

# Demystifying Department of Defense Specialty Metals Restrictions (and the Exceptions Thereof)

This article provides insight and instruction in regard to specialty metals restrictions and their various exceptions by presenting relevant governing statutes and regulations and detailed examples in an attempt to simplify the daunting, expensive, and, at times, seemingly impossible task of ensuring compliance with the restrictions

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The history behind the domestic preference restrictions of the Department of Defense (DOD) on specialty metals has a long, complex, and dynamic story; a story with a flurry of recent activity. While this article provides a brief background, as well as a discussion of compliance complexities, the main objective is to provide an examination of the many exceptions available to government contractors. Ensuring compliance with DOD specialty metal restrictions can be a daunting, expensive, and, at times, seemingly impossible task. Therefore, assessing what exceptions may apply prior to contracting with DOD is essential.

## Background

The late Congressman E.Y. Berry (R-SD) served as South Dakota's western district congressman from 1951 to 1971. Congressman Berry is credited (or discredited based upon who is asked) with implementing the Berry Amendment. According to an article published in *The Government Contractor*,

The Berry Amendment is a law of ancient vintage that rarely was enforced until recent years. In general, it forbids DOD from using funds to procure certain items that are not 100 percent American-made. Originally enacted in 1941 as a war-time measure to ensure that our troops ate American food and wore American clothing, the Berry Amendment has grown expansively and now covers a wide range of items, including food, many textiles, tents, hand tools, and specialty metals.<sup>1</sup>

### About the Author

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## Do Specialty Metals Restrictions Fall under the Jurisdiction of the Berry Amendment?

A part of United States Code (U.S.C.), the Berry Amendment is found at 10 U.S.C. 2533a. However, Title VIII, Subtitle D, Section 842 of the John Warner National Defense Authorization Act of 2007 (JWNDAA)<sup>2</sup> moved the restriction pertaining to specialty metals into the newly created 10 U.S.C. 2533b.<sup>3</sup> Consequently, there is currently a great deal of confusion as to whether or not it is still accurate to continue to refer to specialty metals restrictions within the context of the Berry Amendment. While some may contend that it is contained only within 2533a, others have stated that the Berry Amendment includes both 2533a and 2533b.<sup>4</sup>

The Defense Acquisition University (DAU) offers a course entitled “Berry Amendment” (course CLC 125). This course does not currently cover specialty metals. However, a July 30, 2007, DAU “Ask the Professor Q&A” provides some clarification that training specific to specialty metals is forthcoming.<sup>5</sup> It should be noted that the specialty metals restrictions of the *Defense Federal Acquisition Regulation Supplement (DFARS)*, as currently described at DFARS 225.7002-1, state: “The following restrictions implement 10 U.S.C. 2533a (the ‘Berry Amendment’).” Therefore, there is currently no mention of 2533b within DFARS 225.7002-1. In summary, as 10 U.S.C. 2533b is law and DFARS 225.7002-1 is regulation, the argument of whether or not specialty metals restrictions fall under the authority of the Berry Amendment is really a matter of semantics.<sup>6</sup>

## What is the Rationale for the Restrictions?

The rationale for domestically restricting the smelting of specialty metals is essentially two-fold. First is the protectionist position that contends that certain lightweight, high-strength metals and alloys are so critical to national defense that the United States must ensure suppliers are available domestically (or at least available from certain defined qualifying countries) to ensure that there is a timely and secure source. The second argument supporting restrictions is purely nationalistic. In other words, supporting American industry through legislation, similar to the Buy American Act (BAA),<sup>7</sup> is often portrayed as simply the right thing to do. Not surprisingly, the specialty metals industry, with their very large congressional lobbying effort to influence legislators that the smelting of specialty metals should be carried out domestically, often cite both the protectionist and the nationalistic arguments. While the protectionist position may have validity at face value, and the nationalistic position is

patriotically admirable, the fact remains that all restrictions inherently reduce competition and have the potential to affect quality, cost, and speed to market.

## Is the Berry Amendment Different than the Buy American Act?

The Berry Amendment (including its specialty metals restrictions) is not the same as the BAA, nor is it the same as the Trade Agreements Act (TAA).<sup>8</sup> Rather, the Berry Amendment’s specialty metals restrictions are requirements in addition to the BAA and TAA. What may contribute to the confusion is that 10 U.S.C. 2533a (the Berry Amendment), is not the same as 10 U.S.C. 2533(a) (i.e., “Determinations of public interest under the Buy American Act”). Contrary to both the BAA and TAA, “the Berry Amendment flows down the supplier chain in a manner that is much more burdensome than the other laws.”<sup>9</sup>

## Compliance Complexities

The extreme difficulty, and even impossibility, for some contractors to comply with specialty metals restrictions is widely recognized—not only among contractors, but also within DOD. Rather than discussing the wide range of literature citing contractors’ dissatisfaction on this hot button issue, the following four DOD-related references document DOD’s recognition of the compliance complexities these restrictions impose upon DOD contractors.

1. The first example of a compliance burden was brought before the House Armed Services Committee: “2,200 man hours [were used] to review documentation measuring eight inches thick relating to 4,000 parts to support a waiver involving \$14,000 of DOD funds.”<sup>10</sup>
2. The July 2, 2007, *Federal Register* proposed a commercial-off-the-shelf (COTS) waiver (that became a final rule on November 8, 2007) reporting that manufacturers are subject “to costly and burdensome, if not impossible, tracking requirements.”<sup>11</sup>
3. The secretary of defense during the Nixon administration, Melvin R. Laird, produced a November 20, 1972, memo that provides an earlier example of DOD recognition of the impractical compliance requirements that specialty metals restrictions impose. This memo states: “It is apparent, from the legislative history of this provision, that it was not intended that [DOD] achieve or attempt to achieve the impossible in its implementation.”<sup>12</sup>

4. Lastly, the October 9, 2007, BNA Inc. Federal Contract Report discusses how House Armed Services Committee Ranking Republican Duncan Hunter (R-CA) has “taken issue with one instance of the Army’s implementation of such restrictions.”<sup>13</sup>

## Applicability of Specialty Metals Restrictions

Simply stated, specialty metals restrictions apply only to DOD acquisitions. However, how does one determine what is and what is not a DOD acquisition? What if the appropriate clause does not appear in the solicitation or contract? When should contractors flow down the restrictions? The following sections attempt to clarify these questions.

## Follow the Money

The “follow the money” argument is a complicated and somewhat controversial proposition. The restrictions in DFARS 225.7002-1 instruct DOD to not acquire items with noncompliant specialty metals. But what if DOD uses another agency—such as the General Services Administration—to acquire items with DOD-appropriated funds? Various opinions exist as to whether interagency assisted acquisitions in support of DOD acquisitions (and using DOD funds) must comply with specialty metals restrictions. According to a 2006 article written by Jan Ferguson, “the Berry Amendment follows the money, so the requirements of the Berry Amendment apply to all procurement vehicles (including non-DOD contracts, such as Federal Supply Schedules) if the contract action is funded by money appropriated or otherwise made available to DOD.”<sup>14</sup>

Consistent with this quote, the Defense Logistics Agency (DLA) uses *Defense Logistic Agency Directives (DLAD) 7.9003*, which covers policies and procedures pertaining to these types of assisted acquisitions. DLAD 7.9003(b)(4) states:

Any terms, conditions, and/or requirements unique to DOD or DLA are incorporated into the order to comply with applicable statutes, regulations, and directives (e.g., the requirement that the items listed in DFARS 225.7002-1, pertaining to restrictions on food, clothing, fabrics, specialty metals, and hand or measuring tools, and that are procured with DOD funds, be of domestic origin).<sup>15</sup>

Additionally, the Defense Procurement and Acquisition Policy’s (DPAP) Frequently Asked Questions (FAQs) on the Berry Amendment supports the premise that specialty metals restrictions follow the money:

Q3. What if I am from a DOD buying activity but I am spending non-DOD money, for example, on behalf of [a foreign military sales (FMS)] country or another U.S. Federal agency—is the Berry Amendment applicable in that circumstance?

A3. Yes. FMS funding and other Federal agencies’ funding is being made available to DOD and therefore falls under the Berry Amendment. The Berry Amendment also applies when DOD provides funding to another agency to buy items. The other Federal agency must comply with the Berry Amendment. Violation of the Berry Amendment would generally also result in the violation of the Anti-Deficiency Act.<sup>16</sup>

However, the DPAP Berry Amendment FAQ Web site also states:

CAUTION: THESE FAQs ARE FOR GENERAL INFORMATION AND ARE NOT DEFINITIVE. THE STATUTE AND REGULATIONS SHOULD ALWAYS BE REVIEWED FOR THE DEFINITIVE RULES THAT APPLY TO INDIVIDUAL FACT SITUATIONS.<sup>17</sup>

While the previously cited examples indicate that specialty metals regulations do in fact follow the money, the JWNDAA would seemingly eviscerate this position. Although the JWNDAA states in 2533b(a) that restrictions apply to “funds appropriated or otherwise available to the Department of Defense,” paragraph 2533(b)(2) goes on to say that the acquisition must “be purchased directly by the Department of Defense.”<sup>18</sup>

So which is it? David Churchill and Kathy Weinberg specifically respond to the DPAP FAQ with the following response:

[I]t 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.<sup>19</sup>

## Applicability and Incorporation by Reference

The first logical step of assessing specialty metals compliance requirements is to determine if the appropriate clause is included in, or applicable to, the DOD solicitation. Rather than finding DFARS 252.225-7014, Preference for Domestic

Specialty Metals, as a standalone clause, the clause usually appears as part of 252.212-7001, Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items, and specifically states: “The Contractor agrees to comply with any clause that is checked on the following list of [DFARS] clauses which, if checked, is included in this contract by reference to implement provisions of law or Executive orders applicable to acquisitions of commercial items or components.”

Included in the previously mentioned list of DFARS clauses is the specialty metals clause (252.225-7014). If this clause happens to be checked, it would be part of the resulting contract. If the clause is not checked, the contractor should understand why. A good starting point for understanding why this clause may not be checked is to read the clause prescription at 252.7002-3(b)(1): “Use the clause at 252.225-7014, Preference for Domestic Specialty Metals, in solicitations and contracts exceeding the simplified acquisition threshold [SAT] that require delivery of an article containing specialty metals.”

Per this prescription, even if an exception were to apply (e.g., if the acquisition is in support of a contingency operation), the clause would seemingly still be inserted, even if not applicable. The logic here seems to be that unless the acquisition is less than the SAT and/or no specialty metals are contained in the articles being procured, the contracting officer shall insert the clause. This interpretation is in line with the Defense Contract Management Agency’s (DCMA) March 10, 2006, “Interim Instruction for Specialty Metals Clause Compliance.” This instruction states that “DCMA will not accept products containing nonconforming specialty metals unless notified in writing by the procuring activity that an exception applies.”<sup>20</sup>

## Flow-Downs

While the previous section discusses how the prescription of DFARS 252.7002-3(b)(1) incorporates clause 252.225-7014 into a solicitation and/or contract, 252.225-7014(b)(2) states:

Use the clause with its Alternate I in solicitations and contracts exceeding the simplified acquisition threshold requiring delivery, for one of the following major programs, of an article containing specialty metals:

- i. Aircraft.
- ii. Missile and space systems.

- iii. Ships.
- iv. Tank-automotive.
- v. Weapons.
- vi. Ammunition.

Without Alternate I, DFARS 252.225-7014 does not require that the restriction be flowed down, which arguably places the restrictions only on the prime contractor. Additionally, Alternate I alters paragraph (c) and adds paragraph (d) that requires flow-down in subcontracts at all tiers.

Mechanically speaking, the Alternate I version of DFARS 252.225-7014 is inserted into contracts via 252.212-7001(c) and includes guidance from the *Federal Acquisition Regulation (FAR)*:

In addition to the clauses listed in paragraph (e) of the Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items clause of this contract (FAR 52.212-5), the Contractor shall include the terms of the following clauses, if applicable, in subcontracts for commercial items or commercial components, awarded at any tier under this contract.

In other words, even if the specialty metals clause is unchecked in DFARS 252.212-7001(b), the restrictions are flowed down to all subcontractors at all tiers, if applicable, per 252.212-7001(c). The key term to make note of is “if applicable.” Does “applicable” mean that flow-downs are required if the clause is checked in 252.212-7001(b); or, are flow-downs always applicable within the six major programs; or, is the clause to be flowed down only in subcontracts (within the six major programs) when subcontracting for commercial items, components, or articles and items containing specialty metals?

## The Christian Doctrine

The previous section introduces a significant dilemma. If the clause is not checked in DFARS 252.212-7001(b), or if 252.212-7001 and/or 252.225-7014 do not appear anywhere in the solicitation and/or contract, could the restrictions still be read into contracts per the “Christian Doctrine”? Simply put, this is a principle asserting that if an important clause is required to be included in a contract, the contract shall be read to include it, even if the clause is not actually physically contained within the contract.

As discussed in an April 2002 issue of *Procurement Law Advisor*, under the Christian Doctrine, clauses that are “significant or deeply ingrained strand of public procurement

policy” are incorporated by operation of law. However, there can be “difficulty of predicting (or proving) that a particular contract clause is so significant or deeply ingrained that it should be incorporated into a contract by operation of law.”<sup>21</sup> The article goes on to say:

According to the D.C. Circuit, under the Christian Doctrine...“it is not enough that the legislative or regulatory provision is important or significant (assuming one could make such rankings) to constitute a contractual obligation. Even though not written into the contract, the provision must be a mandatory contract clause, a clause the legislation—or as in the Christian [Doctrine]—the regulation requires to be included in contracts.”<sup>22</sup>

In summary, because specialty metals regulations are derived from law, it seems quite possible that the Christian Doctrine could apply the restrictions, even if the clause is not checked in a solicitation or contract. Moreover, the courts have already applied the Christian Doctrine to one particular domestic preference clause—the BAA. While it is not yet certain how the courts would rule, the previously cited *Procurement Law Advisor* article states that “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.”<sup>23</sup>

## Exceptions

When discussing specialty metals, the term “exception” is somewhat fuzzy and requires a bit of explaining. In a perfect world, exceptions to specialty metals restrictions would be listed in the law (i.e., 10 U.S.C. 2533b) and then align with the exceptions listed in the regulations at DFARS 225-7002-2. While 225-7002-2 lists certain categorical acquisitions that “are not subject to the restrictions in 225.7002-1,” there is not a perfect alignment with the exceptions discussed in paragraphs (b) through (j) of 10 U.S.C. 2533b. In fact, certain conditions that are not addressed in 225-7002-2 or 2533b provide what are in effect “exceptions” to the specialty metals restrictions. In other words, there is no one place to turn in order to find all exceptions.

Complicating matters, the exceptions discussed at DFARS 225.7002-2 address several different restricted items (i.e., food, clothing, certain fabrics, specialty metals, and hand or measuring tools) listed at 225.7002-1, not just specialty metals. Also, some of the exceptions at 225.7002-2 are applicable to all of the items listed in 225.7002-1, whereas others apply to a limited subset.

Finally, some exceptions even exempt the entire contract (such as if the acquisition is in support of a contingency operation), whereas other exceptions could be relied upon for a specific component (e.g., electronics components with a *de minimus* value for specialty metals).

## Exceptions to Specialty Metals Restrictions

With the previously discussed caveats in mind, the remainder of this article will individually discuss the exceptions to the specialty metals restrictions. Due to the scope and complexity of each exception, it is only practical to offer a brief synopsis of each exception, including where each exception can be found.

## Acquisitions at or Below the SAT

If an acquisition is at or below the SAT, specialty metals restrictions do not apply. This exception is found at DFARS 225.7002-2(a), the 2007 JWNDAA (per 10 U.S.C. 2533b(f)), as well as in the clause prescription per 225.7002-3(b)(1).

Interestingly, 10 U.S.C. 2533b(f) uses the term “small purchases.” As discussed in the “Amendments” section of 10 U.S.C. 2304:

Subsec. (g)(2). *Pub. L.* 103-355, Sec. 4401(a)(4), substituted “simplified acquisition threshold” for “small purchase threshold” and “simplified procedures” for “small purchase procedures.” *Pub. L.* 103-355, Sec. 4401(a)(2), (3), redesignated [paragraph] (3) as (2) and struck out former [paragraph] (2) which read as follows: “For the purposes of this subsection, a small purchase is a purchase or contract for an amount which does not exceed the small purchase threshold.”<sup>24</sup>

In turn, the SAT is now based on the price of the entire contract, not an individual purchase. Why the JWNDAA uses the arguably obsolete term of “small purchase” is unclear.

## Acquisitions Outside the United States in Support of Combat Operations

This exception is found at DFARS 225.7002-2(d) as well as 10 U.S.C. 2533b(c)(1). Two precautions to consider before relying on this exception are that:

1. The term “combat operations” is not defined in the *FAR*, *DFARS*, nor in the *Department of Defense Dictionary of Military and Associated Terms*; and

2. The phrase “outside the U.S.” should also be clarified. Several agencies take the view that acquisitions performed outside the United States mean that the government procuring office has to be located outside the United States.

## Acquisitions in Support of Contingency Operations

A “contingency operation” is defined at FAR 2.101. However, documenting whether or not an acquisition is in support of a contingency operation is not always a straightforward task. While the contracting officer’s contract file should document if the acquisition is indeed supporting contingency operations, that documentation is not always accessible. Also, other factors (such as FMS or partial funding from foreign sources) can cause confusion when relying on this exception. Additionally, tracing the dollars to the budget source to confirm whether the funds are in support of a contingency operation is no simple task either. Further, there can be confusion as to the different types and stages of a contingency operation.<sup>25</sup>

The contingency operations exception is found at 10 U.S.C. 2533b(c)(1) and DFARS 225.7002-2(f)(1). Note that the *DFARS* exception at 225.7002-2(f) narrows the exceptions of 225.7002-2(f)(1), Contingency Operations, and 225.7002-2(f)(2), Unusual and Compelling Urgency, only to acquisitions of food, specialty metals, or hand or measuring tools. Items such as tents, tarpaulins, certain fabrics/fibers, etc., are not covered by the two exceptions listed at 225.7002-2(f). Therefore, contractors must carefully assess which items are covered by which exceptions.

Aside from DFARS 225.7002-2 and 10 U.S.C. 2533b, this exception is also applicable per DFARS 218.201(9). (Note that DFARS 218.2 is titled “Emergency Acquisition Flexibilities.”) Again, exceptions can and do present themselves in sundry locations.

## Unusual and Compelling Urgency

The legal reference for acquisitions for which the use of other than competitive procedures has been approved on the basis of “unusual and compelling urgency,” in accordance with FAR 6.302-2, is found at 10 U.S.C. 2533b(c)(2), and also at DFARS 225.7002-2(f)(2). However, FAR 6.302-2 should be referenced for circumstances permitting other than full and open competition.

## Emergency Acquisitions by Activities Located Outside the United States

While the exception for emergency acquisitions by activities located outside the United States for personnel of those activities is found verbatim at DFARS 225.7002-2(g), 10 U.S.C. 2533b does not specifically include this language. However, 2533b seemingly covers this exception per the unusual and compelling urgency exception at 2533b(c)(2), as previously discussed.

## Acquisitions by Vessels in Foreign Waters

This is one example of an exception found in the *DFARS* at 225.7002-2(h) that is not found in the *JWNDA*.

## Acquisitions of Items Specifically for Commissary Resale

This exception is found verbatim at DFARS 225.7002-2(i). However, the *JWNDA* provides a somewhat broader exception: “Exception for Commissaries, Exchanges, and Other Non-appropriated Fund Instrumentalities—Subsection (a) does not apply to items purchased for resale purposes in commissaries, exchanges, and non-appropriated fund instrumentalities operated by the Department of Defense.”<sup>26</sup>

## Purchases of Specialty Metals by Subcontractors at any tier for the Big Six Programs

This exception, found at DFARS 225.7002-2(m), outlines the purchases of specialty metals by subcontractors at any tier for programs other than:

1. Aircraft,
2. Missile and space systems,
3. Ships,
4. Tank-automotive,
5. Weapons, and
6. Ammunition.

These programs are considered DOD’s “big-six” programs; the premise of which is that if DOD limits restrictions to these major programs, the sheer size of this business is enough

to ensure sufficient demand to support an adequate supply of domestic sources. This exception is also found in the JWNDAA. However, it is not listed as an exception within 10 U.S.C. 2533b(b) through (j); but rather, it is found in 2533b(a) as a statement describing the parameters for which the exceptions in paragraphs (b) through (j) apply.

### **Items that do not Contain Specialty Metals as Defined at DFARS 252.225-7014(a)(2)(i) through (iv)**

The JWNDAA lists this exception within 10 U.S.C. 2533b(b). However, this exception is not found in DFARS 225.7002-2, but rather in the definitions section of the clause (i.e., 252.225-7014(a)(2)). The definitions state the threshold for which various elements and metal alloys are to be considered specialty metals. While it intuitively goes without saying, items that do not meet the definition (e.g., contain no metals whatsoever) are, in effect, exceptions. Looking at this exception another way, if an article contains certain elements and metal alloys in amounts that are under the defined thresholds, the restrictions would not apply. For example, if an article contains steel with 0.24 percent aluminum, the item is not subject to restrictions because the threshold for the aluminum must exceed 0.25 percent.

### **Acquisitions of Items Listed in FAR 25.104(a)**

While many of the items listed in FAR 25.104(a) are miscellaneous foodstuffs (e.g., bananas, coffee, etc.) or other oddities (swords, rabbit fur felt, etc.), two items worth mentioning include:

1. Manganese (one of the steel alloys listed within the definition of specialty metals), and
2. Spare and replacement parts for equipment of foreign manufacture.

If an end item or component contains manganese, or is a spare/replacement part for foreign-manufactured equipment, it is arguable that this exception could be applicable. Similar to the “Acquisitions by Foreign Vessels” exception, this is another example of an exception in DFARS 225.7002-2 that is not maintained in the JWNDAA.

### **Domestic Non-Availability Determination**

DFARS 225.7002-2(b) explains that if DOD “determines that items grown, reprocessed, reused, or produced in the

United States cannot be acquired as and when needed in a satisfactory quality and sufficient quantity at U.S. market prices,” a domestic nonavailability determination (DNAD) may be approved.<sup>27</sup> The *DFARS* goes on to explain that only certain individuals (such as the under secretary of defense or the secretary of the army, navy, or air force) can issue a DNAD. Interestingly, the JWNDAA calls this exception an “availability exception,” whereas the *DFARS* and DCMA use the term “DNAD.”

According to the guidance given in the September 21, 2006, memorandum from the under secretary of defense: “If a [DNAD] that would cover the item is in process, the contracting officer may award a contract which includes [DFARS] 252.225-7014. If the DNAD is not approved, the contractor is required to deliver compliant items.”<sup>28</sup>

A good example of consistency in guidance is given by DOD’s April 19, 2007, guidance issued by the Office of the Assistant Secretary of the Air Force, which refers back to the under secretary of defense’s September 21, 2006, guidance previously cited.<sup>29</sup> Further, the *DFARS* “Procedures, Guidance, and Information” (PGI) exceptions guidance (found at DFARS PGI 225.7002-22(b)(5)(A)(2)) states that “military departments should establish approval authority, policies, and procedures for the reciprocal use of DNADs.”

Finally, the December 8, 2006, DCMA Information Memo No. 07-042 explains that contractors’ corrective action plans “are the key to assuring future compliance with the law, serve as the basis for [DNADs], and are required before the new One-Time Waiver can be granted.”<sup>30</sup>

### **One-Time Waiver**

The JWNDAA explains that DOD may accept noncompliant 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” (i.e., October 17, 2006).<sup>31</sup> Therefore, this condition is not so much an exception, but really a mechanism for rectifying prior inadvertent noncompliance. It should be noted that the JWNDAA also states that the Act “shall apply with respect to contracts entered into after the date occurring 30 days after the date of the enactment of this Act.”<sup>32</sup> There is also language in the House Conference Report (109-702) stating that the Act “would allow a 12-month ‘get well’ period for suppliers at all levels of the supply chain to become compliant with section 2533b of Title 10.”<sup>33</sup>

### **Qualifying Countries**

DFARS 225.7002-2(n) refers to this exception as “acquisitions of specialty metals when the acquisition furthers an agree-

ment with a qualifying country.” Based on the reading of 252.252-7014(c), furthering an agreement with a qualifying country can be interpreted not only as smelting specialty metals in a qualifying country, but also as specialty metals being “incorporated in an article manufactured in a qualifying country.” In other words, if specialty metals were not smelted in the United States or a qualifying country, the article would still be compliant so long as the specialty metals were incorporated within a qualifying country. When referencing 225.872-1 for a list of qualifying countries, it should be noted that the United States is not considered a qualifying country.

There are several examples in applicable literature that question the fairness<sup>34</sup> and validity<sup>35</sup> of this exception. At face value, it does appear to be an unfair scenario that U.S. suppliers are not given qualifying country status. However, when taken to its conclusion, this condition is logical within its context. The rationale is that if the United States were a qualifying country, then the restrictions would fall on their face because it would not matter where U.S. suppliers’ specialty metals were smelted, so long as they were incorporated in the United States. This would defeat the rationale for the domestic preference discussed earlier.

Interestingly, the JWNDAA never uses the term “qualifying country.” Rather, it refers to this as the “Exception Relating to Agreements with Foreign Governments,” giving an arguably broader exception to additional countries outside the qualifying countries. For example, section 2533b(d)(1)(A) seemingly refers to countries with reciprocal agreements, 2533b(d)(1)(B) to countries with Trade Agreements, and 2533b(d)(2) to countries with coproduction memoranda of understanding or agreement as detailed in section 36 of the Arms Export Control Act (22 U.S.C. 2776). Finally, 2533b(d)(2) refers to 10 U.S.C. 2457—referencing NATO countries, but seemingly only in the context of eliminating BAA restrictions, not specialty metals restrictions.

### **A Commercially Available Electronic Component With a *De Minimis* Amount of Specialty Metals**

This exception seems to build off the logic explained in the “Populated Circuit Card Assemblies” DNAD, which explains that nearly all military hardware contains certain electronics with small amounts of specialty metals. In other words, DOD recognizes that it is not practical to apply restrictions on this broad of a basis. Rather than issuing a DNAD for commercially available electronic components, DOD has elected to issue the December 6, 2006, “Class Deviation” memorandum.<sup>36</sup> While this exception is part of the JWNDAA, it has

not yet been included in DFARS 225.7002-2. The definition of “electronic component” can also be found in the memo.

The Class Deviation memo introduces an alternate specialty metals clause that it states “is effective immediately.” This new clause does not apply the domestic preference restrictions to specialty metals that are:

[I]ncorporated 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.<sup>37</sup>

### **Third Tier or Lower Level Assemblies or Parts**

Similar to the electronic component exception, the DOD’s Class Deviation memo introduces another exception, namely “third tier or lower level assembly or part.”<sup>38</sup> The memo explains that specialty metals restrictions apply only to: “articles that are end products, or components thereof.”<sup>39</sup> The important concept to make note of is that “tier” refers to the tier (predetermined by DOD) of which the government is buying, not the level in the contractor’s supply chain.

To summarize the previous two exceptions, the Class Deviation memo introduces two new exceptions that can roughly be summarized as 1) “electronic components” and 2) “third tier or beyond components.” Interestingly, the electronic components exception appears in the JWNDAA but does not yet appear in DFARS 225.7002-2—whereas the third tier and beyond exception does not appear in either.

### **Commercially Available Off-the-Shelf Items**

Consistent with DOD guidance given per the Class Deviation memo, the summary section of the November 8, 2007, *Federal Register* reports that “DOD has issued a final rule amending the [DFARS] to waive application of 10 U.S.C. 2533b for acquisitions of [COTS] items.”<sup>40</sup> The final rule essentially accomplished three things:

1. It added a new section to the DFARS (212.570, titled “Applicability of Certain Laws to Contracts and Subcontracts for the Acquisition of Commercially-Available Off-the-Shelf Items);

2. It listed 10 U.S.C. 2533b at DFARS 212.570; and
3. It listed the COTS exception within DFARS 225.7002-2(q), with the caveat that the “exception does not apply when the specialty metal (e.g., raw stock) is acquired directly by the government or by a prime contractor for delivery to the government as the end item.”

### Additional Recent Exceptions per the FY2008 Defense Authorization Act, Section 804

The following additional, more recent exceptions (as detailed in the FY2008 Defense Authorization Act, Section 804) are succinctly explained in the February 5, 2008, BNA, Inc. Federal Contracts Report.<sup>41</sup> These exceptions include:

1. Exceptions for purchases of specialty metals below the minimum threshold,
2. Streamlined compliance for commercial derivative military articles, and
3. National security waivers.

Finally, the report also describes that Section 804 of the Act “removes the implication that accepting noncompliant material may create an Anti-Deficiency Act violation” by DOD. Also, a certain number of the “previously issued DNADs are expiring, and all existing DNADs must be reviewed by July 26. DOD also further defined the availability of ‘required form’ for issuing a DNAD. While new DNADs may still be issued, the 2008 Defense Authorization Act restricts DOD’s ability to approve broad new DNADs.”

### Conclusion

Ensuring compliance with DOD specialty metal restrictions can indeed be a seemingly impossible task. And while this article attempts to demystify many specialty metals restrictions, this is not exactly a mystery that can truly be solved concretely. Rather, it should be understood that regardless of how much one reads, rereads, and researches, there is not always clear solutions or guidance. Despite everything covered in this article, the answers to many questions and concerns are not always definitive. Some examples of this include:

- The Berry Amendment places domestic restrictions on various items. However, whether or not specialty metals restrictions fall under the Berry Amendment is not entirely clear.

- Specialty metals restrictions stem from forces that are both practical (ensuring domestic sources are readily available to support the military) and political (supporting U.S. businesses). However, all restrictions have the effect of limiting full and open competition.
- Specialty metals restrictions are requirements in addition to the BAA and TAA, and require more stringent flow-down requirements.
- Debate exists as to exactly how the restrictions follow the money. For example, it is debatable as to when funds are made available to DOD.
- If the specialty metals clause does not appear in a solicitation or contract, it is likely, but not entirely clear, that the Christian Doctrine would apply.
- When exactly flow-down of the restrictions is required depends on how the term “if applicable” is interpreted.
- Finally, there are certain conditions where specialty metals restrictions do not apply. While these conditions can generally be thought of as exceptions, not all the exceptions are found in one location. *JCM*

### ENDNOTES

1. Nadler, D., H.G. Sherzer, and M.C. Mateer, “New Department of Defense Berry Amendment Guidance—Some Answers and More Questions,” *The Government Contractor*, 48(46), 1-5, 2006. Accessed September 28, 2007, at [www.dicksteinshapiro.com/files/Publication/4fd5bf14-664f-45fb-a4a8-128ebcbb2c50/Govt\\_Contractor\\_Sherzer-Nadler\\_byline.pdf](http://www.dicksteinshapiro.com/files/Publication/4fd5bf14-664f-45fb-a4a8-128ebcbb2c50/Govt_Contractor_Sherzer-Nadler_byline.pdf). (It should also be noted that “Specialty Metals” were added to the Berry Amendment via the FY1972 Act.)
2. The 2007 JWNDAA was accessed October 5, 2007, at <http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.5122:>
3. See the “DISCUSSION” section of Section 832 on page 25 of the “Acquisition Reform Working Groups Comments on Fiscal Year National Defense Authorization Act 2007.” Accessed September 28, 2007, at [www.ita.gov/es/docs/FY2007Auth\(FINAL\)7-12-06.pdf](http://www.ita.gov/es/docs/FY2007Auth(FINAL)7-12-06.pdf).
4. See Greenberg and Traurig, “FY 2007 Defense Authorization Act Introduces Procurement Reform: One-Time Waiver on Domestic Source Restrictions for Specialty Metals,” *ALERT: Government Contracts*, 2006. Accessed November 15, 2007, at [www.gtlaw.com/pub/alerts/2006/1100f.pdf](http://www.gtlaw.com/pub/alerts/2006/1100f.pdf).

5. The July 30, 2007, DAU "Ask the Professor Q&A" was accessed September 28, 2007, at: <https://akss.dau.mil/askaprof-akss/qdetail2.aspx?cgiSsubjectAreaID=14&cgiQuestionID=20654>.
6. This analysis is based on data available as of November 13, 2007. FY2008 legislation was not considered. *DFARS* citations can be retrieved at [www.acq.osd.mil/dpap/dfarspgi/current/index.html](http://www.acq.osd.mil/dpap/dfarspgi/current/index.html).
7. Found at 41 U.S.C. 10a-d.
8. Found at 19 U.S.C. 2501 et. seq.
9. Greenberg and Traurig, see note 4.
10. Chierichella, J.W. and D.S. Gallacher, "The Continuing Saga of Specialty Metals—Nothing is Ever so Bad that it cannot be Made Worse," *International Government Contractor*, 4 (4), 2007. Accessed October 8, 2007, at [www.sheppardmullin.com/assets/attachments/313.pdf](http://www.sheppardmullin.com/assets/attachments/313.pdf).
11. The July 2, 2007, *Federal Register* was retrieved October 8, 2007, from: <http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/E7-12763.htm>.
12. Secretary of Defense Melvin R. Laird's November 20, 1972, memo was retrieved October 8, 2007, from [www.aia-aerospace.org/pdf/berry\\_lairdmemo.pdf](http://www.aia-aerospace.org/pdf/berry_lairdmemo.pdf).
13. The October 9, 2007, BNA Inc. "Federal Contract Report" was retrieved November 11, 2007, from <http://pubs.bna.com/ip/bna/FCR.NSF/eh/a0b5f1p0c7>.
14. Ferguson, J., "Buying American: The Berry Amendment," *Defense AT&L*, 25-28, 2006 March-April. Accessed October 5, 2007, at [www.dau.mil/pubs/dam/03\\_04\\_2006/fer\\_ma06.pdf](http://www.dau.mil/pubs/dam/03_04_2006/fer_ma06.pdf).
15. DLAD 7.9003(b)(4) was retrieved October 5, 2007, from: [http://farsite.hill.af.mil/reghtml/regs/other/dlad/PART07.htm#P392\\_37658](http://farsite.hill.af.mil/reghtml/regs/other/dlad/PART07.htm#P392_37658).
16. The DPAP FAQ on the Berry Amendment was retrieved October 5, 2007, from [www.acq.osd.mil/dpap/paic/berr Yamendmentfaq.htm](http://www.acq.osd.mil/dpap/paic/berr Yamendmentfaq.htm).
17. *Ibid.*
18. See, generally, the 2007 JWNDAA, *supra* note 2.
19. Churchill, D.A. and K.C. Weinberg, "Domestic Specialty Metals Restrictions: A Bumper Crop of Fresh Berry Issues," *Briefing Papers*, Second Series, NO. 07-04, March 2007. Accessed October 8, 2007, at [www.jenner.com/files/tbl\\_s20Publications%5CRelatedDocumentsPDFs1252%5C1678%5CBP\\_march\\_07-3\\_box.pdf](http://www.jenner.com/files/tbl_s20Publications%5CRelatedDocumentsPDFs1252%5C1678%5CBP_march_07-3_box.pdf).
20. The March 10, 2006, DCMA "Interim Instruction for Specialty Metals Clause Compliance" was retrieved October 8, 2007, from: <http://guidebook.dcm a.mil/225/instructions.htm>.
21. McCaleb, S. and K. Maynard, "Incorporation of Contract Clauses under the Christian Doctrine: An Argument of Last Resort in the D.C. Circuit?" *Procurement Law Advisor*, 5(1), April 2002. Accessed October 8, 2007, at [www.wileyrein.com/docs/publications/11487.pdf](http://www.wileyrein.com/docs/publications/11487.pdf).
22. *Ibid.*
23. *Ibid.*
24. The Amendments section of 10 U.S.C. 2304 was retrieved October 8, 2007, from: <http://uscode.house.gov/uscode-cgi/fastweb.exe?getdoc+uscview+t09t12+1310+1++%28%29%20%20AND%20%28%2810%29%20ADJ%20%20USC%29%3ACITE%20AND%20%28USC%20w%2F10%20%282304%29%29%3ACITE%20%20%20%20%20%20%20%20>.
25. The following three references (retrieved on October 31, 2007) provide helpful resources regarding contingency contracting:
  1. Search for "contingency" in the search file of the DAU's "Ask the Professor" Web site: <http://acquire.dau.mil/akss/>.
  2. Review the following excerpt from the DAU's Contingency Contracting training (CON 218): <https://myclass.dau.mil/bbcswbwebdav/orgs/CON218-workspace/Student%20Materials/Pre-Course%20Materials/Contingency%20Contracting.pdf>.
  3. Visit the following DOD Standard Procurement System (SPS) link: [www.spscoe.sps.eis.army.mil/contingencycontracting.htm](http://www.spscoe.sps.eis.army.mil/contingencycontracting.htm).
26. See, generally, the 2007 JWNDAA, see *supra* note 2; and The DPAP FAQ on the Berry Amendment, *supra* note 16.
27. DNADs can be reviewed at the following Web site: [www.dcm a.mil/dnad](http://www.dcm a.mil/dnad).
28. The September 21, 2006, OUSD Memo: "Implementation Guidance for Pre-Award Berry Amendment Compliance" was retrieved October 24, 2007, from [www.acq.osd.mil/dpap/policy/policyvault/2006-1788-DPAP.pdf](http://www.acq.osd.mil/dpap/policy/policyvault/2006-1788-DPAP.pdf).
29. The April 19, 2007, Office of the Assistant Secretary of the Air Force Memo: "Mandatory Procedures for Exceptions on Specialty Metals" (Policy Letter from OUSD (AT&L)/DPAP dated January 17, 2007) was retrieved October 24, 2007, from [www.safaq.hq.af.mil/contracting/policy/AQC/policy-2007/aqc-memo-19apr07.pdf#zoom=100%](http://www.safaq.hq.af.mil/contracting/policy/AQC/policy-2007/aqc-memo-19apr07.pdf#zoom=100%).
30. The December 8, 2006, DCMA Information Memo (No. 07-042) was retrieved on October 24, 2007, from <http://guidebook.dcm a.mil/225/dc07-042.htm>.
31. See, generally, the 2007 JWNDAA, *supra* note 2; The DPAP FAQ on the Berry Amendment, *supra* note 16; and the Amendments section of 10 U.S.C. 2304, *supra* note 24.
32. *Ibid.*
33. House Conference Report 109-702 was retrieved on October 30, 2007, from [www.wifcon.com/dodauth7/dod07\\_842.htm](http://www.wifcon.com/dodauth7/dod07_842.htm).
34. See, generally, Chierichella, J.W. and D.S. Gallacher, Feature Comment: "Specialty Metals and the Berry Amendment—Frankenstein's Monster and Bad Domestic Policy," *The Government Contractor*, 46 (14), 2004. Accessed October 24, 2007, from [www.sheppardmullin.com/assets/attachments/294.pdf](http://www.sheppardmullin.com/assets/attachments/294.pdf).
35. Nadler, see note 1.

36. The December 6, 2006, OUSD Memo: "Class Deviation—Restriction on Procurement of Specialty Metals" was retrieved October 8, 2007, from [www.acq.osd.mil/dpap/policy/policyvault/2006-2051-DPAP.pdf](http://www.acq.osd.mil/dpap/policy/policyvault/2006-2051-DPAP.pdf).
37. *Ibid.*
38. *Ibid.*
39. See, generally, the 2007 JWNDAA, *supra* note 2; and The DPAP FAQ on the Berry Amendment, *supra* note 16.
40. The November 8, 2007, *Federal Register* was retrieved on November 11, 2007, from <http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/E7-21888.htm>.
41. The February 5, 2007, BNA Inc. Federal Contract Report was retrieved May 30, 2008, from <http://pubs.bna.com/NWSSTND/IP/BNA/fcr.nsf/SearchAllView/983E74844A85E721852573E60006A201?Open&highlight=SPECIALTY,METAL>.