

INTERNATIONAL GOVERNMENT CONTRACTOR

Information and Analysis on Legal Aspects of International Public Procurement

Vol. 4, No. 4

April 2007

Analysis

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The Continuing Saga Of Specialty Metals—Nothing Is Ever So Bad That It Cannot Be Made Worse

The March 22 Congressional Research Service report on the specialty metals provisions of the Berry Amendment should be mandatory reading for any U.S. Government contracts practitioner. The report provides a useful synopsis of the origin and evolution of the statute; it addresses the validity of some of the factual underpinnings of the statute; it summarizes the competing political arguments; it provides some candid discussion of the impact of last year's amendments and some of the options currently on the legislative table; and it demonstrates just how removed from commercial reality the specialty metals provision of the Berry Amendment, 10 USCA § 2533b, has become.

As the CRS report notes, the ostensible goal of the specialty metals provision of the Berry Amendment is to protect U.S. interests and ensure that the Department of Defense has continued, uninterrupted access to specialty metals in its major systems. As the report also makes abundantly clear, the law is having the opposite effect—and at an accelerating pace. As industry repeatedly warned, and as the report tends to confirm, the statute's unrealistic requirements, coupled with the Draconian sanctions for noncompliance, are driving away many suppliers whose products incorporate specialty metals. Thus, while Congress clings to the notion that U.S. contractors can and should maintain two separate supply chains to permit tracking of relatively small quantities of specialty metals down to the piece-part level, and while the Department of Justice hovers on the fringe waiting to pounce on those whom perfection eludes, many suppliers with commercial outlets for their products simply opt out of the DOD market. Ironically, as the Government moves—or purports to

move—to a more “commercial” procurement model with increased emphasis on commercial products and services, the Berry Amendment induces precisely the opposite result.

The CRS report repeatedly notes the colossal administrative burden that accompanies compliance. In March 7 testimony before the House Armed Services Committee, Lt. Gen. Donald J. Hoffman illustratively quantified the compliance burden—2,200 man hours to review documentation measuring eight inches thick relating to 4,000 parts to support a waiver involving \$14,000 of DOD funds. While DOD and the contractor share the administrative burdens, the contractor alone bears the risk of false certification and Justice Department enforcement actions.

Given the realities of the current global marketplace, the increased administrative costs of compliance, the increased acquisition costs of U.S. specialty metals and the preferential treatment accorded to “qualifying country” suppliers over U.S. suppliers under the regulations, many people are hard-pressed to understand how this law provides “best value” or even “rational value” to the U.S. taxpayer, or whether it simply drains the public fisc by advancing dubious policy goals. Obviously, such questions must be addressed directly by Congress, and such questions must be addressed in a more direct way than was done last year with P.L. 109-364.

The CRS report identifies several options for Congress, none of which are particularly new. In fact, several of these alternatives were advanced last year by industry and DOD alike, but were rejected by Congress. Of the various options, only two have any real merit: (1) eliminating the statute because it is unworkable in an increasingly global supply chain system, coupled with (2) increased incentives for the economic production and use of U.S. specialty metals. Providing greater incentives for U.S. industry places the burden of maintaining a domestic specialty metals capacity—if that is, in fact, an important national objective—on the nation as a whole. And replacing the existing punitive sanctions for noncompliance with profit incentives for the use of domestic specialty metals makes the contracting community a *partner* with the Government in cooperatively advancing a national objective when it is practicable to

do so—using sugar in lieu of vinegar, so to speak. Alternatives identified in the CRS report follow.

Elimination of the Specialty Metals Provision—Although this suggestion offered by the CRS report would have an adverse impact on lawyers, bureaucrats and lobbyists for the specialty metals industry, it is in the best interest of the American taxpayer and DOD, which would undoubtedly welcome the reduced costs. Removal of such trade barriers sends the clear signal to our allies and international trading partners that the U.S. is serious about “full-and-open access” in procurement markets. A major impediment to the participation of many U.S. commercial suppliers in the DOD market will be eliminated, thereby increasing competition and creating the additional job opportunities that accompany expanded outlets for those suppliers’ products. Finally, the need for separate supply chains to service identical product needs and the legal risks that permeate the present system will be eliminated. However, even if complete repeal is beyond the will of the Congress, then—at a minimum—the current formulation that relegates U.S. suppliers to the status of second-class citizens in relation to the bizarre “qualifying country loophole” found in the existing regulations should be consigned to a well-earned and deep rung of regulatory hell from which it can never be resurrected.

Incentives—Eliminating the specialty metals provision would undoubtedly be criticized for its allegedly adverse impact on the U.S.’ ability to respond in time of war. This has never been an impediment to the more liberal approaches adopted by the Buy American Act, which uses preferences instead of prohibitions, and the Trade Agreements Act, which recognizes the sanitizing effect of “substantial transformation” on a foreign material or product. But, even if one concedes that specialty metals are (either qualitatively or strategically) different from the products the TAA and BAA govern, there are better and more rational ways to strengthen the domestic specialty metals base. As the CRS report notes, a program of tax incentives designed to stimulate research and development in scientific and manufacturing technology, or some other form of socioeconomic subsidy, could enable domestic suppliers of specialty metals to become more competitive, eliminating over time the need for the “guaranteed outlet” inherent in the current structure. And the development of profit incentives for the use of domestic specialty metals on a Government-wide basis—not limited to DOD—would replace the “en-

forcement” stick with the “profit motive” carrot. In tandem, these mechanisms would spread the burden and risk of maintaining the U.S. supplier base on a more rational and equitable basis.

Combining the Specialty Metals Provision of the Berry Amendment with the BAA and Increasing the BAA Domestic Content Factor to 75 Percent—Perhaps Alexander Pope can speak from the grave to remind proponents of this approach that “a little learning is a dangerous thing.” The BAA generally does not apply at the level at which most specialty metals are found. The BAA involves an analysis of the places of manufacture of the end product and first-tier components. If the specialty metals are below the component level, their origin would be irrelevant under the BAA. This approach would only make compliance with the BAA quantitatively more difficult, while making the origin of specialty metals largely irrelevant. While the latter result may in fact be salutary, it is hardly what the proponents of this approach have in mind.

Enforcing the Existing Specialty Metals Provision—This is not a viable alternative. Recent DOD pronouncements of general waivers for printed circuit card assemblies and fasteners (“excluding cotter pins, dowel pins, hose clamps, spring pins and turnbuckles”) demonstrate how and why the law is unworkable. Congress should not defer to “legislation by waiver” because such implementation is inherently arbitrary, offering industry little guidance on how it should conduct its long-term planning, and making the law a chameleon that can change colors based on the ability of industry and product groups to marshal enough money and sway with enough policymakers to exempt them, while lower-tier suppliers are saddled with the compliance burden and risks. Consider this a plug for good, old-fashioned neutral principles of law: the law should not be applied with an obvious disproportionate impact. As for the exception included in P.L. 109-364 for commercial electronic components incorporating de minimis amounts of specialty metals, the guidance issued by DOD in December 2006 is as incomprehensible as it is impenetrable. With due respect for the DOD officials charged with implementing the new exception for electronic components, Congress has handed them a mess. Asking DOD to implement an imprecisely crafted exception is simply unfair to both DOD and its suppliers.

Tying a Contractor’s Use of Noncompliant Metals to the Portion of Its Business With DOD—This has been supported in the past by industry and DOD alike. While considered by the Senate last year in S. 2766,

this provision ultimately was stripped from the final version. Although industry undoubtedly would prefer the outright revocation of the statute, this “breadbasket” approach to compliance eases but does not eliminate the problems posed by the current structure. It does not deal with the current anomalous favoritism afforded to foreign suppliers through the “qualifying country loophole,” and—as is always the case—the details (in which the devil often resides) of regulatory implementation are wholly unknown. Given the twists and turns that previous regulatory implementation have taken in this area, a little pre-endorsement caution is in order.

More Congressional Oversight and Another “Blue-Ribbon Panel”—Neither of these would be a welcome development. With the passage of P.L. 109-364, Congress has created the Strategic Materials Protection Board to review the nation’s domestic specialty metals requirements. Merely creating another panel or turning our congressional leaders into administrative overseers with day-to-day responsibility for managing DOD’s compliance with the enormous administrative

burdens of the current approach does little to solve the problems that everyone recognizes.

The real solution to the current problems posed by the specialty metals provision of the Berry Amendment lies in a practical recognition of how global supply chains have proliferated, how needlessly complex the current structure is and how dramatically unfair it is in certain respects, and in finding incentives for the revitalization of a competitive domestic specialty metals base that do not place the monetary, administrative and punitive burdens of a national strategic objective squarely—and in the case of the punitive burden, exclusively—on the backs of DOD contractors.



This PRACTITIONER’S COMMENT was written for INTERNATIONAL GOVERNMENT CONTRACTOR by John W. Chierichella, a partner, and David S. Gallacher, an associate, resident in the Washington, D.C. office of Sheppard Mullin Richter & Hampton LLP. Their practice focuses on counseling and litigation related to Government contracts.

