendment requirements or to document why such compliance is not possible. The analysis should include conducting market research and assessing alternatives such as: (1) obtaining technical data rights to manufacture compliant parts; (2) identifying compliant suppliers for military unique parts; (3) considering if systems are already exempted under other regulatory exceptions; and (4) determining the cost or effort for bringing contractors into compliance (pages 11 & 12/GAO Draft Report).

DOD RESPONSE: Concur. The Director, Defense Procurement & Acquisition Policy will direct the Air Force to conduct an analysis of each commercial derivative aircraft system included in the Berry Amendment waiver in order to consider opportunities to obtain specialty metals melted in the United States or to document why such an approach is not possible. This direction will be provided to the Air Force by October 31, 2005, and will request the Air Force to develop a plan to implement this recommendation.

RECOMMENDATION 2: The GAO recommended that the Secretary of Defense direct the Secretary of the Air Force to assess, on a periodic basis, whether changes have occurred in the supplier base for each aircraft system included in the Berry Amendment waiver that would provide opportunities to procure domestically produced items as required by the Berry Amendment. (page 12/GAO Draft Report).

DOD RESPONSE: Concur. The Director, Defense Procurement & Acquisition Policy will direct the Air Force to assess, on a periodic basis, whether changes have occurred in the supplier base for each aircraft system included in the Berry Amendment waiver that would provide opportunities to procure domestically produced items as required by the Berry Amendment. This direction will be provided to the Air Force by October 31, 2005 and will rely upon the Secretary of the Air Force to develop a plan to conduct periodic assessments.

Now on p. 12.



SECRETARY OF THE AIR FORCE
WASHINGTON

08 SEP 2005

MEMORANDUM FOR UNDER SECRETARY OF DEFENSE FOR ACQUISITION,
TECHNOLOGY AND LOGISTICS

SUBJECT: Air Force Response to Draft GAO Report GAO 05-907 (Berry Amendment
Waiver for Commercial Derivative Aircraft)

Your office asked the Air Force to review and comment on the subject draft audit report. The Air Force concurs with the GAO's recommendations. The Air Force will develop a plan to implement GAO's recommendations. That plan will include a review of the current waiver. If this review establishes that the waiver is inappropriate, in whole or in part, the Air Force will rescind or modify the waiver as appropriate. Further, the Air Force will periodically review all Berry Amendment waivers to ensure the appropriateness of the waivers.

We also take this opportunity to provide comments on the GAO report to clarify the record and to ensure an accurate understanding of the relevant facts. Those comments are attached.

A handwritten signature in black ink, appearing to read "Pete Geren", is positioned above the typed name.

Pete Geren
Acting Secretary of the Air Force

Attachment:
Air Force Response

Air Force Comments on Draft GAO Report GAO-05-957

General Comments

The Air Force appreciates the time and resources committed by GAO to review the April 6, 2004, Berry Amendment waiver for commercial derivative aircraft. The draft report, however, fails to acknowledge the critical circumstances and rationale that compelled the Air Force to execute a Berry Amendment waiver for commercial derivative aircraft.

In the fall of 2002, senior Air Force leaders discovered that the Air Force had awarded several contracts that did not comply with the Berry Amendment, and that aircraft were scheduled for future delivery under those contracts. The Air Force was advised that taking delivery of these aircraft, absent compliance with or a waiver of the Berry Amendment, could be a violation of the Anti-Deficiency Act. The Air Force had to address this situation. Given the commercial nature of the aircraft, and the stated inability of contractors to comply with the Berry Amendment, a waiver was deemed necessary.

As the Air Force began to address Berry Amendment compliance for aircraft purchases, it became clear that the compliance issue also extended to related spare parts purchases. Contractors supplying spare parts for commercial derivative aircraft had advised the Air Force that they could not accept contracts with the Air Force to supply those parts, absent a Berry Amendment waiver. The Air Force had a critical need to ensure the availability of spare parts manufactured using specialty metals. Simply put, without spare parts, the Air Force could not perform its missions. Thus, the Air Force executed a waiver for both commercial derivative aircraft and related spare parts for those aircraft. The Air Force continues to believe that the Berry Amendment waiver is critical to ensuring the ability of the Air Force to perform its missions.

There seems to be some confusion as to the scope of the current waiver. The existing Berry Amendment waiver for commercial derivative aircraft does not extend to future purchases of commercial derivative aircraft, although it does cover future spares purchases. As it relates to aircraft purchases, the waiver applies only to aircraft purchases authorized by Congress and on contract as of the date of the waiver. The Air Force will analyze all future aircraft purchases to determine how to satisfy Berry Amendment requirements.

As noted above, the Air Force believes that the Berry Amendment waiver for commercial derivative aircraft is reasonable and necessary. Nevertheless, the Air Force agrees that periodic reexamination of the justification for continuing the waiver is also warranted. Accordingly, the Air Force concurs with the GAO recommendations.

Appendix III: GAO Contact and Staff Acknowledgments

GAO Contact

Ann Calvaresi-Barr (202) 512-4841 or calvaresibarra@gao.gov

Acknowledgments

In addition to the contact named above, John Neumann, Assistant Director; Noah Bleicher; Greg Campbell; Jeffrey Hartnett; Robert Lee; Lillian Slodkowski; and Adam Vodraska made key contributions to this report.

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