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If You Are a Service Provider the Berry Amendment May Apply to You?

Manufacturers and system integrators doing business with the Department of Defense take note. On June 22, 2006 I attended a meeting in Washington, D.C. to discuss the requirements of the Berry Amendment codified at 10 U.S.C.A. § 2533a. The amendment requires that funds appropriated or otherwise available to the Department of Defense may not be used for the procurement of an item not grown, reprocessed, reused, or produced in the United States or a qualifying country. The Berry Amendment should not be confused with the requirement of the Buy America Act or the Trade Agreement Act. Compliance with one of these does not ensure compliance with the others.

The Amendment covers a wide range of items including: food; clothing; tents, tarpaulins or covers, specialty metals, and hand or measuring tools. We will be discussing specialty metals that include: steel, metal alloys consisting of nickel, iron-nickel, and cobalt base alloys, titanium and titanium alloys, and zirconium and zirconium based alloys.

Qualifying countries include: Austria (purchase-by-purchase determination), Australia; Belgium, Canada, Denmark, Egypt, Germany, France, Finland (purchase-by-purchase determination), Greece, Israel, Italy, Luxemburg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United Kingdom of Great Britain and Northern Ireland. Items manufactured in a qualifying country are exempt from the requirements of the Amendment if the metals contained in them have been melted in the qualifying country or manufactured in a qualifying country without regard to the melt source.

If the procurement is for aircraft, missile and space systems, ships, tank-automotive, weapons, and ammunition the requirements of the Amendment flow down to subcontractors at each tier.

It applies to any drop of specialty metal. There are no de minimus exceptions. Any nut, bolt, screw or piece of wire qualifies as non-compliance. There is no exemption for commercial items.

Non-compliances can be remedied contractually by withholding from reimbursement the cost of the item including all allocated indirect costs. Non-compliances can also be remedied under the Civil False Claims Act with penalties of between \$5,000 and \$11,000 per false claim, three times the damages sustained by the government, and the cost of any civil action brought to recover the penalties or damages.

Criminal liability can be assessed under the Criminal False Claims Act and the False Statements Act with penalties that can include imprisonment and substantial fines. Suspension and debarment are also an administrative remedy.

The "punch line" is that the requirements of this amendment can apply to not only manufacturers of product but to systems integrators that provide non-compliant items. It is getting more and more attention due to a decreasing or non-existent specialty metal melt from domestic mills, GAO compliance scrutiny and DoD's focus on compliance.

We suggest that you contact your legal counsel knowledgeable in the requirements of the Berry Amendment to ensure your compliance.