New DOD Guidance on the Berry Amendment: Still Berry After All These Years

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The Berry Amendment, 10 U.S.C. § 2533a,[1] has been one of the most vexing of the domestic preference statutes affecting government contracts, especially with regard to the use of specialty metals. Recent statutory changes have tantalized government and private sector officials with the possibility of meaningful reforms. Although the recent statutory "reforms" received a lukewarm review, many held out hope that implementing regulations and guidance would aggressively exploit openings in the legislative language to provide the sought-after relief. However, guidance from the office of the Under Secretary of Defense issued on December 6, 2006, once again leaves some questions unanswered.

The Berry Amendment generally restricts the Department of Defense (DOD) from purchasing certain items, including specialty metals, either as end products or components, unless the items have been grown, reprocessed, reused, or produced in the United States. Section 842 of the John Warner National Defense Authorization Act for Fiscal Year 2007[2] (FY07 NDAA) amended the existing Berry Amendment to give specialty metal its own section—10 U.S.C. § 2533b "Requirement to buy strategic materials critical to national security from American sources; exceptions" (hereinafter "section 2533b"). Section 2533b contains several significant provisions:

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> (1) it ostensibly restricts the application of the Berry Amendment to prime contracts for end items or components for six major product categories: aircraft, missile and space systems, ships, tank and automotive items, weapon systems, or ammunition (collectively the "big six") and for specialty metals themselves, but would not appear to apply to prime contracts (or separate contract line items (CLINs)) for lower-tiered parts;
> (2) it codifies previous exceptions that previously existed only in the Department of Defense Federal Acquisition Regulation Supplement (DFARS), including the exceptions for items of specialty metals purchased by subcontractors for end products other than the "big six" and the exception for specialty metals melted in or incorporated into a product manufactured in a "qualifying country";
> (3) with regard to procurements outside the "big six" categories, it applies the Berry Amendment restriction only to those procurements for the "delivery of specialty metals" and not to items incorporating specialty metals; and
> (4) it provides an exception for "procurements of commercially available electronic components whose specialty metal content is *de minimis* in value compared to the overall value of the lowest level electronic components produced that contains such specialty metal."

Section 842(b) of the FY07 NDAA also provides for a one-time waiver of noncompliant items, separate from a domestic nonavailability exception, which may be approved by the contracting officer where the items of specialty metals were incorporated into items produced, manufactured, or assembled in the United States before November 16, 2006, and the noncompliance was inadvertent.

Section 842 neither satisfied industry, which had sought a commerciality exception, nor the specialty metals lobby, which had sought to eliminate the loophole for the "big six."

The DOD, the agency charged with creating the regulatory structure to implement section 842, was left to make these statutory changes work within the intent of Congress. Initial guidance has come in a December 6, 2006, memorandum from the Director of the Defense Procurement and Acquisition Policy, issuing Class Deviation No. 2006-O0004 (the "Deviation" or "Deviation 2006-O0004") to DOD Federal Acquisition Supplement (DFARS) 252.225-7014, Restriction on Acquisition of Specialty Metals, and Alternate I.[3] This article will address the key features and impact of this deviation:

- Deviation 2006-O0004 restricts DOD's application of the Berry Amendment for the "big six" to end items and "components," which it defines to include first- and second-tiered assemblies, but not "third-tier and below parts."
- It limits the application of the Berry Amendment for product categories other than the "big six" to only those solicitations and contracts for "delivery of specialty

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metal," thus excepting articles or items other than the "big six" that might contain specialty metal.
- It clarifies the application of the de minimis exception for electronic components.
- It clarifies the process for the one-time waiver contained in the statute.
- It provides examples of the application of the revised Domestic Non-Availability Determination (DNAD) process, which should include a consideration of whether the price of compliant metal is fair and reasonable.

Additionally, on December 8, 2006, the Defense Contract Management Agency (DCMA) issued implementing procedures for the waiver provisions, Information Memorandum No. 07-042, and a related corrective action plan.[4]

Unfortunately, this DOD and implementing DCMA guidance does not answer all the issues associated with the statutory changes. Indeed, the guidance raises new questions about how the DOD will implement and enforce the Berry Amendment.

The New DOD Guidance

As indicated above, the Berry Amendment's restrictions on the purchase of items incorporating specialty metals was separated from the other restrictions of the Berry Amendment and codified into its own section, 10 U.S.C. § 2533b. That section establishes a dual approach for treatment of the Berry Amendment restrictions. Section 2533b provides, in relevant part:

> (a) . . . funds appropriated or otherwise available to the Department of Defense may not be used for procurement of—
> (1) the following types of end items, or components thereof, containing a specialty metal not melted or produced in the United States: aircraft, missile and space systems, ships, tank and automotive items, weapon systems, or ammunition; or
> (2) a specialty metal that is not melted or produced in the United States and that is to be purchased directly by the Department of Defense or a prime contractor of the Department.

Paragraph (a)(1) generally codifies the regulatory restrictions on implementation of the Berry Amendment, which have long been present in DFARS.[5] However, paragraph (a)(2) seems to take a much narrower approach than the traditional regulation, which extended the Berry Amendment to any article that contained specialty metal. In contrast, paragraph (a)(2) applies Berry Amendment restrictions for nonbig six programs only to "specialty metals," and not to "items of specialty metals."

This dual approach appears to establish different requirements at the two opposite ends of the spectrum: (1) at one extreme are the "big six" product categories; and at the other are (2) actual "delivery of specialty metals." Between these two extremes, the statute creates a new, potentially large exemption for DOD procurement of items containing specialty metals that fall under neither section 2533b(a)(1) nor section 2533b(a)(2). The size of this gap will depend on DOD's construction of the requirements, especially those in section 2533b(a)(2). The narrower the construction, the wider the gap and the larger the new exemption.

Berry Amendment Restrictions for the "Big Six" Limited to End Items/Products or Components

DFARS 225.7002-1 has long applied the Berry Amendment to the procurement of "items, either as end products or components."[6] However, prior to the recent statutory changes, "component" was not defined. Section 2533b defines " 'component' [as having] the meaning provided in section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403)."[7] "Component," as defined in 41 U.S.C. § 403, is "any item supplied to the Federal Government as part of an end item or of another component." It does not, however, define "end item," nor does DOD Deviation 2006-O0004.[8]

DOD Deviation 2006-O0004 clarified "component" to mean "those first-tier parts and assemblies that are incorporated directly into the end product (i.e., first-tier components). Parts and assemblies that are incorporated directly into a first-tier component are also components (i.e., second-tier components). Third-tier and below parts and assemblies are not components."[9] Thus, DOD may decide not to include, or require the prime contractors to include, any specialty metals clause in contracts for items at or below the third tier.

2006-O0004 Class Deviation—Restriction on Acquisition of Specialty Metals, provides guidance and examples of how the new procedures work. Example 1 provides an example of the "application to end products and components in one of six major programs" as follows:

> [I]f a spare rocket motor were purchased as a contract line item, that spare rocket motor is a first tier component of the missile and would still be covered, even if purchased separately from the missile system. If for example, the rocket motor contains a power supply (second tier item [sic], and it was purchased as a separate item, it would also be covered by the new specialty metals provision. If, however, a third tier or lower level assembly or part e.g., the printed circuit board contained within the rocket motor power supply is purchased separately from the missile system (i.e. under a separate contract line item), the restriction does not apply.

Based on this example, the same item contained in two separate CLINs of the same contract might have different Berry Amendment treatment, depending upon whether it is in the first two tiers, or is a third-tier or lower assembly. In such an instance, it would appear that the parties could negotiate Alternate I out of the contract as it applied to third-tier or lower assemblies that were separate CLINs. Indeed, if the third tier or below CLIN was not itself a "specialty metal" (e.g., raw stock), it would appear that no Berry Amendment restrictions would apply.

Although the OMB definition of component seems to focus on the physical relationship of the item to an end product or another component, Example 1 suggests that the definition of "component" may depend, in part, on contract

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structure. In Example 1, if a printed circuit board is purchased as a separate CLIN under the prime contract, the example states that it would be covered as a separate end item from the missile, and thus, not one of the six major product categories. The implication is that where the printed circuit board is not called out as a separate CLIN, the prime contractor will be subject to Alternate I, paragraph (d), and must flow down Alternate I to all parts. Example 1's result elevates form over substance—a circuit card purchased for a missile will have two separate treatments, depending on how the contracting officer structures the contract. There appears to be no logical basis for treating a circuit board on the same contract differently where it is intended for the same purpose and purchased with the same funds.

Paragraph (d) of Alternate I remains unchanged from the nondeviated version and provides, "(d) [t]he Contractor shall insert the substance of this clause, including this paragraph (d), in all subcontracts for items containing specialty metals." Once Alternate I applies, the contractor with Alternate I in its prime contract or subcontract must flow it down to the last piece part. For the supply chain to realize the protections of exclusion of the Berry Amendment below the second tier, however, the specialty metals clause should provide prime contractors with the same contractual flexibility the government has. Currently it does not clearly do so.[10]

Example 1 also suggests that DOD intends the tiers to be applied mechanically based on physical design principles, rather than based upon the tier of contractor from whom the government was purchasing the item. In Example 1, a power supply for a missile that the government purchases under a separate contract line item will still be a second-tier assembly and thus will be subject to the Berry Amendment requirements in Alternate I.

Although the DOD Deviation and Example 1 present the tiered system as if the tiers could be easily and clearly discerned, in practice it may be more difficult to distinguish between second and third tiers. The degree to which tiers will be distinguished based on mechanical principles or subcontracting tiers is not clear. Generally, assemblies and subcontracts are naturally linked, as a large system integrator would have various subcontracting levels for different levels of assemblies.

The DOD guidance leaves significant unresolved issues for the supply chain. The resulting uncertainty as to application will make it even more difficult for subcontractors and vendors to predict when a part they are selling is covered by Alternate I and when it is not. The only reliable method to determine their compliance obligations will be the terms of the subcontract or purchase order. Indeed, presumably a subcontractor would have one contract with the prime or the next tier of subcontractors, which would cover items for incorporation in the end product as well as separate spare or replacement part CLINs. Thus, if Alternate I were flowed down, as it appears the prime contract requires, then all of the items produced by the subcontractor would have to be compliant unless Alternate I were modified to anticipate the listing of the item under a separate CLIN. Even in that case it would seem impractical for the subcontractor to maintain the ability to produce a version of the item that is compliant and one that is not compliant with the Berry Amendment.

Berry Amendment Restrictions for Procurements Requiring Delivery of Specialty Metals

Section 2533b(a)(2) eliminated the application of the Berry Amendment to items containing specialty metals that were not end items or components under one of the "big six." As noted, section 2533b(a)(1) applies only to these six major product categories. However, for products, that do not fall within these six categories, section 2533b(a)(2) restricts only procurements of "a specialty metal that is not melted or produced in the United States and that is to be purchased directly by the Department of Defense or a prime contractor of the Department."

Difficult issues of interpretation surround two terms in this restriction, "specialty metal" and "produce," with the most critical term being "specialty metal." If DOD interprets the term "specialty metal" narrowly then this provision of the statute becomes extremely limited—as discussed below, it may apply to purchases of raw material—and may prove virtually meaningless for most contractors.

DOD implemented this application through two mechanisms: (1) the language in the prescription for including DFARS 252.225-7014 (Deviation) in contracts; and (2) in the clause itself. Terms in both must be understood harmoniously to understand the extent of the exemption for specialty metals not addressed in either the prescription or the requirement.

The Deviation prescribes that DOD include DFARS 252.25-7014 (Deviation) in "solicitations and contracts exceeding the simplified acquisition threshold that require delivery of specialty metals." The definition of "specialty metals" in DFARS 252.225-7014 (Deviation) addresses only the chemical content of specialty metals and does not address the key issue of what form of the metal constitutes "specialty metal" and when in the manufacturing process it becomes an item of specialty metal that is not covered under the statute and regulations. The December 6, 2006, memorandum identified "raw stock" as an example of "specialty metal acquired directly by the government," but does not define "raw stock." Presumably, the most basic forms, specialty metal bar and sponge, would be considered "raw" stock. However, arguably raw stock is not the only form that meets the definition of a procurement for the delivery of specialty metal. Specifically, it is not clear how DOD will characterize products made entirely of specialty metal that have been taken to a more processed level of production, such as sheet or hollows for tubing, but which are not in their final, usable state.

A narrow construction limiting the Berry Amendment's

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prescription to specialty metals' rawest form, "bar" or "sponge," would eliminate the majority of procurements by the government or prime contractors. Indeed, it would probably limit the procurements to those acquiring strategic stockpile materials. Alternatively, a broader approach would arguably include items made wholly of specialty metals, such as fasteners, bolts, sheets, or fittings, as "specialty metals," even though they have undergone significant processing and manufacturing.

DOD December 6, 2006, guidance provides no additional factors or parameters to consider in determining when a procurement requires delivery of "specialty metals" and when it requires delivery of items of specialty metals.

"Melted or Produced"

Closely tied to determining the scope and effect of this provision dealing with the procurement of "specialty metals" is what constitutes compliance with the Berry Amendment. Section 2533b(a)(2) recognizes that Berry Amendment requirements may be met by specialty metal that is either "melted *or* produced" in the United States. (Emphasis added.)

The introduction of the word "produced" raises questions as to the overall intent of Congress and DOD in this part of the Berry Amendment. The meaning of "produce," coupled with the meaning of "delivery of specialty metals" (described above) is critical to understanding the requirement imposed by DFARS 252.225-7014 (Deviation) on contractors for specialty metals to be "melted or produced" in the United States or a qualifying country.[11]

The term "produce," which was introduced in this context in section 2533b, suggests that the term "specialty metals" might have a more manufactured form than the basic form that specialty metals assume after having been melted, such as bars or sponge. Although the term "produce" could be treated as a synonym for melt, it also could be argued that it has a meaning distinct from melt; otherwise, it is redundant and meaningless. Since there is no special trade usage associated with the term "produce," its plain meaning, which would encompass the "manufacturing" of specialty metals, prevails. If the phrase "specialty metal" is interpreted to mean the metal is its most basic form (bars or sponge), then the meaning of "produced" becomes less important and would logically be the equivalent of melt.

If, however, "specialty metals" is more broadly interpreted, then production logically extends to the processes used to render the metal in the form that constitutes "specialty metal." The use of the term "produced" is most significant if the restriction in Alternate I is interpreted to include manufactured products including parts made solely of specialty metal, e.g., fasteners or fittings. Although such a construction greatly increases the products subject to DFARS 252.225-7014 (Deviation), it would also increase the scope of products that comply with the clause. Specifically, under such a broad construction of specialty metals, any reprocessing or manufacture of a specialty metal part in the United States would satisfy the requirements of the Berry Amendment. A similar result would appear to be supported for Alternate I (Deviation), which requires "[a]ny specialty metals incorporated in articles delivered under this contract shall be melted or produced in the United States or its outlying areas."

New Exception for Commercially Available Electronic Components

Prior to the fiscal year 2007 NDAA, the Berry Amendment applied to any drop of specialty metal. There was no de minimis exception. Section 2533b(g) introduced a de minimis exception for commercial electronic components only. It stated that the Berry Amendment, "does not apply to procurements of commercially available electronic components whose specialty metal content is de minimis in value compared to the overall value of the lowest level electronic component produced that contains such specialty metal."[12] Alternate I (Deviation) defines "[e]lectronic component" as

> an item that operates by controlling the flow of electrons or other electrically charged particles in circuits, using interconnections of electrical devices such as resistors, inductors, capacitors, diodes, switches, transistors, or integrated circuits. An item can be an "electronic component" regardless of the tier of the end product at which it is installed.

The statement that the definition can be met at any tier suggests that the term "electronic component" is divorced from the definition of "component" in Alternate I (Deviation), which is defined with respect to tiers.

DOD Alternate I (Deviation)[13] implemented section 2533b by excepting specialty metals:

> (2) Incorporated in a commercially available electronic component, if the value of the specialty metal content in the electronic component does not exceed 10 percent of the overall value of the lowest level electronic component, containing specialty metal, that is-
>
> (i) Produced by the Contractor; or
>
> (ii) If the Contractor does not produce the electronic component, produced by the subcontractor from which the electronic component was acquired.

The definition requires the identification of the electronic component being measured. Since an electronic component may exist at any tier, the determination of what to measure may be more difficult than suggested by the example provided with the DOD guidance. The requirement is to identify the lowest level electronic component incorporating specialty metal that is produced by the subcontractor selling the item. Effective implementation, however, will require some thought by contractors that outsource electronic components to ensure that they have accurately identified their subcontractors that actually produced the electronic components and have assurances from them that the value of any specialty metal is less than 10 percent of the total value.

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The DOD Deviation includes Example 2 in which it explains that the term "component" is neither measured by the end item, nor by the individual electronic parts, but by all the costs of the "component" itself. Example 2 also indicates that "[i]t is not necessary to know the exact value of the specialty metal, only to reasonably estimate that it is less than 10 percent of the total value."[14] Prime contractors that must flow down DOD Alternate I (Deviation) may want to obtain certifications from their component producers regarding the estimated value of the specialty metals in the electronic components. However, some may be reluctant to certify to even an estimated content of specialty metals because this is normally not tracked in commercial markets and hence the supplier would have no basis to even estimate that the specialty metal content was less than 10 percent.

One-Time Waiver

Section 832(b) provided DOD with a one-time waiver to 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 of title 10, United States Code.

The December 6, 2006, DOD guidance outlines the chain of approval for the one-time waiver, but does not create proposed regulatory provisions for such implementation. The waiver applies "for contracts under which specialty metals were incorporated into items produced, manufactured, or assembled in the United States prior to November 16, 2006, and where final acceptance by the Government takes place after that date."[15]

The date restriction imposed by section 832(b)(1) appears to remain a bar for contractors that delivered noncompliant items that were accepted prior to November 16, 2006, or that produce, manufacture, or assemble noncompliant items after November 16, 2006.

A waiver requires "written determination by the contracting officer, approval from the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L) or the Service Acquisition Executive of the Military Department concerned, and notification in FedBizOpps.gov within 15 days from the time the contracting officer makes the required determination."[16]

The December 6, 2006, memorandum emphasizes that in the determination, the "[t]he contractor should be reminded of the importance of having adequate procedures in place to ensure compliance in the future" and references the compliance plan cited in section 832(b)(1)(A)(ii).

The December 6, 2006, memorandum also recognizes that the House Armed Services Committee report on the 2007 legislation[17] indicated "that many suppliers have been 'inadvertently noncompliant' with the specialty metals provision of the Berry Amendment." It further states that

> for violations involving commercial items, it is likely that noncompliance was inadvertent. If so, the appropriate amount and form of consideration, if any, due to the Government, should be determined by the contracting officer on a case by case basis. When making the required determination, the contracting officer should obtain and may rely on contractors' representations that "the non-compliance is not knowing or willful."

Thus, there appears to be a presumption that noncompliant product was inadvertently provided. More importantly, it assists contracting officers by allowing them to merely accept a contractor's assertion and allows them to have their determination based solely on this assertion. This memorandum also establishes that consideration must be "appropriate," and allows that consideration might not be due the government.

Numerous questions surround the scope of the waiver and how it will be administered by DOD. One question that will likely arise is the extent to which this waiver will be extended to noncompliant items in inventory. DOD's December 6, 2006, memorandum leaves open the possibility that inventory items produced, manufactured, or assembled in the United States prior to November 16, 2006, that contain noncompliant specialty metal could continue to be used until September 30, 2010, in end items and higher-tiered components.

The December 6, 2006, memorandum recognizes that the House Armed Services Committee report on the 2007 legislation indicated "that many suppliers have been 'inadvertently noncompliant' with the specialty metals provision of the Berry Amendment."

The full impact of this waiver depends on the interpretation of the term "items" in section 832(b). "Item" is defined in 41 U.S.C. § 403(10) as "any individual part . . . integral to a major system . . . which may be replaced during the service life of the system, and includes spare parts and replenishment spare parts . . . ." If the definition of "item" includes parts, then the one-time waiver arguably could be extended to any part that was produced in the United States prior to November 16, 2006, regardless of where in the supply chain it was stored or used. Thus, suppliers could continue to deliver and prime contractors could continue to use until 2010 parts inventory produced in the United States prior to November 16, 2006. If so interpret-

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ed, this one-time waiver could provide relief to the suppliers, such as those in the fastener industry, that otherwise would find themselves with inventory that could only be sold for scrap.

Domestic Nonavailability Exception Process

There has always been an exception for purchasing items where there was a finding that adequate domestic sources were not available. In the past the process to apply for and receive this exception was rarely used. Section 2533b(b) provides a revised standard for determining an exception based on a domestic nonavailability. It states:

> Subsection (a) does not apply to the extent that the Secretary of Defense or the Secretary of the military department concerned determines that compliant specialty metal of satisfactory quality and sufficient quantity, and in the required form, cannot be procured as and when needed. For purposes of the preceding sentence, the term "compliant specialty metal" means specialty metal melted or produced in the United States.[18]

This domestic nonavailability determination (DNAD) can be made with respect to "prime contracts and subcontracts at any tier."[19] The "availability exception" in section 2533b appeared in the old law without the "availability in the required form" language.

The key issue is whether DOD can implement a process that allows for timely consideration and approval of appropriate exceptions. DOD's December 6, 2006, memorandum provides examples of nonavailability based on form and need as follows: "[D]omestic specialty metal may not be available in the bar stock required to produce fasteners or the specialty metal may not be available, as and when needed, in the forged or milled form that is required." This guidance suggests that DOD may issue a DNAD for a forged or milled form, such as a fastener, if the fastener is not available "as and when needed" from a subcontractor. The memorandum also suggests that a determination of availability should include a consideration of "whether the price of compliant metal is fair and reasonable, in accordance with FAR 15.402." It indicates that existing DNADs should be reviewed to ensure they are consistent.

The expansion of the factors that may be considered in issuing DNADs provides DOD agencies and contracting officers with expanded flexibility to support and obtain DNADs; whether they will use this flexibility remains to be seen.

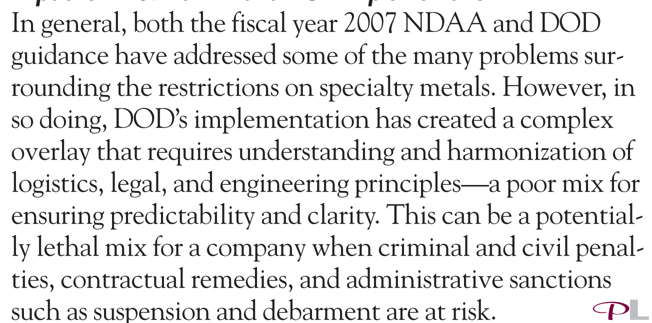
Lack of Adequate Future Remedies

The December 6, 2006, memorandum, however, contains language that indicates that with the exception of the one-time waiver and domestic nonavailability determination process, there is no additional safety valve that would allow DOD to conditionally accept aircraft with noncompliant parts. Specifically, it states, "in any contract awarded after November 15, 2006, the Department can no longer continue the practice of withholding payment while conditionally accepting non-compliant items in these categories." The DCMA guidance of December 8, 2006, reemphasizes this position by identifying as a significant change that "[f]or contracts awarded after November 15, 2006, DoD can no longer withhold payment while conditionally accepting non-compliant items (but, DCMA ACOs may continue this practice as outlined in our March 10, 2006 Specialty Metals Instruction for contracts awarded prior to that date)."[20]

It is not clear what process will apply to future instances of noncompliance. The six major product categories include incredibly complex systems and even with strong compliance systems on the part of contractors at all tiers, there will be instances of inadvertent noncompliances. The past practice of rejecting necessary aircraft because of noncompliant parts far down in the supply chain, such as fasteners, benefited no one. Although the prior process of withholding funds was not equitable to contractors that had delivered systems, it was at least a safety valve that allowed prime contractors for the "big six" categories to deliver critical military product. There is a risk that rigid interpretation of the December 6, 2006, guidance might result in renewed refusals to accept "big six" systems where there is a single noncompliance that falls outside of the statutory window. Hopefully, DOD will adopt a clear and fair process for remedying future instances of inadvertent noncompliances after the enactment of the fiscal year 2007 NDAA.

Impact of FY07 NDAA and DOD Implementation

In general, both the fiscal year 2007 NDAA and DOD guidance have addressed some of the many problems surrounding the restrictions on specialty metals. However, in so doing, DOD's implementation has created a complex overlay that requires understanding and harmonization of logistics, legal, and engineering principles—a poor mix for ensuring predictability and clarity. This can be a potentially lethal mix for a company when criminal and civil penalties, contractual remedies, and administrative sanctions such as suspension and debarment are at risk.



Endnotes

1. The Berry Amendment originated in the Naval Appropriations Act of 1940 and, at that time, prohibited naval appropriations from being used for food not grown or produced in the United States. The Defense Appropriations Act of 1973 expanded the scope of the Berry Amendment to cover "specialty metals." Through 1993, its restrictions were passed in each annual Defense Appropriations Act, without being codified in the U.S. Code. In 1993, the Berry Amendment became a note to 10 U.S.C. § 2241, and in 2002 was recodified at 10 U.S.C. § 2533a.
2. H.R. 5122, Pub. L. No. 109-394 (2006).
3. Available *at* http://www.acq.osd.mil/dpdp/policy/policyvault/2006-2051-DPAP.pdf.
4. Available *at* http://guidebook.dcma.mil.
5. In 1972, then-Secretary of Defense Melvin R. Laird determined that the requirements and exceptions of the Berry Amendment also would be flowed down to certain subcontractors, but only for six key areas of procurement: aircraft, missile and space systems, ships, tank-

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automotive, weapons, and ammunition. Memorandum from Secretary of Defense Melvin R. Laird (Nov. 20, 1972) (available *at* www.aia-aerospace.org/pdf/berry_lairdmemorandum.pdf); *see also* Christopher R. 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 THE GOV'T CONTRACTOR, No. 38, ¶ 367 (Oct. 18, 2006); Sean P. Bamford, *The Persistence of Time: A Brief History and Analysis of the Berry Amendment*, Vol. 32, No. 3 PUB. CONT. L.J. 584 & n.44 (Spring 2003). Consistent with this policy decision, the Defense Acquisition Regulation and the DFARS have long excepted subcontractors on all other programs from the requirements of the Berry Amendment. *See* DFARS 225.7002(a)(10)(1986).

6. DFARS 225.7002-1.

7. Sec. 842 of FY07 NDAA, § 2533b(j)(2).

8. In fact, neither the FAR nor DFARS defines "end item." 10 U.S.C. § 2308 defines "end item" in the context of a "buy-to budget acquisition" as a "production product assembled, completed, and ready for issue or deployment."

9. 2006-O0004, Clause Prescription.

10. Some have suggested that the language in the prescription might be read to allow prime contractors to not include Alternate I (Deviation) in subcontracts for third-tier and below assemblies, as anything below the second tier is defined not to be a "component" under the guidance. However, because the literal language of paragraph (d) in Alternate I (Deviation) requires the prime contractor to flow down this clause's requirements to all tiers, prime contractors may want to obtain express, written approval from their contracting officers before relying on the general guidance to justify not flowing down Alternate I (Deviation).

11. WEBSTER'S NEW WORLD DICTIONARY, THIRD COLLEGE EDITION, p. 1073 (1988); *see* MERRIAM-WEBSTER'S ONLINE DICTIONARY (http://www.m-w.com/dictionary/produced) (2006).

12. 10 U.S.C. § 2533b(g)).

13. DFARS 252.225-7014 (Deviation) without Alternate I does not provide an exception for electronic components. Presumably, this is because DFARS 252.225-7014 (Deviation) without Alternate I no longer applies to solicitations and contracts for articles or components containing specialty metals that are not for use in one of six major categories of programs. Only a direct buy of the part containing the specialty metal (such as a stainless steel wire) would be covered.

14. 2006-O0004, Example 2.

15. 2006-O0004 at p. 2.

16. *Id.*

17. House of Representatives, Committee on Armed Services Report for the FY07 NDAA (H.R. Report 109-452, p. 361).

18. Sec. 2533b(b).

19. *Id.* § (b)(2).

20. DCMA Information Memorandum No. 07-042, *Specialty Metals (1 0 USC.2533b1 Protection of Strategic Materials Critical to National Security*) (INFORMATION) (December 8, 2006) available at http://dcma.guidebook.mil.

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