

## Possible Changes on the Horizon for the Berry Amendment

Amid a recent crack-down in the enforcement of domestic preference laws, the Department of Defense (“DoD”) recently provided Congress with draft legislative language to be included in the fiscal year 2007 authorization bill that would, among other things, ease Berry Amendment restrictions.

**The Berry Amendment:** The Berry Amendment, which was first enacted in 1941 and subsequently amended on several occasions, is codified at 10 U.S.C. § 2533a in 2002. It restricts the DoD from procuring various items, such as food, various textiles or specialty metals as end products or components of end products unless they were “grown, reprocessed, reused, or produced in the United States.” Exceptions to the Amendment exist, yet a myriad of issues and concerns regarding the application of the Berry Amendment and other domestic preference statutes have surfaced in recent years, which have precipitated the DoD request.

Despite the obvious advantage the Berry Amendment provides to U.S. businesses and the national security reasons to maintain domestic sources for military products, ample criticism also surrounds the Amendment. Among these criticisms are the hurdles it creates for defense contractors to ensure that both end products and their components are sourced domestically. A recent example reportedly resulted in the delay of body armor and up-armored Humvees for troops stationed in Iraq and Afghanistan because the American source of armor was not able to keep up with demand.

**DoD Legislative Recommendations:** In order to ease the difficulties that can arise in the course of ensuring compliance with the Berry Amendment, DoD has included the following proposals in the draft DoD Authorization Act for 2007, which DoD submitted to Congress on April 2:

- Specialty Metals – DoD requests Congress to allow suppliers and producers of aircraft, missiles, space systems, ships, tank-automotive items, weapons and ammunition to use both foreign and domestic sources, so long as the domestic and foreign specialty metal procured is of “an equivalent amount (in terms of quantity and quality).” DoD contends that this compromise would both ensure the protection of domestic sources, while easing the pressure placed on domestic suppliers to meet increased demand. This change will also ease the burden on the many DoD suppliers that presently maintain separate production lines to ensure that the items they supply to DoD contain only Berry Amendment compliant specialty metals.
- Small Quantity Exception – DoD seeks a “small quantity” exception for specialty metals, textiles and other items subject to the Berry Amendment. The exemption, as proposed, would apply when “the estimated value of all such content in the contract is not greater than the simplified acquisition threshold or 10 percent of the total price of such items, whichever is less.” The idea being to remove domestic preference hurdles for components that are merely complimentary to the end product, but would result in unwarranted and unnecessary, and possibly costly delay in the production and delivery of end items.
- Additional Recommendations – DoD also requests to limit the Berry Amendment’s food restrictions to meals, ready-to-eat (MREs), and to eliminate the restrictions to other foodstuffs, which DoD contends are general commercial commodities and because DoD is finding it increasingly difficult to provide service members with fresh food that is compliant. Finally, DoD seeks the removal of stainless steel

flatware from Berry Amendment restrictions entirely, because it is a “commercial commodity little produced in the U.S. after Oneida Ltd. ceased its domestic manufacturing operations.”

**Expansion of the Berry Amendment Also Included in Separate Legislative Proposal:** Although DoD has strong policy arguments for the modification of the Berry Amendment, such recommendations are neither new nor rare. In fact, such recommendations often fail as the Amendment enjoys strong support in some quarters of the Congress. Currently, legislation is pending that would actually extend the applicability of the Berry Amendment to the Department of Homeland Security, in addition to DoD (H.R. 4946). This legislation has been referred to the House subcommittee on Management, Integration, and Oversight.

**Conclusion and Practitioners Tips:** Although it is unclear what may happen with the Berry Amendment over the next year, it is clear that the Amendment will remain a contentious issue and one that contractors must be aware and cautious of. In the meantime, DoD prime contractors and subcontractors/suppliers should consider:

- In the case of prime contractors, reviewing current production operations to ensure that any specialty metals or other items subject to Berry Amendment requirements comply with the law and with contractual requirements.
- In the case of subcontractors and suppliers to DoD prime contractors that supply items that are potentially subject to the Berry Amendment, reviewing subcontracts and purchase orders to determine whether Berry Amendment requirements have been “flowed down” and, if they have, undertaking a review of current operations to ensure compliance.

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