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FEATURE COMMENT: Berry Amendment 'Reform'—The Sound And The Fury

The Berry Amendment, 10 USCA §§ 2533a and 2533b, restricts the types of metals, textiles and foodstuffs that the Department of Defense can buy. As a complement to other, more broadly applicable non-tariff trade barriers such as the Trade Agreements Act and the Buy American Act (BAA), the Berry Amendment applies solely to DOD procurements, focuses on a limited number of products, and extends downward into the procurement chain in a way that is far more controlling than other such statutes. While foreign content can be "sanitized" under the Trade Agreements Act through the process of "substantial transformation," and is, in fact, irrelevant below the "component" level for BAA purposes, the Berry Amendment extends down the line, from the final delivered end-item all the way to the original source, especially for certain metals used in every step of the manufacturing process.

As explained in a prior FEATURE COMMENT, see Chierichella and Gallacher, "Specialty Metals and the Berry Amendment—Frankenstein's Monster and Bad Domestic Policy," 46 GC ¶ 168, the Berry Amendment is a relic of a former age, ill-suited to the realities of our global marketplace and current procurement demands, particularly for "specialty metals," which are the most rigorously controlled of the Berry Amendment product lines. While, in a robust campaign for reform, industry has recently taken the opportunity to spotlight the unworkable nature of the statute, these efforts have proved largely futile. In fact, Congress recently enacted legislation purporting to "reform" the Berry Amendment. See John Warner National Defense Authorization Act for Fiscal Year 2007 (P.L. 109-364)

§§ 842–843 (the 2007 Authorization Act). Rather than truly reforming the specialty metals provision of the Berry Amendment, a provision that industry, DOD and many in the Senate agree sorely needs to be improved, Congress instead did the familiar—it pushed through limited and inadequate reforms. In many ways, these "reforms" mirror Macbeth's lamentation on life itself, for despite the furor over the need for changes to the Berry Amendment, in the end, Congress has produced—yet again—a cacophony of "sound and fury," while offering little meaningful progress.

To be fair, the 2007 Authorization Act did accomplish three things:

- It recognized a sorely needed exception for de minimis amounts of specialty metals in commercially available *electronic components*.
- It authorized a *one-time waiver* of contractor noncompliance with the Berry Amendment based on products and components previously delivered to DOD.
- It created a *Strategic Materials Protection Board* to assess the domestic supply of specialty metals and make recommendations as to those metals considered "critical to national security."

While the exception for electronic components is welcome, the 2007 Authorization Act does not address the larger issue of foreign specialty metals in general, and particularly in commercial-item procurements—an issue deliberately ignored by Congress. The provision allowing for a limited one-time waiver addresses past compliance issues, but the 2007 Authorization Act fails to offer hope on the much larger issue of prospective compliance. And though the provision creating the Strategic Materials Protection Board may offer insight into the availability and needs of domestic industrial commodity suppliers, it adds nothing to the current regime but another administrative body to issue reports and recommendations. Not surprisingly, Congress has offered little constructive reform and little to ease the burdens and costs on the industry that provides the means to defend our shores and borders. "Rea-

son” and “sanity” rarely emerge from the legislative process when procurement reform is on the table, and the recent compromise legislation is no exception.

This FEATURE COMMENT provides a brief summary of the specialty metals provision of the Berry Amendment, discussing its background, the implementing regulations and the limited exceptions to the statute’s far reach. It notes the difficulties that have been observed by both DOD and industry in applying the broad scope of the Berry Amendment prohibitions—ranging from a 1972 position taken by DOD on Berry Amendment enforcement, to reformulated 2006 DOD policies. The FEATURE COMMENT also explores reform efforts pushed by industry and DOD, discussing the woefully inadequate congressional response to calls for reform in the 2007 Authorization Act. While Professor Christopher Yukins has recently discussed the 2007 Authorization Act generally, and the debate on the Berry Amendment reforms more specifically, see Yukins, Feature Comment, “Procurement Reform in the Defense Authorization Act for Fiscal Year 2007—A Creature of Compromise, Pointing the Way to Future Debates,” 48 GC ¶ 367, this FEATURE COMMENT discusses the severe burdens on industry that continue to exist thanks to Congress’ “compromise legislation.” It concludes with a renewed call for reforms consistent with those previously requested by DOD and the Berry Amendment Reform Coalition.

Background of the Berry Amendment—The difficulty in implementing the Berry Amendment should not come as a surprise to anyone. The statute, as written and as amended in 1973, provides for few exceptions and demands “zero tolerance” on DOD purchases of most specialty metals that are not produced, reprocessed or reused in the U.S. In fact, the Berry Amendment creates a near-absolute prohibition on using *any* funds made available to DOD to purchase *any* non-domestic source specialty metals, with the only meaningful exception being for metals originating in or incorporated into products manufactured in certain specially favored “qualifying countries.” There is no de minimis exception in the statute for commingled specialty metals. There is no exception for the purchase of commercial items, even though lower cost commercial items are generally preferred by the Government. For the majority of DOD procurements, there is no exception for purchases by subcontractors—the Berry Amendment applies to purchases made by suppliers at *any* level for DOD procurements of aircraft, missile and space systems, ships, tank-

automotive products, weapon systems and ammunition. And there is no exception for tiny parts such as nuts or bolts that constitute a small fraction of the overall price of a delivered product. Zero tolerance for non-domestic specialty metals is the statutory mandate.

The Berry Amendment, as originally passed, proposed domestic source restrictions for articles of food, clothing, cotton or wool that were not grown, reprocessed, reused or produced in the U.S. Beginning in 1973, a preference for specialty metals was added to the statute—ostensibly to protect the domestic industrial base involved in mining, melting and manufacturing of certain specialty metals, defined as:

- steel, if it contains more than the specified percentages of certain elements;
- certain metal alloys consisting of nickel, iron-nickel, and cobalt base alloys containing a total of other alloying metals (except iron) in excess of 10 percent;
- titanium and titanium alloys; and
- zirconium and zirconium base alloys.

See DFARS 252.225-7014(a)(2) (2006); see also 10 USCA § 2533b(i) (to be codified in 2007).

There are limited exceptions to the Berry Amendment, namely:

- Purchase of specialty metals produced, reprocessed, or reused within a “qualifying country” with which the U.S. has a trade agreement. Currently, these countries include Australia, Belgium, Canada, Denmark, Egypt, France, Germany, Greece, Israel, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey and the UK (with Austria and Finland considered on a “purchase-by-purchase basis”). Bizarrely, this qualifying country exception includes an anti-American bias that allows qualifying foreign countries to procure their specialty metals from anywhere across the globe, while U.S. companies must purchase only from “qualifying countries” or the U.S. While DOD has acknowledged this counter-intuitive exception, it has declined to change the regulations. See Chierichella and Gallacher, Feature Comment, “Specialty Metals and the Berry Amendment—Frankenstein’s Monster and Bad Domestic Policy,” 46 GC ¶ 168. Perhaps even more bizarre is that the House of Representatives proposed a provision in April 2006 to close the loophole (see H.R. 5122 § 831(a), proposing

§ 2533b(e)(3); see also H. Rep. No. 109-452, discussing § 831, but ultimately eliminated that provision from the final 2007 Authorization Act.

- Acquisitions at or below the simplified acquisition threshold, currently \$100,000. Note that this applies to the procurement as a whole, not to the individual cost of the specialty metals. Most major procurements do not satisfy this requirement.
- Products that the Government has determined to be unavailable domestically in satisfactory quality and quantity at U.S. market prices.
- Purchases during contingency operations.
- When there is an “unusual and compelling urgency” (as described in FAR 6.302-2).

See DFARS 225.7002-2.

Beyond these limited exceptions, the specialty metals restriction reaches all levels of the DOD procurement chain for aircraft, missile and space systems, ships, tank-automotive products, weapon systems and ammunition, including all suppliers at *any* tier. DFARS 225.7002-2(m). The far-reaching restriction to suppliers at all levels for most DOD procurements stands in stark contrast to the more limited restrictions on purchases of cotton, cloth or wool products under the Berry Amendment, which expressly recognize a *de minimis* threshold of \$100,000 and 10 percent of the total price of the end product. DFARS 225.7002-2(j). It would appear that the “specialty metals” lobby is much more effective than the lobbyists representing the domestic textile industry.

Admittedly, the Berry Amendment does not necessarily apply at all levels to all subcontractors in the entire supply chain; the zero tolerance prohibition at all supply levels applies only to DOD procurements for aircraft, missile and space systems, ships, tank-automotive products, weapon systems and ammunition. The restrictions for purchases not involving these types of procurements apply only at the prime contractor level, not to sub-tier contractors in the supplier chain. This has come to be known as the “subcontractor exception.” But, given that the greatest concentration of DOD procurements are of these six types, most prime contractors should be aware that their products, as well as their suppliers’ products, could easily fall within the scope of the Berry Amendment restrictions. On the other hand, if a supplier is in a market other than aircraft, missile

and space systems, ships, tank-automotive products, weapon systems or ammunition, such as facilities construction or information technology support and warranty services at DOD stations, then the absolute prohibition would not apply. This small segment of DOD suppliers is fortunate to avoid the brunt of the Berry Amendment. See generally Yukins, Feature Comment, “Procurement Reform in the Defense Authorization Act for Fiscal Year 2007—A Creature of Compromise, Pointing the Way to Future Debates,” 48 GC ¶ 367 (discussing the origins of the subcontractor exception, its enforcement through DFARS 225.2002-2(m), and recent proposals in the House to eliminate the exception).

The Problems with Berry Amendment Compliance—From the outset, DOD recognized that the near-absolute prohibition on the purchase of non-domestic specialty metals was virtually impossible to enforce across its supplier base, let alone to trace. In 1972, shortly after the specialty metals provision was added to the Berry Amendment, then-Secretary of Defense Melvin R. Laird issued a memorandum noting that it was “impracticable” to achieve 100-percent compliance with the Berry Amendment:

It is apparent, from the legislative history of this provision, that it was not intended that this Department achieve or attempt to achieve the impossible in its implementation. Rather, it is clear that *its purpose is to afford reasonable protection* to the specialty metals industry to help preserve our domestic production capacity to satisfy mobilization requirements, without forcing a massive disruption of our existing procurement methods and programs. *An accommodation is therefore needed to give maximum effect to this new requirement without losing sight of other Congressional objectives that the Department of Defense function in an efficient and economical manner in meeting its mission.*

Memorandum for Secretaries of the Military Departments and Directors of Defense Agencies (Nov. 20, 1972) (emphasis added) (available at www.aia-aerospace.org/pdf/berry_lairdmemo.pdf).

Observing that the “great bulk of the specialty metals identified in the House Appropriations Committee Report and procured by and for the Department (in excess of 85%) fall within six major classes of program, i.e., aircraft, missiles, ships, tank-automotive, weapons and ammunition,” Secretary Laird offered an “accommodation” by enforcing the

ban at all tiers of the supply chain only to those six types of core programs. “To attempt to identify and control the use of such metals for the remaining small quantities involved in other innumerable and varied contracts and purchases would not achieve any real beneficial result sufficient to justify the effort and cost involved.” Through this policy accommodation, Secretary Laird created the “subcontractor exception.”

In issuing this memo, Secretary Laird recognized the inherent difficulties in trying to enforce the amendment throughout *all* tiers of the supply chain and that trying to do so would require “enormous expense in both time and money.” Clearly, requiring compliance with the specialty metals restriction in *all* circumstances was, to quote Secretary Laird, “impracticable.” While fashioning a limited “subcontractor exception,” however, he cautioned that it was “vital that our programs not be unduly delayed or disrupted,” and that exceptions may be appropriate.

Whether by choice or inadvertence, or as a concession to the shortness of life, it appears that DOD’s accommodation to the pragmatics of a multi-tiered worldwide economy may, over the years, have exceeded Secretary Laird’s expectations. When the DOD inspector general published Audit Report No. 99-023, “Procurement of Military Clothing and Related Items by Military Organizations,” in October 1998, it observed that over 35 percent of the procurements reviewed as part of the audit failed to consider Berry Amendment restrictions. After other high-profile violations of the Berry Amendment and press reports of alleged violations, DOD reaffirmed its commitment to enforce—to the letter—the specialty metals restrictions that had been on the books since 1972.

Recent DOD Positions: an Unwelcome and Unwise “Relentless Pursuit of Perfection” in an Imperfect Marketplace—DOD recently has issued several memoranda and policy decisions emphasizing its renewed commitment to a zero tolerance policy for noncompliance with the specialty metals provisions of the Berry Amendment.

- A March 10 Defense Contract Management Agency memo instructed agencies to conditionally accept noncompliant parts and to withhold payment from the contractor for “the cost of the lowest auditable non-compliant specialty metal part plus appropriate burden.” DCMA indicated that a conditional acceptance was acceptable only as an interim

measure until final, compliant parts could be located.

- On March 20, DCMA issued a “problem advisory” through the Government-Industry Data Exchange Program (GIDEP) seeking identification of noncompliant specialty metal products. After criticism from industry, this “problem advisory” was withdrawn in July.
- A June 1 memo from Undersecretary of Defense for Acquisition, Technology and Logistics Kenneth Krieg required all noncompliant contractors to submit a comprehensive action plan no later than 180 days after conditional acceptance through DCMA. Krieg stated that, despite the fact that a company and the contracting officer may have a common compliance plan going forward, such a plan “must clearly protect the rights for the Government to pursue the full range of potential remedies.”
- On June 5 and again on August 28, the deputy assistant secretary of the navy for acquisition management, through his chief of staff, Michael F. Jaggard, issued memoranda disseminating the guidance from DCMA and Krieg. Jaggard offered several suggestions on improving Berry Amendment compliance, emphasizing that “reliance on withholdings [consistent with the DCMA guidance] is not an appropriate strategy for dealing with noncompliance.”
- On July 18, DOD posted to its Web site a series of frequently asked questions about Berry Amendment compliance, emphasizing that absolute compliance is required.
- An August 18 memo from Director of Defense Procurement and Policy Shay Assad instructed all COs to conduct a comprehensive pre-award Berry Amendment audit “to avoid non-compliance during performance.”
- Backpedaling and recognizing the impracticality of this requirement, Assad acknowledged in a September 21 memo that pre-award verification may be difficult. He stated that it would be sufficient for a contractor to certify, prior to award, that it will comply with the Berry Amendment. Any subsequent noncompliance would be addressed consistent with the policies announced by DCMA in March. And, while not expressly stated by Assad, any consequences resulting from the contractor’s false certification would undoubtedly be addressed through the Department of Justice.

Despite this long line of policy pronouncements, it is perhaps two answers posted by DOD on its “Frequently Asked Questions Regarding the Berry Amendment” Web site that raise an alarm most clearly and demonstrate the “sound and fury” with which DOD intends to enforce the Berry Amendment. DOD’s answers to these “frequently asked questions” may trouble some contractors.

One contractor asked:

[Question:] I have been informed by one of my subcontractors that they may have delivered aircraft components that are in breach of the Berry Amendment. It could take several months to find out the extent of the breach, and with current market conditions and scarcity of specialty metal supplies, I will be unable to get Berry compliant components for several months. This product is critical to US military operations; how should I proceed?

[Answer:]

- *Immediately* notify the Government contracting officer of the potential breach!
- Immediately conduct a review to determine the extent of the Berry Amendment breach as soon as possible.
- In conjunction with the PCO, develop a recovery/correction plan to replace all non-Berry compliant components once domestically sourced materials are available, [and] submit this plan to the contracting officer.

See www.acq.osd.mil/dpap/paic/berryamendmentfaq.htm.

But, when the company notifies the CO and submits a plan for going forward, the Web site advises the CO to *immediately* contact legal counsel because the contractor has violated the law:

[Question:] I have been informed by my Contractor that they may have inadvertently included Non-Domestic Specialty Metals (i.e. titanium, stainless steel, etc.) in one or more sub-tier components on my aircraft contract. The Contractor has indicated the problem occurred at the level of a 4th or 5th tier subcontractor and therefore the magnitude (i.e. number of aircraft already delivered and components involved) of the Berry Amendment breach is not yet known and could take months to fully determine. The Contractor has informed me that they will be unable to get domestic titanium/stainless steel for 6-12 months. These aircraft are critical to US military

operations and any delivery delay would impact readiness. How should I proceed?

[Answer:] Notify legal counsel and the cognizant contracting officer immediately! If the contract includes DFARS 252.225-7014 (ALT I), the contractor is in violation of the Berry Amendment and is required to replace the parts.

Id. The “2006 Learning Module” on the Berry Amendment, available through Defense Acquisition University, offers similar advice about contacting legal counsel *immediately* regarding compliance issues.

Perhaps it goes without saying that when agency lawyers get involved, the Department of Justice, the IG and/or the Defense Criminal Investigative Service are not too far behind. Predictably, this has left industry with feelings that can only euphemistically be described as “unsettled.” It is rarely good to be confronted with a zero tolerance policy with respect to an unworkable statute, particularly when the non-compliance might arise out of actions far down the procurement chain, beyond one’s control, and taken by others without one’s knowledge.

The burden placed on companies is made even greater in most procurements by the requirement for contractors to obtain compliance certifications at *every* level in their supply chain. Such certifications are unwieldy, difficult to obtain, and—in more than a few instances—of dubious reliability. Will a seventh-tier commercial supplier of nuts and bolts who may not even know or care where his bulk shipments are ultimately destined know or understand whether its parts “comply with the specialty metals requirements of the Berry Amendment?” If the supplier is located outside the U.S., will it even care? Or will the supplier simply think to itself, “I have delivered these same parts in the past, perhaps even through a qualifying country, and there was no objection,” sign the certification, and mistakenly certify? Without a complete understanding of the Berry Amendment requirements at all tiers of the supply chain, the higher-tier and prime contractors face extreme risk from the enforcement arms of the Government.

Proposed Berry Amendment Reforms: Hopes Unrealized—Some commentators have speculated that the recent flurry of DOD policy memoranda was, in fact, a ploy to force Congress to act; if the law requires total compliance, and total compliance is impossible given modern procurement realities, then the law should be changed. In fact, in April 2006, DOD proposed changes to the specialty metals provision

of the Berry Amendment, noting that the changes would significantly ease the burden on industry and “eliminate the administrative and costly burden that suppliers face in ensuring that items and components destined for the Department’s procurements include only specialty metal melted in the United States, while ensuring that the domestic industry is protected.” See Letter from Daniel J. Dell’Orto, acting DOD general counsel (April 3, 2006) (available at www.dod.mil/dodgc/olc/legispro.html). But if that was, in fact, DOD’s strategy, it clearly backfired.

DOD’s proposed changes are generally consistent with those proposed by industry, especially those proposed by the Berry Amendment Reform Coalition, which suggested the following changes:

- “An exception to the Berry Amendment for commercial items at any tier of the supply chain, while still requiring suppliers to obtain parts that are military unique from domestic sources;”
- “An alternative compliance approach that allows contractors to use commingled foreign and domestic specialty metals so long as the contractors procure an equivalent amount of domestically-melted specialty metals; and”
- “An exception for items containing specialty metals purchased at any tier, provided the estimated value of such content is below the Simplified Acquisition Threshold (currently \$100,000) or 10% of the total price of an item, whichever is less.”

Berry Amendment Reform Coalition, “Legislative Reforms Needed for Berry Amendment” (May 2006).

Actual Berry Amendment “Reform”: *Plus ça change, plus c’est la même chose*—While the Senate seemed poised to embrace many of the changes proposed by industry and DOD by passing S. 2766, the House took the other side of the issue, passing H.R. 5122, which would have rejected virtually all Berry Amendment reform, extended the reach of the Berry Amendment to *all* levels of the procurement chain for *all* DOD procurements, and expanded the reach of the domestic source restrictions to include all items “critical to national security.” The chasm between the two chambers was wide. See Rae Ann S. Johnson, “House and Senate Debate the Berry Amendment: Keeping a Focus on the Needs of a 21st Century Military,” LAR-477e, Manufacturers Alliance/MAPI (August 2006).

While a compromise ultimately was reached, the reforms sponsored by the Senate were almost uniformly rejected. The House succeeded in pushing

through an ill-conceived, backward-looking compromise “reform” that solves few of the problems DOD suppliers currently face. See 2007 Authorization Act §§ 842–843. Perhaps the most troubling aspect of the new legislation is that it simply ignored the critical reforms requested by DOD and industry alike.

The 2007 Authorization Act adds 10 USCA § 2533b. Removing specialty metals from 10 USCA § 2533a, the new § 2533b exclusively focuses on specialty metals restrictions. It codifies the long-standing restriction on specialty metals (which previously dated back to the 1972 Laird memo and the implementing regulations in the DFARS), indicating that it applies to *all* tiers for most DOD procurements—aircraft, missile and space systems, ships, tank-automotive products, weapon systems and ammunition—and only to the prime contractor for all other DOD purchases. Thankfully, the final version of the bill declined to extend the specialty metals restrictions to *all* suppliers at every level for all DOD procurements, as originally included in H.R. 5122. The difficulty of complying with such an onerous requirement was, presumably, obvious.

Exception for Electronic Components and Failure to Include Broader Commercial Exceptions: The new changes to the Berry Amendment come with few exceptions. Section 2533b provides for exceptions already available under the current law (such as when the DOD issues a Domestic Non-Availability Determination (DNAD), when specialty metals are procured from a “qualifying country” (leaving the “qualifying country” loophole intact), purchases below the simplified acquisition threshold, purchases made during contingency operations, and when there is an “unusual and compelling urgency”).

The new statute also recognizes one other welcome exception authorizing DOD to pay for commercially available electronic components that contain de minimis amounts of noncompliant specialty metals. This exception allows companies that purchase commercial electronic components to not worry about the source of any specialty metals that may incidentally be incorporated in the final product (such as titanium alloys in transistors or nickel plating in microelectronic devices). The exception applies only to “commercially available electronic components.” Whether this requires the electronic component to conform to the definition of a “commercial item” under FAR 2.101 is unclear, as is whether customized variants of commercially available electronic components deliv-

ered to DOD must still satisfy the Berry Amendment requirements. Another issue that remains unclear is exactly what the *de minimis* level is because the statute does not offer a definition. To the extent the statute is vague, Congress has succeeded in offering “one step forward and one step back” by creating an ambiguity that will only invite further debate and confusion. Contractors should be aware that, while the *de minimis* rule for electronic components offers a welcome exception, DOD may choose to implement the exception more narrowly than industry might expect.

Complicating this issue, the new statute specifically rejects *any* exception for commercial parts generally, noting at the new § 2533b(h) that “this section applies to procurements of commercial items.” This means that (borrowing from Secretary Laird) companies delivering products to DOD must implement the following “impracticable” procedures at “enormous expense in both time and money” to ensure that they comply with an inflexible and unwieldy law.

- *All* contractors must implement procedures to track the source of *all* metal components, from major parts to piece-parts, including screws, nuts, bolts, and fasteners, delivered to the DOD as part of the delivered hardware, irrespective of the production tier at which the metal was introduced.
- *All* contractors must spend extra money to track and ensure that *all* commercial parts, including commercial IT, incorporating specialty metals are from approved sources, with the possible exception of *some* electronic components that incorporate *some* *de minimis* amounts of specialty metals from different sources.
- *All* DOD COs must verify that *all* purchases made from the Federal Supply Schedule from *all* previously approved vendors contain only approved specialty metals.
- *All* contractors must ensure that commercial parts from non-approved sources are not delivered under a DOD contract.
- *All* contractors that also sell commercial products that incorporate non-restricted specialty metals must maintain separate manufacturing lines to ensure that *all* products delivered to DOD do not contain any unapproved specialty metals.
- *All* contractors must verify the sources of *all* metals mixed with or melted into alloys used

in *all* products and *all* components delivered to DOD.

- *All* DOD COs must implement procedures, through both a pre-award audit and a postaward compliance review, to ensure that *all* contractors comply with *all* the requirements of the new § 2533b.

At the risk of overstating the compliance burden, as already noted, the Berry Amendment does not necessarily apply at all levels to all subcontractors in the supply chain, such as contractors involved in facilities construction or IT support and warranty services at DOD stations. But it does apply at all levels to DOD procurements for aircraft, missile and space systems, ships, tank-automotive products, weapon systems and ammunition. Because these types of procurements are the largest and most common for DOD, the compliance plans of most prime contractors (or companies that aspire to be prime contractors) should recognize that their products and their suppliers’ products likely will fall within the broad reach of the Berry Amendment restrictions. When it comes to a zero tolerance statute such as the Berry Amendment, caution and conservatism are prudent.

One-Time Waiver: Beyond offering one new, limited exception, the 2007 Authorization Act also provides another tool that has immediate—albeit limited—utility. It allows for a one-time waiver anytime between now and 2010 allowing DOD to accept delivery of noncompliant parts that have been delivered previously:

The Secretary of Defense or the Secretary of a military department may accept specialty metals if such metals were incorporated into items produced, manufactured, or assembled in the United States *before the date of the enactment* of this Act with respect to which the contracting officer for the contract determines that the contractor is not in compliance with section 2533b.

2007 Authorization Act § 842(b)(1) (emphasis added).

To issue the one-time waiver, the CO must make written determinations on the contractor’s current compliance status and the impracticality of replacing the noncompliant parts. After higher level approval in DOD, the CO must post a notice of the waiver on *FedBizOpps.gov*. The conditions for the waiver include a determination that:

- it is impractical or not economically feasible to remove or replace the parts or components *al-*

ready delivered that incorporate noncompliant specialty metals;

- the contractor that delivered the noncompliant products now has in place “an effective plan” to allow future compliance; and
- the past noncompliance was not knowing or willful.

While this waiver authority is helpful for purposes of past noncompliance issues, it does nothing to address the enormous difficulties companies face on *future* issues. For even the most vigilant compliance program cannot screen *all* noncompliant products at *all* levels of the distribution chain, especially when such supply chains involve commercial parts from unknown sources. While contractors may be able to avoid liability for deliveries prior to October 2006, going forward they are left with few options other than incurring significant costs and administrative burdens, and passing that extra cost to the taxpayer. See also Yukins, “Procurement Reform in the Defense Authorization Act for Fiscal Year 2007—A Creature of Compromise, Pointing the Way to Future Debates,” 48 GC ¶ 367 (discussing potential different interpretations of the waiver policy that could give rise to further debate and litigation).

Strategic Materials Protection Board: Perhaps the most irrelevant of the “reforms” implemented by the 2007 Authorization Act is the creation of a new administrative review board, the Strategic Materials Protection Board. In true governmental fashion, the hallmark of Congress’ Berry Amendment “reform” is a board that no one asked for and no one except Congress wants. The Board’s duties are as follows:

- determine the need to provide a long-term domestic supply of materials designated as critical to national security to ensure that defense needs are met;
- analyze the risk associated with each material designated as critical to national security and the effect on national defense that the nonavailability of such material from a domestic source would have;
- recommend a strategy to the president to ensure the domestic availability of materials designated as critical to national security;
- recommend such other strategies as the Board considers appropriate to the president to strengthen the industrial base for materials critical to national security; and

- at least once every two years, publish recommendations regarding materials critical to national security, including a list of specialty metals, if any, recommended for addition to, or removal from, the definition of “specialty metals.”

With regular reporting to Congress, and intermittent reporting to the public, this board undoubtedly will ensure that debate on specialty metals remains alive, even if it does not move toward progress. Beyond that, the utility of this Board seems limited.

Conclusion—Not surprisingly, the latest round of Berry Amendment “reforms” are long on rhetoric and short on results. While the reforms relating to electronic components and the limited waiver policy are welcome, the reforms as a whole simply miss the point—the specialty metals provision of the Berry Amendment is seriously outdated and unwieldy, adding unnecessary expense and burden on both DOD and industry.

Congress should immediately revisit the issue of Berry Amendment reform. In so doing, it should implement the following simple, yet necessary, changes.

- The Berry Amendment should not apply to contracts or subcontracts for *commercial items*.
- The Berry Amendment should not apply when the total amount of noncompliant specialty metals in a product as a whole is *de minimis*.
- The *de minimis* exception for specialty metals should be adjusted so that it is *consistent* with other *de minimis* thresholds under the Berry Amendment, such as for products incidentally incorporating cotton, wool or other natural fibers, if the estimated value of the noncompliant content is below the \$100,000 simplified acquisition threshold or 10 percent of the total price of the product, whichever is less.
- The Berry Amendment should not apply to purchases from prime or first-tier subcontractors if the secretary of defense determines that the item is produced using the same production facilities and supply chain as is used for non-Government customers, and the contractor has agreed to buy a certain amount of *domestically melted specialty metals to be commingled* in products delivered to the DOD.
- The secretary of defense should continue to have the authority, beyond the DNAD process, to *waive* the requirements of the Berry Amendment when it is in the national interest.

If Congress were to implement these changes, then a sixth issue that currently requires attention—waiver authority for *future* procurements, beyond the one-time waiver for *past* procurements—would vanish. As it currently stands, however, CO waiver authority is another issue that Congress must consider if it intends to protect industrial suppliers.

If Congress makes the Berry Amendment a law with which contractors can comply, they invariably will implement effective compliance screens. But as currently drafted, and as previously noted by both the Berry Amendment Reform Coalition and Secretary Laird in 1972, compliance with the

Berry Amendment is virtually impossible. The fact that Congress continues to expect the impossible from industry is disappointing. But the fact that the recent Berry Amendment “reforms” amount to so much hot air—full of sound and fury, signifying nothing—is perhaps most disappointing of all.



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