DOMESTIC SPECIALTY METALS RESTRICTIONS: A BUMPER CROP OF FRESH BERRY ISSUES

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Domestic specialty metals supply restrictions were first enacted by Congress in 1972 and have been a part of doing business with the Department of Defense ever since. Until October 2006, the restrictions on specialty metals were included, along with similar restrictions on the purchase of other commodities (including food, clothing, tents, various textiles, and hand tools) in a statute known as the “Berry Amendment.” Because of widespread confusion and compliance issues arising out of these restrictions, Congress in the John Warner National Defense Authorization Act for Fiscal Year 2007 amended and recodified the specialty metals restrictions.

The Berry Amendment domestic restrictions on specialty metals operate through a statutory prohibition on the DOD’s use of appropriated funds to acquire noncompliant specialty metals, as well as through regulations and DOD memoranda implementing and enforcing that prohibition. The restrictions apply only to the DOD.

While the Berry Amendment prohibitions have been in place for many years, Congress...
and the DOD recently have shown renewed interest in compliance with, and enforcement of, the specialty metal restrictions. This renewed attention has revealed uncertainty in the industry and serious problems facing not only prime contractors, but also lower-tier subcontractors, in complying with the restrictions on use of these common materials. Congress acknowledged some of these problems, providing limited relief while renewing its commitment to support the domestic specialty metals industry in the FY 2007 Defense Authorization Act. The purpose of this BRIEFING PAPER is to inform you about the current specialty metals restrictions to enable you to deliver products compliant with these unique and sometimes burdensome requirements. In light of the recent changes, the PAPER discusses the statutory and regulatory requirements applicable to contracts awarded both before and after the effective date of the revised Berry Amendment specialty metals provisions and addresses several common areas of concern and uncertainty.

The Statutes

Prior Statute

The FY 2007 Defense Authorization Act made important changes to the law governing specialty metals. Contracts awarded before the November 16, 2006, effective date of the FY 2007 Defense Authorization Act, however, will continue to be covered by the prior Berry Amendment specialty metals provisions. Since the former requirements will remain applicable to existing contracts for the foreseeable future, you need to be familiar with them.

Under the former version of the Berry Amendment statute, codified at 10 U.S.C.A. § 2533a, “funds appropriated or otherwise available to the Department of Defense” could not be used to procure certain listed items “if the item is not grown, reprocessed, reused, or produced in the United States.” Before the recent statutory changes, the listed items included “specialty metals.” Although the prior version of the Berry Amendment statute did not define “specialty metals,” the DOD’s implementing regulations define “specialty metals” as follows:

(i) Steel—

(A) With a maximum alloy content exceeding one or more of the following limits: manganese, 1.65 percent; silicon, 0.60 percent; or copper, 0.60 percent; or

(B) Containing more than 0.25 percent of any of the following elements: aluminum, chromium, cobalt, columbium, molybdenum, nickel, titanium, tungsten, or vanadium;

(ii) 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;

(iii) Titanium and titanium alloys; or

(iv) Zirconium and zirconium base alloys.

This definition was codified by the FY 2007 Defense Authorization Act, as discussed further below.

The prior version of the Berry Amendment statute included several exceptions to the restrictions on procurement of specialty metals
(as well as of the other listed commodities), including exceptions for procurements “outside the United States in support of combat operations,” procurements “in support of contingency operations,” procurements “by vessels in foreign waters,” “items purchased for resale purposes in commissaries, exchanges, or nonappropriated fund instrumentalities,” and purchases for amounts under the simplified acquisition threshold. There were also several other important exceptions:

1. The domestic nonavailability exception for purchases in which “the Secretary of Defense or the Secretary of the military department concerned determines that satisfactory quality and sufficient quantity of any such specialty metal “produced in the United States cannot be procured as and when needed at United States market prices.”

2. The urgency exception for purchases for which the use of procurement procedures “other than competitive procedures” have been approved on the basis of “unusual or compelling urgency of need.”

3. The qualifying country exception for purchases of specialty metals “to comply with” or “in furtherance of” certain international agreements.

These three exceptions, which remain key elements of the recodified Berry Amendment specialty metals statute, are discussed separately later in this Paper.

**FY 2007 Defense Authorization Act Changes**

The FY 2007 Defense Authorization Act separated the Berry Amendment specialty metals restrictions from the provisions applicable to other commodities at 10 U.S.C.A. § 2533a and recodified them, with significant revisions, in a new U.S. Code section, 10 U.S.C.A. § 2533b. The new statute states:

[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.

Under this revised language, the restrictions now expressly apply only to the procurement of specialty metals “purchased directly” by the Government or prime contractors and to the procurement of end items or components of the six major systems specified in the statute—aircraft, missile and space systems, ships, tank and automotive items, weapon systems, and ammunition—that contain specialty metals. As discussed in more detail below, the DOD’s Berry Amendment regulatory coverage has long distinguished between items within these six major system types and other items containing specialty metals. In the six major programs, the restrictions flow down to subcontractors. For all other DOD procurements, the restrictions apply only at the prime contract level. Now, apart from items or components in the six system types, only specialty metals themselves purchased directly by the Government or a prime contractor—and not items containing specialty metals—are covered in the new statute.

In the new legislation, Congress made an effort to “maintain all current exceptions and waivers to the current Berry Amendment.” Thus, the specialty metal restrictions can be waived if “compliant [domestic] specialty metal of satisfactory quality and sufficient quantity, and in the required form, cannot be procured as and when needed.” In addition, certain types of procurements continue to be excepted from the specialty metals requirements, such as small purchases, commissary purchases, purchases outside the United States in support of combat or contingency operations, procurements for which competitive procedures are waived because of an unusual or compelling urgency of need, and purchases under certain agreements with foreign governments. The traditional Berry Amendment exception for procurements “by vessels in foreign
waters” was eliminated with respect to specialty metals.

In addition, in response to widespread reports of the difficulty of obtaining compliant electronic components, the FY 2007 Defense Authorization Act created a new “de minimis” 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 component produced that contains such specialty metal. The Act also added a “one-time waiver” provision to deal with rampant current compliance issues. Both of these provisions are discussed in more detail below.

The Regulations

Since the Berry Amendment restrictions apply only to DOD procurements, the specialty metals rules are implemented solely in the Defense Federal Acquisition Regulation Supplement and not in the FAR. The current DOD regulations address the previous specialty metals coverage of the “old” Berry Amendment, although the DOD has already promulgated new clauses as a “deviation” to implement the FY 2007 Defense Authorization Act changes in contracts awarded on or after November 16, 2006.

• Current DFARS

The current DFARS specialty metals provisions state that the DOD will not acquire “[s]pecialty metals, including stainless steel flatware, unless the metals were melted in steel manufacturing facilities located within the United States.” The regulations also implement the statutory exceptions. Further guidance on both the restrictions and exceptions can also be found by consulting the DFARS Procedures, Guidance and Information at PGI 225.7002.

The standard contract clause implementing the Berry Amendment specialty metals restrictions, “Preference for Domestic Specialty Metals,” must be used in all the DOD contracts above the simplified acquisition threshold that require delivery of an “article” containing specialty metals (unless an exception applies). The clause requires that “[a]ny specialty metals incorporated in articles delivered under this contract shall be melted in the United States or its outlying areas.” “Outlying areas” are defined as the Commonwealths, Territories, and certain islands subject to the laws of the United States.

While the standard clause states that all specialty metals must be melted in the United States, it nevertheless incorporates the statutory foreign agreements exception, allowing purchase of specialty metals “[m]elted in a qualifying country or incorporated in an article manufactured in a qualifying country.”

The clause defines “qualifying country” as those listed as such in the DFARS for Buy American Act purposes.

Note that the standard clause is inapplicable by its own terms to specialty metals “purchased by a subcontractor at any tier” and thus applies the Berry Amendment restrictions only at the prime contract level. Importantly, the “Alternate I” version of the DFARS clause must be used in contracts for major programs—aircraft, missile and space systems, ships, tank and automotive items, weapons, and ammunition—and Alternate I requires that the contractor insert the Berry amendment restriction in all subcontracts at every tier that involve specialty metals. Therefore, if a contractor is supplying an item under one of these major programs, the restrictions of the Berry Amendment must flow down to contractors at every tier where specialty metals are involved.

Note also that, while the Berry Amendment restrictions apply only to contracts above the simplified acquisition threshold (normally $100,000), this limitation refers only to the prime contract. As a result, the restrictions that flow down under the Alternate I clause cover all subcontracts regardless of the subcontract price.

• New Deviation Clauses

The DOD’s December guidance memo sets out as a class deviation both a new “Preference for Domestic Specialty Metals (Deviation)” clause to use in procurements that require “delivery of specialty metals” and a new “Alternate I (Deviation)” clause for use in contracts “requiring delivery of an article containing specialty metal, if the article is an end product, or a component thereof” in any of six listed product categories (aircraft, missile and space systems, ships, tank and automotive items, weapon systems, and ammunition). End products are simply “supplies delivered under a line item of a Government contract,” while “components” are defined in the December 2006 guidance memo as first-tier or second-tier parts incorporated into end products.

Both the new “Preference” clause and its Alternate I require specialty metals to be melted or produced in the United States, and both contain an exception for specialty metals melted or produced in qualifying countries. In addition, the Alternate I clause sets out the new “de minimis” exception for commercially available electronic components and requires the contractor to flow down the clause requirements to subcontracts at all tiers.

Outside of purchases in the six major programs, the DOD apparently interprets the new statutory coverage to extend only to direct purchase, by the Government or prime contractor, of the metals themselves—“raw stock.”

Berry Amendment Exceptions

- Domestic Nonavailability

The Berry Amendment recognizes that domestic specialty metals simply will not be available in some cases and provides an exception for those situations. Before you can take advantage of this exception, the “Secretary [of the military service] concerned”—the Secretary of the Army, Secretary of the Navy, Secretary of the Air Force, or, for other defense agencies, the Under Secretary of Defense (Acquisition, Technology, and Logistics)—without power of re-delegation, must determine that the contract item “cannot be acquired domestically as and when needed in satisfactory quality and sufficient quantity at U.S. market prices.” The FY 2007 Defense Authorization Act adds that the metal must also be available “in the required form,” although the DFARS does not yet reflect this change. This determination is called a domestic nonavailability determination (DNAD). If the DNAD covers the acquisition of titanium or a product containing titanium, the congressional defense committees also must be notified at least 10 days before contract award.

Certain items are already covered by blanket nonavailability determinations. The FAR lists a number of articles (including certain forms of chrome, nickel, platinum, and tin) that the Government has already determined to be unavailable under the Buy American Act. The DFARS provides that acquisitions of items on that FAR list are similarly exempt from the Berry Amendment unless they are hand or measuring tools.

One important class DNAD was issued on January 4, 2007, for “circuit card assemblies populated with commercial components (i.e., populated circuit card assemblies).” The DNAD notes that most such circuit card assemblies will not even be covered by the Berry Amendment restrictions, since the value of the specialty metal is significantly less than 10% of the value of the assembly. Those assemblies not otherwise excepted, however, are now exempt under the DNAD.

According to DOD guidance issued January 17, 2007, a DNAD does not require that compliant metals “cannot be obtained at any cost.” Rather, Contracting Officers should determine if the price premium to obtain compliant metals is fair and reasonable (keeping in mind that Congress anticipated some price premium), and the military department Secretaries can take this finding into consideration in making DNADs. The guidance also states that “in the required form” is interpreted “to relate to specialty metal that is formed in some fashion into a part.”

As you might expect, DNADs are rare, often take substantial time to obtain, and may
require voluminous supporting documentation (such as market research and an analysis of alternatives). The Defense Logistics Agency suggests, for example, that “the contracting activity should submit the DNAD package 4 to 6 months before it is needed” and instructs COs to take the following steps:

1. Make a determination and findings explaining the basis for concluding the item is unavailable domestically.

2. Advise the requiring activity in writing that the required item requires a Berry Amendment waiver and inform the requiring activity of alternative items that would not require such a waiver.

3. Obtain from the requiring activity a written response “certifying” that the proposed alternatives are unacceptable.

4. Obtain a report and recommendation of the Contracting Activity Commander discussing the supply and procurement situations as well as the potential political ramifications of the waiver and certifying that the customer has explored all reasonable alternatives to the item requiring waiver and that all such alternatives are unacceptable to the customer.

5. Submit all the required letters, reports, and certifications to Headquarters DLA.

The Government Accountability Office has criticized the military for, in effect, not doing its homework before requesting a DNAD, so you should do all you can to help with this process. You should provide all the information you can gather on the unavailability of domestic sources and explain why alternative, domestically available products cannot be used in the end item.

■ Urgency

If the Government properly decides that a particular acquisition is of “unusual and compelling urgency” such that the Government can justify an exception from the Competition in Contracting Act and thus use acquisition procedures other than full and open competition, then the resulting contract is also excepted from the Berry Amendment restrictions. The urgency exception is available only when “the United States would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals.” Not surprisingly, this exception is generally limited to only the most compelling situations. Agencies have justifiably used the exception in such situations as short notice repairs on a ship that would only be in port for a very short period of time and procurements needed to remedy critical supply shortages.

■ Qualifying Country

Purchases made pursuant to certain international agreements are excepted from the Berry Amendment prohibitions. The countries with which the United States has such agreements are called “qualifying countries,” and the standard DFARS “Preference for Domestic Specialty Metals” clause states that the Berry Amendment restrictions do not apply to specialty metals “[m]elted in a qualifying country or incorporated into an article manufactured in a qualifying country.”

The qualifying countries are listed at DFARS 225.872-1 and currently include Australia, Belgium, Canada, Denmark, Egypt, the Federal Republic of Germany, France, Greece, Israel, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United Kingdom of Great Britain and Northern Ireland. Austria and Finland are also qualifying countries for Berry Amendment purposes, though they are only exempted on a “purchase-by-purchase” basis for Buy American Act purposes.

The qualifying country exception has the (probably unintended) result of granting foreign manufacturers significantly more sourcing flexibility than domestic manufacturers. Note that the exception in the “Preference” clause covers specialty metals either melted in or incorporated in an article manufactured in a qualifying country. The United States is not listed in the regulations as a qualifying country. Thus, an item manufactured in a qualifying country
complies with the clause even if the specialty metal it contains has been melted in a nonqualifying country, whereas a specialty metal incorporated in the United States (which is not, under the regulations, a qualifying country) must meet the basic “Preference” clause requirement that the specialty metal be “melted in the United States.”

As a result, domestic manufacturers have (probably inadvertently) been placed on an unequal footing with competing qualifying country manufacturers. For example, consider two manufacturers competing for a contract to manufacture an aircraft item under a DOD contract, and assume that titanium is used in the manufacture of the item. The Italian manufacturer can use less expensive Russian (nonqualifying country) titanium as long as the Russian titanium is incorporated in items in Italy (a qualifying country), whereas the domestic manufacturer may only use titanium melted in the United States or a qualifying country.

As this example also shows, if you are a domestic manufacturer, you may be able to reduce the cost of the items by moving manufacturing operations to a qualifying country. Thus, the failure to list the United States as a “qualifying country” may have the perverse consequence of decreasing domestic manufacture in this circumstance.

De Minimis

Responding to a major outcry from the electronics industry, the FY 2007 Defense Authorization Act added an exception for purchases 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.” The DOD’s December 2006 guidance memo states that the DOD will use “does not exceed 10%” as its standard for determining whether specialty metal content is “de minimis.” “Electronic component” is defined in the new “Alternate I (Deviation)” clause to mean “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.”

According to the new clause, the 10% of overall value test is applied by comparing “the value of the specialty metal content in the electronic component” to the “overall value of the lowest level electronic component, containing specialty metal,” that is either produced by the contractor or by the subcontractor supplying that electronic component. For example, if you contract to manufacture an aircraft, and you obtain radio communication equipment from a subcontractor that buys electronic parts to assemble from a lower-tier supplier, the radio communication equipment—and not the individual electronic parts assembled into that equipment—will be considered the “electronic component.” The purchase is then excepted if the value of the foreign specialty metal content of that equipment is less than 10% of the value of the radio communications equipment. (By the same logic, however, if your supplier produces the individual electronic parts, under the December 2006 guidance memo, those parts apparently would be considered the “electronic components,” the value of which would then form the denominator for purposes of applying the 10% test.)

The December 2006 guidance memo makes clear that you need not know the exact value of the specialty metal in applying the de minimis test; rather, you simply must “reasonably estimate that [that value] is less than 10 percent of the total value.”

Coverage Issues

Covered Specialty Metals

The regulations (and, after the 2006 amendments, the Berry Amendment statute itself) define “specialty metals,” but it can be difficult to apply the definition to specific products. Many of the terms used in the statutory and regulatory definition quoted earlier in this paper—“steel,” “alloy content,” “metal alloys,” “base alloys,” and “other alloying metals”—may have only a general, imprecise scientific meaning and thus no clear legal meaning. Also, it can be difficult for your compliance personnel...
and legal advisors to come to grips with the metallurgical issues posed in applying the definition to commonly specified materials.

Note that the determination whether a given metal is a specialty metal is an “all or none” determination. Unlike the Buy American Act, in which components are subject to a percentage analysis, any amount of specialty metal is subject to restriction (except for the new “de minimis” analysis for electronic components). Even if the primary material used in a deliverable item is iron or some other material not covered by the statute, the presence of any component or assembly containing noncompliant specialty metal will trigger the statutory restrictions.

■ Covered Prime Contracts

Every contract issued by the DOD before November 16, 2006, must contain the “Preference for Domestic Specialty Metals” clause unless an exception applies or the contract either does not require the delivery of an article containing specialty metal or does not exceed the simplified acquisition threshold. The type of program involved—whether the article is for an aircraft, missile and space, ship, tank and automotive, weapon system or ammunition program—is important only in determining whether “Alternate I” to the clause, with its infinite flowdown requirements, applies. In other words, all over-threshold, nonexcepted DOD contracts for either items of specialty metals or for items containing specialty metals are covered by some contractual requirement.

The FY 2007 Defense Authorization Act effected a change in the basic coverage of the specialty metals restriction. Contracts calling for delivery of specialty metals themselves (such as bar stock) are still covered, as are contracts for items of one of the six listed program types. Based on changes in the statutory language and the DOD’s December 2006 guidance memo, however, it appears that other nonlisted items that contain specialty metals are not subject to any of the Berry Amendment specialty metals restrictions unless they “require delivery of specialty metals.” Under the current guidance, for example, a 2007 DOD contract for desks that contained specialty metal would not be covered by the FY 2007 Defense Authorization Act and would not have to contain a “Preference” clause (unless the prime contractor ordered raw stock directly to make the desks).

Interestingly, it is not completely clear whether the change expanded or contracted the basic statutory coverage. A Senate Armed Services Committee report on the FY 2007 Defense Authorization Act states that the entire pre-2007 regulatory coverage of items containing specialty metals was not mandated by the literal scope of the Berry Amendment, which the report said covered only the acquisition of specialty metals themselves. Thus, according to that report, the DOD chose to regulate its own acquisition of items containing specialty metals.

When a post-FY 2007 Defense Authorization Act contract calls for delivery of either the listed types of articles or any first- or second-tier component of such articles, “all parts and assemblies at all tiers” must be compliant with the specialty metals restrictions. When the DOD awards prime contracts requiring delivery of third-tier (or lower) parts or assemblies (even when they are ultimately to be used in end items in one of the six listed program categories), the December 2006 guidance memo instructs that these items are not to be treated as components at all, and no “Preference” clause is to be incorporated in such contracts. Where it is difficult or expensive to find some compliant lower-tier component, this distinction may encourage the Government to buy third-tier components directly and supply them to prime contractors as Government-furnished material.

The “Clause Prescription” included in the DOD’s December 2006 guidance memo, which sets out when the new Deviation clauses must be included in solicitations and contracts, reflects both of these limitations on the clauses’ coverage (nonlisted programs and third-tier or lower components). However, if the CO erroneously includes either of the new “Preference” clauses in a solicitation for an item
that contains specialty metals but is not for one of the six listed types of programs, or for a third-tier or lower component of even a listed type of article, you may object to the inclusion of the clause or point out that an exception applies.

The DOD has taken the position in its “Frequently Asked Questions” website that the Berry Amendment restrictions apply to Foreign Military Sales procurements, procurements in which the DOD provides funding to another agency, and even procurements in which another federal agency’s funding is being made available to the DOD, on the basis that funds “otherwise available” to the DOD are being used in those procurements. On the other hand, it could be argued that FMS trust funds retain their character as the foreign government’s funds, are administered by the Government (and the DOD) only in a fiduciary capacity, and thus should no more be considered “available” to the DOD than personal trust funds would be “available” to their administrator. The same argument could be made that other agencies’ funds similarly are not “available” to the DOD. Note that the DOD states on the “Frequently Asked Questions” site that, because of the changes in the FY 2007 Defense Authorization Act, new guidance is being prepared to address specialty metals specifically.

Flowdown Requirements

■ Pre-November 16, 2006 Contracts

If you hold a pre-November 16, 2006 DOD prime contract over the simplified acquisition threshold that requires delivery of an article containing specialty metals in the category of aircraft, missile and space systems, ships, tank and automotive items, weapons, or ammunition, the specialty metals restrictions must flow down to all subcontracts regardless of tier or dollar amount. The DOD chose those six classes of programs for special treatment because, according to 1972 materials estimates, they accounted for most of the specialty metals procured by the DOD. Subcontracts in other categories were exempted because then-Secretary of Defense Melvin R. Laird realized that the specialty metals restrictions were almost impossible to enforce across the wide spectrum of DOD purchases while still allowing the DOD to “function in an efficient and economical manner in meeting its mission.”

As a result of this accommodation, if your contract does not fall into one of the six categories, the DFARS “Preference for Domestic Specialty Metals” clause must be in your prime contract, but you are not required to flow it down to subcontractors.

■ November 16, 2006 & Later Contracts

For contracts awarded on or after November 16, 2006, the basic new “Preference for Domestic Specialty Metals (Deviation)” clause included in the DOD’s December 2006 guidance memo apparently is to be used only in contracts to deliver specialty metals (rather than items containing specialty metals) and is not required to be flowed down. The new “Alternate I (Deviation)” version, on the other hand, is to be used in any prime contract for end items or components in the six major categories and requires flowdowns to all subcontracts at all tiers, again regardless of amount.

As a result, when the Government purchases an end product that is in one of the six major program categories, components including all parts and assemblies at all tiers must be compliant. The same is true of any DOD purchases of first- or second-tier components in those categories. However, if your contract with the DOD does not require delivery of specialty metals and is not for end items or first- or second-tier components in one of the six categories, neither clause is prescribed for your prime contract.

Commercial/COTS Items

The Office of Federal Procurement Policy Act defines a “commercial item” as an item that has been sold or offered for sale to the general public. Even if a commercial item has been modified for the Government, such modified item may still meet the commercial item definition. A “commercially available off-the-shelf” (COTS) item is defined differently,
and more restrictively, as a commercial item sold in substantial quantities in the commercial marketplace and offered to the Government, without modification, in the same form as sold commercially.\textsuperscript{90}

There is no commercial item exception to the specialty metals requirements. A substantial argument can be made that there is (or should be) an exception for COTS items.

In 1994, the Federal Acquisition Streamlining Act of 1994\textsuperscript{91} first created a commercial item exception for federal contracts to encourage commercial procurement. The DOD understood FASA to require an exception to the Berry Amendment restrictions for commercial components purchased from subcontractors, and language to that effect was added to the DFARS in late 1995. The exception was for “[c]ommercial items or components purchased by contractors from subcontractors/suppliers.”\textsuperscript{92} Only two years later, Congress again intervened and eliminated the Berry Amendment commercial item exception by statute.\textsuperscript{93} The rule in place since 1997 is that the Berry Amendment specialty metals restrictions apply to commercial item procurements.

Under the OFPP Act, the only laws that apply to the procurement of commercial items are laws that expressly state that they apply notwithstanding § 34 of the OFPP Act.\textsuperscript{94} Similarly, the only laws that apply to procurement of COTS items are laws that expressly state that they apply notwithstanding § 35 of that Act.\textsuperscript{95} Both the prior version of the Berry Amendment and the current version as revised by the FY 2007 Defense Authorization Act explicitly state that they apply to procurements of commercial items “notwithstanding section 34” of the OFPP Act.\textsuperscript{96} Significantly, neither of these laws even mentions COTS items or states that the Berry Amendment applies to COTS items “notwithstanding Section 35” of the OFPP Act.

Thus, Congress has plainly provided that the specialty metal restrictions continue to apply to commercial items and the new statutory language effectuates that intent. The situation is not at all so clear with respect to strictly COTS items. Congress specified in § 34 of the OFPP Act that the FAR be amended to include a list of requirements inapplicable to commercial item procurement, and that regulatory coverage was duly issued.\textsuperscript{97} Congress also specified in the § 35 of the OFPP Act that the FAR also be amended to include a list of requirements inapplicable to COTS procurement\textsuperscript{98} but that regulatory list called for by Congress has never been published.

While the expression of congressional intent regarding COTS items thus may not be entirely clear, the plain words of OFPP Act § 35 dictate that the specialty metals restrictions should not apply to COTS items. Moreover, COTS procurements are not referred to at all in the FY 2007 Defense Authorization Act, which further supports the conclusion that Congress did not intend that this inherently small and quintessentially commercial area of COTS procurement be subject to burdensome and unique DOD specialty metals restrictions. To make clear that specialty metals restrictions do not apply to COTS procurement, the required regulatory list of provision of law inapplicable to COTS procurements should be promulgated by the DOD, and the specialty metals restrictions should be included in that list of inapplicable provisions.

This result would make sense from a policy standpoint. COTS items are quintessentially “commercial” but represent only a subset of the broader category of commercial items—the bull’s-eye on the target. A COTS exception from the Berry Amendment would further two competing policies: minimizing Government-unique restrictions on commercial item purchases while still providing protection for the domestic specialty metals industry.

Note that, while it declined to provide an exception covering all commercial items, as discussed above, the FY 2007 Defense Authorization Act did create a narrower (“de minimis”) exception for commercially available electronic components, which historically have posed particular problems for weapon system suppliers.\textsuperscript{99}
Compliance Problems

Before Acceptance—Pre-November 16, 2006 Contracts

What should you do when you discover before acceptance that your manufactured products do not, or may not, comply with the specialty metals restrictions? There is no easy answer to that question. Some of the first steps you should take are to try to determine the magnitude of the problem and notify the Government. While ideally you would want to understand the problem fully before you make that notification, as a practical matter you may not be able to do so if you are faced with making imminent deliveries or submitting invoices.

You then will have to determine how to address the problem with your suppliers for delivered and undelivered components, how to correct any problems with your supply chain or subcontract management that may have led to the noncompliance, how to deal with items in the process of being manufactured, and how to deal with items completed and presented for acceptance.

If you discover that one supplier has delivered noncompliant items to you, should you immediately conduct an audit of all your other subcontractors/suppliers? If you inadvertently failed to flow down the Alternate I clause, must you assume that all items furnished under your subcontracts contain noncompliant specialty metals? Should you require your subcontractors to certify compliance expressly if there is no clause in the subcontract requiring such certification? Can you require verification? Will making such requests provoke requests for equitable adjustment?

The answers to these important questions will depend on a host of other factors. For example, what are the circumstances of the noncompliance? Is there a specific, self-limiting reason for the noncompliance? If you have failed to flow the required clause down, are your suppliers nevertheless invariably subject to, and thus familiar with, Berry Amendment requirements and can they assure you that they have only a single, military-based supply chain and furnish only compliant items?

Note that the consequences of notifying the Government of a violation can be extreme. A DLA directive still available on the agency’s website, for example, states that, while confirming the violation by verifying that the item is subject to Berry Amendment restrictions and positively determining the item’s origin, the CO should suspend acceptance (to avoid creating an Anti-Deficiency Act violation), consider issuing a stop work order, suspend both payments for deliveries and progress payments pending resolution, conduct market research to identify any domestic sources, and look for substitutes acceptable to the Government customer.¹⁰⁰

You can work with the Government to minimize payment delays and get delivered items accepted. The pre-FY 2007 Defense Authorization Act Berry Amendment prohibited use of DOD funds for specialty metals, not for manufactured items containing specialty metals. Specifically, the prior version of the statute prohibited use of DOD funds for items “manufactured from or containing” prohibited fabrics, for example, but it only prohibited use of DOD funds for “specialty metals,” not items “manufactured from or containing” specialty metals.¹⁰¹ The DOD has traditionally reasoned that it therefore can accept end items that contain nonconforming specialty metals so long as it does not pay for the nonconforming portions. Thus, under pre-FY 2007 Authorization Act contracts—contracts awarded before November 16, 2006—you may be able to submit noncompliant items for conditional acceptance while you negotiate a decrement to the contract price for any nonconforming components.

Historically, it was often difficult to negotiate whether contract decrement should be at the item, component, or “nuts and bolts” level. Nothing in the DFARS directly suggests what kind of decrement should be negotiated when the Berry Amendment has been violated. Analogies to the Berry Amendment’s clothing prohibitions provided no help, as the DOD is expressly prohibited from paying for any item containing foreign-made synthetic fabric.¹⁰²
In March 2006, the Defense Contract Management Agency issued updated guidance detailing the procedures for conditional acceptance and for calculating “withholds,” or contract decrements, for noncompliant specialty metals. The DCMA said that it must approve all withholds and that it would look to “the lowest level subcontracted item containing prohibited foreign specialty metal” to calculate the withhold amount. The March 2006 memo provides that a contract decrement should consist of the cost of those items to the prime contractor, including costs of freight and material handling, plus each higher-tier contractor’s burden and profit. The DCMA memo also allows a CO to consider the cost of rework, replacement, or correction of the item to eliminate the nonconformance in the withhold amount.

In June 2006, the DOD provided slightly amended, DOD-wide guidance in a memo issued by Undersecretary of Defense for Acquisition, Logistics & Technology Kenneth J. Krieg. Undersecretary Krieg reaffirmed the approach set out in the March 2006 DCMA memo. He stressed that the delay that would be caused by “immediately pursuing certain remedies” could “seriously impact” the DOD’s ability to meet military needs. Undersecretary Krieg noted that the best course in such instances is (a) conditional acceptance, (b) withholding of the cost of the “lowest auditable part that contains specialty metal,” appropriately burdened, and (c) the contractor’s submission of a corrective action plan within 180 days of such acceptance. If a contractor states that it has been unable to identify alternate replacement items, and supports its position with market research, the DOD will review the plan to determine if a DNAD should be issued.

The DOD indicated in its December 2006 guidance memo that this June 2006 guidance will continue to apply to pre-FY 2007 Defense Authorization Act contracts. The December 2006 guidance memo also states that COs should determine the consideration due the Government for inadvertent noncompliance on a case-by-case basis. Note that the new “one-time waiver,” discussed below, may also be available for noncompliant deliveries under an existing contract.

Before Acceptance—November 16, 2006 & Later Contracts

The new de minimis exception for electronic components should make compliance significantly easier where such components are part of the deliverable item. Moreover, the December 2006 guidance memo makes it clear that the FY 2007 Defense Authorization Act restrictions will not be applied to prime contracts for purchase of third-tier items, as the DOD does not consider these items to be “components” at all. If you have determined that components or end items under a post-Authorization Act contract are noncompliant, you can attempt either to obtain a DNAD or use the “one-time waiver.”

The FY 2007 Defense Authorization Act will make a major change, possibly unintended by Congress, in the DOD’s ability to use the conditional acceptance/decrement process to accept noncompliant weapon systems. As discussed above, the DOD’s practice has been to conditionally accept end items with some noncompliant components through its decrement process, which ensures that the DOD does not use its funds for the noncompliant specialty metal contained in the end item. The DOD has based this practice on the fact that the Berry Amendment itself never expressly forbade the DOD’s purchase of items containing specialty metals. Since the FY 2007 Defense Authorization Act expressly applies to items containing specialty metals, while the predecessor Berry Amendment did not, the DOD has stated that it no longer has the authority to use the decrement procedure.

The DOD’s concern may not be fully supported by the Act’s legislative history. The House of Representatives version of the Act would not have allowed acceptance of end items even if “noncompliant components are delivered under the procurement without charge to the Federal Government.” Neither this language, nor the House’s explicit attempt to stop “the practice of delivering non-compliant components to the federal government without charge...
in order to be considered compliant with the Berry Amendment.115 were reflected in the Senate bill or the final text of the Act itself.

- Post-Acceptance Remedies

What happens when the Government accepts articles containing specialty metals, only to realize later that the item is noncompliant? As a general matter, under the standard “Inspection” clause,116 once final acceptance has occurred, the Government has no remedy under the contract itself. Acceptance is not “conclusive” only if there are latent defects in the items, fraud, or gross mistakes amounting to fraud.117 If the Government can claim one of these limited exceptions to final acceptance, it can retain all of its potential remedies available before acceptance (generally, rejecting the items, paying a reduced price for the noncompliant item, or terminating the contract for default).118

The National Aeronautics and Space Administration Board of Contract Appeals has examined whether a failure to follow a domestic preference requirement could constitute a “gross mistake amounting to fraud.”119 In that case, three years after it accepted and paid for steel tubing, the Government realized that the tubing violated the Buy American Act provisions in the contract and sought either an equitable adjustment in the contract price or replacement tubing from the contractor. The board found that neither remedy was available, reasoning that the “Inspection” clause was not meant to cover mistakes on a “collateral matter” such as a Buy American Act violation. Thus, the Government’s acceptance was final, and the Government could not invoke its preacceptance remedies. The board further found that the Buy American Act clause itself provided no express remedy for a violation of its terms.120

The same reasoning logically should apply with equal force to the Berry Amendments specialty metals restrictions. The same kind of domestic preference policies are involved, and the “Preference for Domestic Specialty Metals” clause is equally silent on the subject of postacceptance remedies.

Discovery of Berry Amendment violations after acceptance also can raise potential fraud issues. The Government (or a qui tam relator) may attempt to argue that an untrue statement of the origin of materials or of Berry Amendment compliance constitutes a false claim actionable under the False Claims Act.121 Of course, the Government would also have to prove all the other elements of a False Claims Act case, including proving that you acted with the required scienter (or “guilty knowledge”).122 Similarly, your intentional or knowing misrepresentation of the origin of materials conceivably could lead to common-law fraud liability, institution of suspension or debarment proceedings against you,123 or even criminal liability.

The DOD may in some cases ask contractors on major weapons systems to “verify” that every nut, bolt, screw, and wire was made in the United States out of domestic materials. This request is often used with contractors that have had prior compliance problems.124 The DOD prefers to obtain verification before the contract is awarded, but recent guidance suggests that the DOD realizes the difficulty of identifying suppliers at all tiers in advance.125

“Verification” is not certification. While COs may interpret this guidance on “verification” to require them to obtain contractor certification, that is not the case. Certification has long been recognized as an administrative burden on contractors. Congress has noted that the end result of a certification requirement is that “many hours” and “reams of paperwork” in researching certifications are often wasted by contractors, which then pass along those costs to the Government.126 As a result, Congress mandated that a requirement for a contractor’s certification may not be included in either the FAR or “in a procurement regulation of an executive agency” unless it is specifically imposed by statute or has been properly justified and approved in writing.127 With respect to a military department, this approval would have to come from the Secretary of Defense. Neither the new FY 2007 Defense Authorization Act nor the old Berry Amendment contains a requirement of contractor certification, and the Secretary of Defense has
not approved such a requirement. As a result, the DOD procurement regulations cannot be interpreted to require certification of Berry compliance, nor, in light of this policy, should departmental guidance on “verification” be construed to require certification.

- **“One-Time Waiver” Provision**

  Under a new “one-time waiver” provision in the FY 2007 Defense Authorization Act, the DOD is authorized to accept noncompliant specialty metals that were incorporated into items produced, manufactured, or assembled in the United States before the FY 2007 Defense Authorization Act’s date of enactment, and offered for final acceptance after that date (but before a “sunset” date of September 30, 2010). For this one-time waiver, the CO must determine that (a) the noncompliance was inadvertent (“not knowing or willful”), (b) it would not be practical or economical to replace the specialty metal already incorporated in the end items, and (c) the prime contractor and supplier responsible for the noncompliance have put in place effective compliance plans. In addition, the waiver must be approved by the Under Secretary of Defense for Acquisition, Technology, and Logistics, or the appropriate military department service acquisition executive, and notice of the waiver must be posted on FedBizOpps no later than 15 days after the CO’s determination.

  The December 2006 guidance memo explains how COs should determine if contractor noncompliance was inadvertent. COs are instructed to obtain a representation from contractors that the noncompliance was not knowing or willful, and the Government may then rely on that representation. The December 2006 guidance memo further suggests that commercial items noncompliance is more likely to be considered inadvertent, presumably because commercial item suppliers are less likely to be familiar with Government contracting restrictions generally, and with Berry Amendment requirements specifically. Note that, while the one-time waiver provision itself states it applies to metals incorporated into items before the “date of the enactment of this Act,” which was October 17, 2006, the guidance memo states, apparently inadvertently, that the one-time waiver is available when specialty metals were incorporated into items manufactured “prior to November 16, 2006,” which is the effective date for the Act rather than its date of enactment.

  Although it is not explicit in the one-time waiver provision, the waiver appears to be available for deliveries under either pre- or post-FY 2007 contracts, as long as its express requirements are met. The “items” that must have been manufactured or produced before October 2006 are not expressly stated to be “end items.” Thus, the trigger date should be the date of manufacture or assembly of components at all tiers. The December 2006 guidance memo supports this view, stating that the new one-time waiver allows a period for “suppliers at all levels of the supply chain to become compliant.” Thus, it appears that you could request a waiver under this provision to permit you to use some noncompliant components, as long as those components were manufactured in the United States before the FY 2007 Defense Authorization Act’s enactment, and as long as final delivery of the contract’s end items will occur before September 30, 2010.

  Moreover, although this provision is titled “One-Time” waiver, there is no express limitation in the provision on the number of items, number of delivery lots, or number of contracts or even programs that can be covered by the one-time waiver. Thus, “one-time” may refer to the specified period of time 2007–2010 in which the waiver is available, rather than limiting the number of such waivers you can obtain if you can otherwise meet the criteria for waiver.

  Note that use of the one-time waiver may provide limited protection against false claims allegations by whistleblowers. Early notification of the Government is evidence of good faith, publication of the waiver in FedBizOpps should constitute public disclosure, and the CO’s required determination of inadvertence would be inconsistent with any allegation that the violation was knowing or willful.
Other Problems

- Omission Of “Preference” Clause

If the “Preference for Domestic Special Metals” clause or Alternate I to that clause has been left out of your prime contract, can you conclude that the specialty metals restrictions do not apply to you? This question is not academic. A 2002 study by the DOD Inspector General found that the “Preference” clause had been left out of 60 of the 166 contracts in the study that were subject to the Berry Amendment.\textsuperscript{134}

The answer, under the Christian doctrine,\textsuperscript{135} is that your prime contract probably is still governed by the clause. The Christian doctrine, unique to Government contracts, provides that clauses that have been omitted from a prime contract will still be considered as part of that contract if they were required to be included by regulations with the force and effect of law and if they serve an important governmental procurement policy.\textsuperscript{136} The DFARS often has been held to have the force and effect of law, and the U.S. Court of Appeals for the Federal Circuit has held that at least one domestic sourcing provision—the Buy American Act—expresses a deeply ingrained strand of public procurement policy.\textsuperscript{137} Moreover, it does not matter, for purposes of the Christian doctrine, whether the clause was omitted by mistake, as in the Christian case itself, or was intentionally omitted.\textsuperscript{138}

Thus, in practical terms, the Christian doctrine most likely means that you must still comply with the “Preference” clause or Alternate I if either clause applies to your prime contract even if it is left out, or even negotiated out, of your prime contract.

A prime contractor also may inadvertently omit the required Alternate I clause from subcontracts even when that clause is in its prime contract. If you are the prime contractor caught in this situation, you may argue that the clause should be deemed incorporated in the subcontract through operation of the Christian doctrine or by some other means.

The question whether the Christian doctrine applies at the subcontractor level has not yet been squarely resolved.\textsuperscript{139} It may be difficult to argue that Government policies can control the terms of subcontracts in this fashion even when the Government purports to act solely through its prime contractors and vigorously disavows having any contractual relationship (privity) with subcontractors. In addition, since a court tasked with interpreting such a subcontract may decide to apply state law rather than federal law,\textsuperscript{140} the question of the Christian doctrine’s application to subcontracts ultimately may have different answers in different jurisdictions.

- Bid Protests

You may also face Berry Amendment issues in bid protest situations, either as the awardee or as a disappointed offeror. Contract awards have been set aside, or the agency ordered to reassess offerors’ compliance, where protesters have shown the awardee could not comply with the Berry Amendment or simply that the evaluation of this point was inadequate.\textsuperscript{141}

What’s Ahead?

Even though the FY 2007 statutory changes largely continue the same specialty metals restrictions that have been in place for years, there is the potential for further change in the near future. The DOD proposed creating significant exceptions to the specialty metal restrictions in 2006.\textsuperscript{142} Among other reforms, the DOD suggested that an exception for the procurement of items containing noncompliant specialty metals as long as the contractor (or applicable lower-tier producer of the item), during the contract period, procured domestic specialty metal at least equivalent in quality and amount to the specialty metal needed to produce the items or components to be delivered to the DOD.\textsuperscript{143} This brilliantly simple exception would avoid expensive compliance issues and eliminate the need for separate commercial and military production lines and supply chains. In addition, the DOD suggested a new de minimis exception for items in which the noncompliant specialty metal content is either below the simplified acquisition threshold.
or less than 10% of the total price.144 Neither of these concepts were made part of the FY 2007 Defense Authorization Act.

At the same time, a radically different vision of Berry Amendment reform was advanced by the House of Representatives. The House version of the FY 2007 Defense Authorization Act would have clarified the allegedly “original intent of the Berry Amendment”145 by requiring that contractors flow down specialty metals restrictions to all subcontractors for all contracts for items containing these metals; even those outside of the six major categories. In addition, the House would have expanded the Berry Amendment’s reach to cover any “items critical to national security.”146

Given this history, it is likely that the political discussion about specialty metals restrictions is not over, and you can look forward to further changes in these restrictions.

GUIDELINES

These Guidelines are intended to assist you in understanding and addressing the Berry Amendment restrictions on specialty metals and the compliance problems that these restrictions pose. They are not, however, a substitute for professional representation in any particular situation.

1. On contracts awarded on or after November 16, 2007, review the contract and determine for yourself if the “Preference for Domestic Specialty” metals clause or its Alternate I applies. With all the new developments in this area, be on the lookout for changes in the clauses, and you also may have to convince your CO that an exception applies to ensure that the “Preference” clause or Alternate I is not incorporated in your contract unnecessarily.

2. If Alternate I applies, ensure it is flowed down correctly to all lower-tier subcontracts.

3. Make specialty metals compliance a meaningful part of your purchasing system and part of your internal reviews of your purchasing system.

4. Consider, while weighing the cost of such measures, adding appropriate representations and certifications to your subcontract terms and conditions to protect you in the event of a noncompliance at a lower tier, and consider auditing your subcontractors and suppliers to ensure their compliance.

5. Since the regulations actually favor qualifying country manufacture over domestic manufacture, use qualifying country manufacture to properly avoid specialty metals restrictions.

6. If you rely on qualifying country provisions, check the list of qualifying countries since the list changes from time to time.

7. On existing contracts awarded before November 16, 2006, if you know of a compliance problem, deal with the issue effectively internally, with your subcontractors, and with the Government. Disclose the noncompliance to the Government, establish that the noncompliance was inadvertent, develop and implement a corrective action plan, and seek to use the conditional acceptance/decrement procedure.

8. Where domestic specialty metals are unavailable, take the necessary steps to get a DNAD.

9. If possible, use the one-time waiver mechanism. To rely on this waiver, you must (a) demonstrate that your noncompliance was inadvertent, (b) demonstrate that replacement of the noncompliant parts is not practicable, and (c) provide your prospective corrective action plan. Use of this mechanism may provide some level of protection against qui tam allegations, as it requires the CO to explicitly find that the noncompliance was inadvertent.

10. It may not be advisable, necessary, or even possible to perform a comprehensive audit of all your existing subcontracts for specialty metals compliance. Neither the statutes nor the regulations require you to certify compliance. Be careful not to make categorical representations to the Government about your compliance if you have not made such an audit or inventory or are not otherwise certain of your compliance, and do not volunteer to make unnecessary certifications.
REFERENCES


2/ 10 U.S.C.A. § 2533a (prior to Nov. 16, 2006).


5/ 10 U.S.C.A. § 2533a(b)(2) (prior to Nov. 16, 2006).

6/ DFARS 225.7001(d) (incorporating definition in DFARS 252.225-7014 (“Preference for Domestic Specialty Metals” clause)).

7/ 10 U.S.C.A. § 2533b(i).

8/ 10 U.S.C.A. § 2533a(d), (g), (h) (prior to Nov. 16, 2006).

9/ 10 U.S.C.A. § 2533a(c) (prior to Nov. 16, 2006).

10/ 10 U.S.C.A. § 2533a(d)(4) (prior to Nov. 16, 2006).

11/ 10 U.S.C.A. § 2533a(e) (prior to Nov. 16, 2006).

12/ 10 U.S.C.A. § 2533b(a) (emphasis added).

13/ See DFARS 225.7002-2(m), 225.7002-3(b)(2).


15/ 10 U.S.C.A. § 2533b(b)(1).

16/ 10 U.S.C.A. § 2533b(f).

17/ 10 U.S.C.A. § 2533b(e).

18/ 10 U.S.C.A. § 2533b(c)(1).

19/ 10 U.S.C.A. § 2533b(c)(2); see 10 U.S.C.A. § 2304(c)(2).

20/ 10 U.S.C.A. § 2533b(d).

21/ Cf. 10 U.S.C.A. § 2533a(d)(2).

22/ 10 U.S.C.A. § 2533b(g).


24/ See DFARS 225.7002

25/ DFARS 225.7002-1(b).

26/ DFARS 225.7002-2.


28/ DFARS 225.225-7014.

29/ DFARS 225.7002-3(b)(1).

30/ DFARS 225.225-7014, para. (b).

31/ FAR 2.101 (Definitions).

32/ DFARS 225.225-7014, para. (c)(1).

33/ DFARS 225.225-7014, para. (a)(1); see DFARS 225.872-1 (listing qualifying countries).

34/ DFARS 225.225-7014, para. (c)(2).


36/ See FAR 2.101 (Definitions).


38/ But see Department of the Navy’s Business Rules for Specialty Metals (prescribing use of new clause “[i]f the end item or component contains specialty metal”), available at http://acquisition.navy.mil/content/view/full/4881.

40/ FAR 2.101 (Definitions).


42/ Id.

43/ Id. at 2 ("Any specialty metal (e.g. raw stock) acquired directly by the Government or by a Prime Contractor for delivery to the Government must be melted or produced in the United States."). Compare Clause Prescription para. (a) (use the Deviation clause in contracts "that require delivery of specialty metals") with Clause Prescription para. (b) (use the Alternate I Deviation clause in contracts "requiring delivery of an article containing specialty metal," but only in the six specified categories).

44/ 10 U.S.C.A. § 2533b(b).

45/ DFARS 225.7002-2(b).

46/ 10 U.S.C.A. § 2533b(b).

47/ DFARS 225.7002-2(b)(4).

48/ FAR 25.104.

49/ DFARS 225.7002-2(c).


52/ Id.

53/ Id.


55/ Id.

56/ GAO, Defense Procurement: Air Force Did Not Fully Evaluate Options in Waiving Berry Amendment for Selected Air Craft (GAO-05-957, Sept. 23, 2005) (Air Force waiver for aircraft systems based on contractor site visits and knowledge of the industry, but not documented with market analyses or, for some aircraft, adequate analyses of available alternatives did not comply with Air Force policy).

57/ 10 U.S.C.A. § 2533b(c)(2); DFARS 225.7002-2(f)(2).

58/ 10 U.S.C.A. § 2304(c)(2).


61/ 10 U.S.C.A. § 2533b(d).

62/ DFARS 252.225-7014, para. (c)(1).

63/ DFARS 225.872-1(a).

64/ DFARS 225.872-1(b).

65/ DFARS 252.225-7014, para. (c)(1).

66/ DFARS 252.225-7014, para. (b).

67/ 10 U.S.C.A. § 2533b(g).


69/ Id., Alternate I (Deviation), para. (a)(1).

70/ Id., Alternate I (Deviation), para. (c)(2).

71/ Id., Example 2

72/ Id.

73/ 10 U.S.C.A. § 2533b(i); DFARS 225.7001(d) (incorporating definition in DFARS 252.225-7014 ("Preference for Domestic Specialty Metals" clause)).

74/ DFARS 225.7002-3(b)(1).

75/ DFARS 225.7002-3(b)(2).

76/ 10 U.S.C.A. § 2533b(a).

80/ Id.
81/ Id.
83/ Id.
84/ DFARS 252.225-7014, Alternate I, para. (d) (contractor must insert substance of clause, including flowdown requirement, in “all subcontracts for items containing specialty metals”).
86/ Id.; see DFARS 252.225-7014.
89/ Id., see also FAR 2.101 (Definitions).
90/ 41 U.S.C.A. § 431(c).
92/ Defense Federal Acquisition Regulation Supplement; Miscellaneous Amendments, 60 Fed. Reg. 61,586 (Nov. 30, 1995) (adding DFARS 225.7002-2(j)).
94/ 41 U.S.C.A. § 430(2); see FAR subpt. 12.5.
96/ 10 U.S.C.A. §§ 2533a(i) (prior to Nov. 16, 2006), 2533a(j), 2533b(h).
97/ 41 U.S.C.A. § 430; see FAR subpt. 12.5.
99/ 10 U.S.C.A. § 2533b(g).
105/ Id. at 1.
106/ Id. at 1–2.
107/ Id. at 2.
109/ Id.
111/ 10 U.S.C.A. § 2533b(g).
113/ Id.
116/ FAR 52.246-2 ("Inspection of Supplies—Fixed Price" clause).
117/ FAR 52.246-2, para. (k).

118/ See FAR 52.246-2.

119/ Southern Pipe & Supply Co., NASABCA No. 570-7, 72-2 BCA ¶ 9512, aff’d on recons., NASABCA No. 570-7, 73-2 BCA ¶ 10,118.

120/ Id. at 44,324.


129/ Id.; see http://www.fedbizopps.gov.


131/ Id.

132/ Id.

133/ Id.


136/ Id.

137/ S.J. Amoroso Constr. Co. v. United States, 12 F.3d 1072, 1075 (Fed. Cir. 1993), 36 GC ¶ 75.

138/ Id.; G.L. Christian, 320 F.2d. at 351 (application of the doctrine turns on whether procurement policies are being “avoided or evaded (deliberately or negligently)”).

139/ See Dowty Decoto, Inc. v. Department of the Navy, 883 F.2d 774, 777–78 (9th Cir. 1989) (“somewhat surprisingly” the effect of the procurement regulations on a subcontract when the form clause text has not been inserted in the subcontract has never been discussed).

140/ E.g., Linan-Faye Constr. Co. v. Housing Authority of City of Camden, 49 F.3d 915, 933 (3d Cir. 1995).


143/ Id.

144/ Id.


146/ Id.