

## DoD Authorization Act Expands Berry Amendment Exceptions and Waivers

On October 17, 2006, President Bush signed into law the John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law 109-364. Section 842 of the Act amends the specialty metals clause of the current Berry Amendment, 10 U.S.C. § 2355a, to expand the products exempted from domestic preferences requirements, provides for a one-time waiver for existing non-compliant products and expands DoD's existing waiver authority. These changes, though limited, will reduce the financial impact for companies unprepared for the governments renewed focus on Berry Amendment compliance, and will make future compliance somewhat easier.

The new law becomes effective November 17, 2006. We anticipate that DoD will publish its implementation guidance prior to that date. In the interim, industry should begin to position itself to benefit from the changes to the law.

### One-Time Waiver

The most significant change in the Act is the "one-time" get well waiver. The intent of this provision is to assist industry in using its current inventory of parts and items, even if those parts or items contain non-compliant specialty metals.

The waiver is available only for parts produced, manufactured, or assembled in the United States prior to October 17, 2006, the date of enactment. To qualify for this waiver, the contracting officer must determine that it would not be practical or economical to remove or replace the non-compliant specialty metal, and that the contractor and subcontractor have in place an effective plan to ensure future compliance. In addition, the production or manufacturing of the item must not have been knowingly non-compliant.

The waiver package is to be submitted to the Under Secretary of Defense (Acquisition, Technology, Logistics) or the service acquisition executive of the military department for approval. After it is approved, the contracting officer must publish the determination on FedBizOpps.gov. Finally, DoD must make final acceptance of the end product prior to September 30, 2010.

DoD's implementing guidance is expected to articulate the process by which industry should follow to obtain this waiver. For now, contractors should evaluate their current inventory to determine the items that could be covered under the waiver. Given the "one-time" nature of the waiver, it is likely that DoD will permit a company to submit only one waiver and it will be critical to include in that waiver all parts or items that meet the waiver criteria. In addition, contractors should begin preparation and implementation of the compliance program necessary to qualify for the waiver.

### Electronic Components Exception

The Act establishes a new exception for "commercially available electronic components" that contain a "de minimis" content value of specialty metal compared to the overall value of the lowest level electronic component that contains such specialty metal. Congress did not provide any definition or legislative history for DoD to use for defining "commercially available electronic component" or "de minimis." Again, not until the Department publishes its implementation guidance will the full extent of this new exception be understood. However, it is clear that the exception will reduce the compliance

### CONTACTS

If you would like more information, please contact any of the McKenna Long & Aldridge attorneys or public policy advisors with whom you regularly work. You may also contact:

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burden for manufactures of off-the-shelf electronic components and for prime contractors required to “flow-down” the Berry Amendment requirements to subcontractors.

## Domestic Non-Availability Determination

Like the existing statute, the Act grants DoD waiver authority if there is a determination of domestic non-availability of the specialty metal. The new waiver authority, however, includes significant changes. First, there is no reference to “U.S. market prices.” We are hopeful that the DoD interprets this deletion to mean that the cost of the specialty metal need only be fair and reasonable in the global market (and not the U.S. market) to qualify for the exception. Second, the Department will not only look to the available quality and quantity of the specialty metal prior to granting an exception, but also will determine if it is available in the “required form.” (For example, there have been instances where there has been sufficient quality and quantity of the specialty metal available in plate form, but not in wire form). Lastly, under the new law subcontractors can obtain this waiver; previously only prime contractors could qualify for the waiver.

The Act makes other changes as well. For example, it codifies the requirement at DFARS 225.7002-3 that the domestic specialty metals provision apply to the purchase of aircraft, missile and space systems, ships, tanks and automotive items, weapon systems and ammunition. For procurements outside of these six areas the specialty metal requirement only applies if the prime contractor or DoD directly purchases the specialty metal. The full impact of these and other changes cannot be assessed until DoD provides its implementation guidance. Until such guidance is issued and implemented, it is likely the Department will continue its current practice of conditional acceptance and withholding of funds for non-compliant products. Contractors should continue to negotiate the delivery of non-compliance product while positioning themselves to take advantages of the changes likely to result from the Act.

We are available to provide you with additional information regarding the Act, or to assist you in positioning your company to take advantage of the one-time waiver and other changes the Act will implement. If you have any questions, please contact [Fred Levy](#) or [Mary Ellen Fraser](#).

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