

BERRY AMENDMENT RULES AND REGULATIONS UPDATE

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Parachute International Association
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I. Berry Amendment Update

- A. Statutory Provisions and Prohibitions, 10 USC 2533a
Implementing regulations at DFAR 225.7000 et. seq.
Implementing clause at DFAR 252.225-7012

1. ***Prohibits the Department of Defense*** from acquiring any item listed unless the item has been “grown, reprocessed, reused or produced in the United States.”
2. Amended as of December 18, 2005 (Hayes Amendment) to

provide:

- a. The restriction on the acquisition of clothing includes “...The materials and components thereof, other than sensors, electronics, or other items added to, and not normally associated with, clothing (**and the materials and components thereof**).” (emphasis added)
- b. “Component” is defined in the implementing clause as “any item supplied to the Government as part of an end product or of another component.” DFAR 252.225-7012(a)(1).

c. Requires DOD to post in FedBizOps within 7 days of a contract award notice of any waiver or other exception to the Berry requirements that pertains to such contract action.

3. The prohibition is absolute. The prohibition takes precedence over the provisions of the Buy American Act. Do not confuse the Berry Amendment with the Buy American Act.

4. The statutory prohibition applies to the Department of Defense. It applies to prime contractors through the DFAR implementation regulations and the inclusion of the applicable clause in prime contracts. While the clause does not indicate that it is a mandatory flow down clause, since the prohibition extends to components of covered end items, prime contractors should flow down the clause to covered vendors to assure that only Berry compliant materials are delivered in support of covered orders.

5. Items covered by the prohibition include:

Clothing

Tents, tarpaulins or covers

Cotton and other natural fiber products

Woven silk or silk blends

Spun silk yarn for cartridge cloth

Synthetic fabric or coated synthetic fabric, including all yarns for such fabrics

fibers and

Canvas products

end items

Wool, whether in fiber, yarn or in fabrics, materials or

Any equipment item in FSC 8465 mfg'd from or containing items listed

B. Exceptions

1. Prime contracts below Simplified Acquisition Threshold (\$100,000.00)

(Known requirements cannot be divided just to bring individual orders under the simplified acquisition threshold in order to avoid the Berry restrictions.)

2. When Secy of Defense determines that items covered cannot be obtained in satisfactory quality or sufficient quantity from domestic sources
3. Acquisition of items listed in FAR 25.104(a)
Presently included textile type products are:
Yarn, 50 dernier rayon
Goat and kidskins
Hemp yarn
4. Acquisitions outside US in support of combat operations
5. Emergency acquisitions outside of US to support personnel of such activities
6. Acquisitions by vessels in foreign waters
7. Items purchased for commissary resale
8. Acquisitions of end products incidentally incorporating cotton, other natural fibers or wool for which such components are not more than 10% of the total price of the end item and not more than \$100,000.00
9. Acquisitions of fibers or yarns for synthetic or coated synthetic fabrics (but not the fabric itself) if the fabric is to be used as a component of an end item that is not a textile product. Parachutes are listed specifically as being textile products. See DFAR 225.7002-2(o)(1)(iv).
10. Acquisitions of para-aramid fibers or yarns for synthetic or coated synthetic fabrics (but not the fabric itself) if the para-aramid fibers or yarn has been produced in the Netherlands or another qualifying country under limited circumstances.
11. Acquisitions of specialty metals (and specialty metal components) when the acquisition furthers an agreement with a qualifying country as set forth at DFAR 225.872. Qualifying countries include Australia, Belgium, Canada, Denmark, Egypt, Germany, France, Greece, Israel, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, Great Britain, Northern Ireland.

II. Waiver Procedures

A. Permitted under 10 USC 2534(a) when

1. The Under Secy of Defense for Acquisition, Technology and Logistics approves for DLA activities and Secy of the Service approves for other DOD activities after determining that:
 - a. There is inadequate domestic supply
 - b. US producers of the item would not be jeopardized by competition from a foreign country source and the country in question does not discriminate against defense items produced in the US /or/
 - c. Application of the restriction would impede cooperative programs entered by the US with other countries
2. Notice of a prospective waiver must be published in the Federal Register and given to Congress at least 15 days before the effective date of the waiver
3. The effective period of the waiver shall not exceed one year

B. Applicability

1. To all contracts issued after the effective date of the waiver
2. To all options awarded after the effective date of the waiver
3. To all subcontracts entered into after the effective date of the waiver
4. Adequate consideration must be given to the prime contractor to defray any added costs incurred as a result of the waiver if the prime contract was awarded before the waiver was issued.

C. Waivers are listed by DOD at <http://www.acq.osd.mil/dpap/paic/dnad.htm>.

1. Current waivers include:
 - Cationic Dyeable Continuous Filament Polyester Tow
 - Poromeric material
 - Rayon yarn for military clothing and textile items
 - Modacrylic fiber

D. Statute has no statute of limitations

1. The restriction is against DOD purchasing non-compliant goods. Since it is a restriction on a Government agency, it is absolute and there is no statute of limitations or grace period.
2. FASA and federal fraud statutes have 6 year statute of limitations.
3. Contract record retention requirements are for 3 years after completion of the contract.

E. Berry Amendment provisions pertaining to specialty metals are different.

1. Specialty metals are excepted when the acquisition furthers an agreement between the US and a qualifying country as listed in DFAR 225.872. See DFAR 225.7002-2(n).
2. Specialty metals are exempted when they are purchased by a subcontractor at any tier, or are melted in a qualifying country or are incorporated in an article manufactured in a qualifying country. See DFAR 252.225-7014.
3. DFAR 52.225-7014 is a mandatory flow down clause.
4. Recent Army proposal to extend specialty metals exemptions to COTS purchases has been criticized.

F. Procedures for violations

1. Self reporting is best.
2. DOD is absolutely prohibited from paying for non-compliant goods. Hence DOD is essentially required to demand repayment for all non-compliant goods received.
3. Liability will fall on the prime contractors pursuant to the contract clause provisions.
 - a. Depending on the terms of the purchase orders issued by the prime contractors to vendors, liability may be passed by the primes to violating vendors.

G. Possible remedies for violations

1. Congressional reference action

- a. Requires members of Congress to introduce a piece of special legislation to exempt a particular contract or portion thereof from the requirements of the Berry Amendment.
- b. The legislation has to pass both Houses of Congress.
- c. The legislation has to be specific. It cannot be open ended.

2. Public Law 85-804 Relief

- a. 50 USC 1431 gives the President the power to: “authorize any department or agency of the Government which exercises functions in connection with the national defense ... to enter into contracts or into amendments or modifications to contracts heretofore or hereafter made and to make advance payments thereon, without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever he deems that such action would facilitate the national defense.”
- b. Record for Request Form Documentation
 - 1. Contractor’s name and address
 - 2. Contractor’s small business status
 - 3. List of affected contracts
 - a. Name of Contracting Officer
 - b. Name of contracting agency
 - c. Contract number, contract type and award date
 - (i) Item(s) procured under the contract
 - (ii) Nature and extent of non-compliant material involved in contract
 - (iii) Delivery status under the contract
 - (A) Number of units delivered to the Government
 - (B) Number of units completed and not delivered to the Government
 - (C) Delivery schedule requirements
 - (D) Amount of work-in-process
 - (iv) Value of affected goods

- (A) Value of completed goods containing foreign content (at the contract unit price)
 - (B) Value of work-in-process containing foreign content
 - (C) Value of foreign content in end items
 - 4. Point of contact at contractor for issues pertaining to the 85-804 request.
 - c. Any such request is reviewed by a review board in accordance with FAR Part 50.
3. Possible action by the Secretary of Defense
- a. Precedence under the June 1, 2006 memorandum of the Under Secretary of Defense as it pertained to the violations disclosed with regard to specialty metals.
 - b. The memorandum provides that where there are exigent circumstances for the Department, contracting officers may accept goods which are non-compliant conditionally providing:
 - (i) financial consideration in at least the amount of the cost of the lowest auditable part which contains the non-compliant materials with appropriate burdens is received, and
 - (ii) the contractor(s) provide a comprehensive plan to implement corrective action and to assure that future compliance with the statute can be assured.

H. Suggestions for improving Berry

- 1. Posting of a real time waiver list by DOD in a readily accessible web location.
- 2. Simplification of the waiver process.
- 3. Provision for acceptance of de minimus non-compliant materials providing the violation can be proven to have occurred without deliberate fault of a contractor or its vendor(s) and providing appropriate financial restitution is made to the Government.