Berry Amendment: Bane or Boon?

For more than 60 years, Congress has placed domestic source restrictions on Department of Defense (DoD) purchases of certain supplies, under legislation that is commonly referred to as the “Berry Amendment.” Although obscure to the general public, the Berry Amendment became front-page news in 2001 during the Army’s black beret procurement.

While this procurement did not violate any law, in particular the Berry Amendment, it resulted in the DoD examining its procurement process to insure compliance with the Berry Amendment. It also spurred Congress to move the Berry Amendment from a note in 10 U.S.C. § 2241 to its own section of the U.S. Code, 10 U.S.C. § 2533a.

Since the black beret procurement, the application and interpretation of the Berry Amendment has ebbed and flowed. See Like a Band-Aid® on a Broken Arm: DCMA’s Interim Guidance on Domestic Specialty Metals, on page 3. This ebb and flow is caused by the lack of clear guidance on how the Berry Amendment should be applied. The Berry Amendment is an anomaly in the world of confusing statutes and regulations, as very few cases discuss how it should be interpreted, and no recent case has dealt with its substance. The only thing that is clear is that it was enacted to protect the defense industrial base, and as such should generally be interpreted broadly.

The Berry Amendment prohibits the spending, availability or use of any appropriation or other funds available to DoD for procuring certain foreign goods. The amendment states that DoD cannot procure:

1. An article or item of--
   (A) food;
   (B) clothing and the materials and components thereof, other than sensors, electronics, or other items added to, and not normally associated

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Pepper Forms Strategic Alliance With Former U.S. Energy Secretary’s Firm

Pepper Hamilton LLP and The Abraham Group LLC, an international strategic consulting firm, announced that they have entered into a strategic alliance to provide a comprehensive range of legal and business consulting services, focusing primarily on the energy sector.

The announcement was made by Spencer Abraham, chairman and CEO of The Abraham Group and former U.S. Secretary of Energy, and Robert E. Heideck, Pepper Hamilton’s executive partner.

“Our clients turn to us for solutions to complex legal issues,” said Mr. Heideck. “Increasingly, they also seek strategic advice concerning opportunities in the energy field, energy-related industries and international expansion, areas in which The Abraham Group has deep knowledge and experience. We believe that Spence Abraham and his team will offer clients terrific value with their strategic counsel, and we are excited to work with them.”

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with, clothing (and the materials and components thereof);
(C) tents, tarpaulins, or covers;
(D) cotton and other natural fiber products, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric (including all textile fibers and yarns that are for use in such fabrics), canvas products, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles); or
(E) any item of individual equipment manufactured from or containing such fibers, yarns, fabrics, or materials.

(2) Specialty metals, including stainless steel flatware.
(3) Hand or measuring tools.

that is not of domestic origin.

It is easy to say the Berry Amendment is the proverbial albatross around DoD’s neck; however, it does not have to be for a contractor. While a contractor’s view of the Berry Amendment may be colored by the industry it is in, regardless of industry a contractor can use the Berry Amendment as a sword and a shield.

Sword

What some fail to realize is that the Berry Amendment grants, in some cases, a government-sanctioned monopoly or oligopoly. Although the Berry Amendment has some exceptions, when no exception applies it can only be waived when “the Secretary of Defense or the Secretary of the military department concerned determines that satisfactory quality and sufficient quantity of [a covered item] ...grown, reprocessed, reused, or produced in the United States cannot be procured as and when needed at United States market prices.” 10 U.S.C. § 2533a (c). In the past, the waiver process was rarely used. Today, DoD is required to post a notification that a waiver has been issued in FedBizOps.gov, or any successor site, which likely will decrease waivers even further. 10 U.S.C. § 2533a (k). Therefore, if a contractor is the only domestic source for a covered article and it can produce it in sufficient quantities, meet a certain quality standard and supply the covered article when needed, then DoD can only purchase the item from that contractor. Price is rarely an issue in a waiver determination. This, of course, presents certain business opportunities for contractors.

In FY 06, language was added to the Berry Amendment as it relates to clothing, which now includes any “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).” 10 U.S.C. § 2533a (b)(1)(B)(2006). This change could open up an opportunity for a contractor to be the sole supplier for either materials and/or components of clothing that had not previously been considered covered by the Berry Amendment, or an article of clothing that includes 100 percent domestic materials and components. This is but one example of the opportunities available to a contractor.

Other opportunities do exist under the Berry Amendment, but those opportunities are dictated by specifics of the contractor’s industry. However, the potential for a government-sanctioned monopoly or oligopoly is hard to ignore.

Shield

As discussed on page one, the Berry Amendment was implemented to protect the defense industrial base. Once a contractor makes a commitment to produce a product that is in compliance with the Berry Amendment they are part of that base. This means that they have the “right” to protect their business and market.

In practice, this might mean that a contractor might, in some instances, have to file a protest at the Government Accountability Office to prevent an agency from procuring a product that does not comply with the Berry Amendment. See MMI-Federal Marketing Service Corp., B-297537, February 8, 2006, 2006 U.S. Comp. Gen. LEXIS 35. This requires the contractor to take a proactive approach to “enforcing” the Berry Amendment by informing the government of potential non-compliance either pre or post contract award. The agency has to investigate any credible evidence of potential non-compliance with the requirements of the Berry Amendment.

While this may be a daunting task for a contractor of any size, the Berry Amendment does present a unique and potentially lucrative business opportunity. That being said, given the less-than clear interpretations of

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Like a Band-Aid® on a Broken Arm: DCMA’s Interim Guidance on Domestic Specialty Metals

The Defense Contract Management Agency (DCMA) issued interim instructions on March 10, 2006, on how the agency would handle a contractor’s noncompliance with Defense Acquisition Regulation Supplement (DFARS) 252.225-7014, Preference for Domestic Specialty Metals.

DFARS 252.225-7014 requires that when DoD purchases an item that contains specialty metal, the specialty metal must be (1) melted in the United States or a qualifying country (see DFARS 225.872-1 for a list of qualifying countries) and be incorporated in an article manufactured in the United States or (2) be melted in the United States, a qualifying country, or non-qualifying country and be incorporated in an article manufactured in a qualifying country.

DCMA issued its guidance after it learned that some items containing foreign specialty metals, which do not comply with the DFARS restriction, were being delivered under several DoD contracts. The goal of the guidance is to allow DCMA to identify all suppliers, prime contractors and subcontractors that have or will deliver items to DoD that contain, or may contain, specialty metals that do not comply with DFARS restrictions.

The guidance/instructions state that DCMA will not accept products containing nonconforming specialty metals unless the procuring activity notifies DCMA, in writing, that an exception applies or DCMA receives written notification from the procuring activity that it authorizes the acceptance of the product conditionally. In order for DCMA to accept the product conditionally, the contractor must withhold “the cost of the lowest auditable non-compliant specialty metal part plus appropriate burden from payments due against the contract.” Further, the contractor must submit a copy of the conditional acceptance document that includes the conditional acceptance and withholding language found in the instructions, which is signed and dated by the procuring contracting officer and the administrative contracting officer authorizing the conditional acceptance.

The guidance/instructions also addresses conditional acceptance on fixed-price contracts as well additional requirements for Critical Safety Items. While this is clearly a step in the right direction, two rather sizable caveats must not be ignored. First, the conditional acceptance option, discussed above, per the instructions will be used rarely. Second, the interim guidance/instructions are just that—interim, temporary and not a permanent fix. The guidance/instruction will likely only be in effect until the Office of the Secretary of Defense develops a long-term remedy for this problem—not an easy task. We will keep you posted on any future developments.

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Secretary Abraham said, “Pepper Hamilton is an outstanding and highly respected law firm. We look forward to helping the firm grow its energy practice, and to consulting with its clients on government regulatory and international matters. Our strategic alliance provides The Abraham Group with a great platform and offers our clients looking to act on our strategic advice access to an array of top-flight legal services.”

Areas in which The Abraham Group and Pepper Hamilton have mutual interests and experience include energy and natural resources, energy corporate transactions (including venture and private equity), government and regulatory affairs, and international affairs. By forming a strategic alliance, The Abraham Group and Pepper Hamilton can offer their respective clients a variety of services to assist with many business challenges and opportunities in these areas.

What’s Old is New: The Buy American IT Exception


Furthermore, these changes will continue to be effective as long as language similar to Section 517 appears in future appropriations act.

The notice and comment period for this interim rule ended on March 6, 2006, and only two comments were received. CDW-G, a hardware and software supplier, praised the interim rule. The Department of Defense Inspector General (DoD IG) criticized it and suggested that it not be applied to DoD or its agencies for security reasons.

While at first blush the DoD IG’s criticism may seem odd, as this exception has been in place since FY 2004, this is the first opportunity the DoD IG had to comment on the IT exception, and it might have had concerns about the exception since its inception in FY 04. What impact, if any, these comments will have on the final rule is unknown. We will keep you posted on any future developments.

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the Berry Amendment that exist, and the fact that the interpretations tend to differ from agency to agency, a contractor should contact an attorney to create a strategic plan, which should include a domestic sourcing audit, before attempting to take advantage of the opportunity that the Berry Amendment presents.

We counsel large and small businesses regarding the Berry Amendment, Buy American Act and other domestic source restrictions. If you have any questions, or need any additional information, please contact Michael A. Hordell (202.220.1232 or hordellm@pepperlaw.com) or Sean P. Bamford (202.220.1217 or bamfords@pepperlaw.com).

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