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Feature Comment: Specialty Metals And The Berry Amendment—Frankenstein's Monster And Bad Domestic Policy

> I had worked hard for nearly two years, for the sole purpose of infusing life into an inanimate body. For this I have deprived myself of rest and health. I had desired it with an ardour that far exceeded moderation; but now that I have finished, the beauty of the dream vanished, and breathless horror and disgust filled my heart.
> Mary Wollstonecraft Shelley, *Frankenstein*, Chapter V.

Dispassionately viewed by many who have been adversely affected by its implementing regulations, the so-called "Berry Amendment" may rightly be regarded as the "Frankenstein's monster" of the procurement process. Designed to protect the interests of particular domestic industries from foreign competition—at least where Department of Defense dollars are concerned—the Berry Amendment has expanded over the course of the last half century by cobbling together, under its supposed protective aegis, a variety of disparate products, related only by the strength of their lobbies in having them added to the protectionist statutory scheme.

As Frankenstein ultimately learned in fashioning his creation, the law of unintended consequences can never be ignored. So it often is when statutes and regulations are stitched together in *ad hoc* fashion. Having been designed to protect United States industry, the Berry Amendment has—in certain significant respects—turned on U.S. industry and rendered it subordinate to certain trading partners. This phenomenon, manifested in the regulatory treatment of "specialty metals," is so problematic that the DOD has waived the Berry Amendment, at least on an interim basis, for a variety of aircraft procurement programs.

A regulatory scheme that requires wholesale waiver is hardly a paradigm of administrative cohesion. For those who subscribe to the theory that one important purpose of the law is to provide predictability of result in the affairs of commerce, the Berry Amendment is an abject failure. A protectionist statute that, as implemented, actually *favors* foreign sellers—and its administrative history incredibly demonstrates an awareness of that result—may not quite engender the "breathless horror and disgust" that beset Shelley's good doctor, but it is, most assuredly, a sign of something gone wrong.

History of the Berry Amendment—Dating back to 1941, each annual DOD Appropriations Act has included a domestic preference clause prohibiting the expenditure of DOD appropriations for certain items "not grown, reprocessed, reused, or produced in the United States." Fifth Supplemental National Defense Appropriations Act, Pub. L. No. 77-29, 55 Stat. 123 (1941). Prior to 1952, these restrictions applied only to specific articles of food and clothing. However, in 1952, Congressman Ellis Berry (R-S.D.) proposed to expand the domestic source restrictions to include additional clothing, cotton or wool. The "Berry Amendment," incorporated in the DOD Appropriations Act of 1953, restricted the procurement of

> any article of food, clothing, cotton or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles), not grown, reprocessed, reused, or produced in the United States or its possessions, unless determined that sufficient quantities of any such domestic articles could not be acquired as needed at United States market prices.

Pub. L. No. 488-630, 66 Stat. 517, 521 (1952).

Since then, the Amendment's protectionist umbrella has widened considerably. In succession, Congress added to the statute's protective embrace "silk or woven silk blends" (1955), "synthetic fabric or coated synthetic fabric" (1967), "protective clothing"

(1978), and "tents, tarpaulins, [or] covers" containing restricted materials (1987). In 1973, a preference for "specialty metals" was engrafted onto the body of the statute. See Defense Appropriations Act of 1973, Pub. L. No. 92-570, 86 Stat. 1184 (1972).

While restrictions of these types had been consistently included in DOD Appropriations Acts since 1941, it was curiously not until 1992 that the Berry Amendment was added to the United States Code, as a note to 10 USCA § 2241. In 2001, responding to alleged violations of the Berry Amendment in the procurement of berets, see 43 GC ¶ 191, Congress formally codified the Berry Amendment as its own section at 10 USCA § 2533a. Today, the Berry Amendment prohibits "funds appropriated or otherwise available to the Department of Defense [from being] used for the procurement of an item described in subsection (b) if the item is not grown, reprocessed, reused, or produced in the United States." Subsection (b) describes the items to which the Berry Amendment applies as:

> (1) An article or item of
> (A) food;
> (B) clothing;
> (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.

There are several exceptions to the Berry Amendment, including an exception for specialty metals. However, contrary to most other simplified acquisition procedures used by the Government, the statute does *not* recognize an exception for commercial products – the Berry Amendment applies to all contracts and subcontracts for the procurement of commercial items. See 10 U.S.C.A. § 2533a(i). This may reflect the fact that an exception for commercial items could well eviscerate the protection accorded hand tools under the statute.

The exceptions to the procurement of specialty metals that are available allow DOD to acquire specialty metals produced outside the U.S. when the procurement is necessary:

> (A) to comply with agreements with foreign governments requiring the United States to purchase supplies from foreign sources for the purposes of offsetting sales made by the United States Government or United States firms under approved programs serving defense requirements; or
> (B) in furtherance of agreements with foreign governments in which both such governments agree to remove barriers to purchases of supplies produced in the other country or services performed by sources of the other country[.]

10 USCA § 2533a(e)(1).

It is the second of these two specialty metals exceptions that has spawned regulations that—in certain significant respects—have caused the Berry Amendment to turn on U.S. industry and render the interests of U.S. industry subordinate to those of certain of our trading partners.

Specialty Metals, the Berry Amendment, and the DFARS—DOD implemented the requirements of the Berry Amendment in the Defense Federal Acquisition Regulation Supplement (DFARS). The DFARS defines "specialty metals" as:

> (i) Steel
> (A) With a maximum alloy content exceeding one or more of the following limits: manganese, 1.65 percent; silicon, 0.60 percent; or copper, 0.60 percent; or
> (B) Containing more than 0.25 percent of any of the following elements: aluminum, chromium, cobalt, columbium, molybdenum, nickel, titanium, tungsten, or vanadium;
> (ii) Metal alloys consisting of nickel, iron-nickel, and cobalt base alloys containing a total of other alloying metals (except iron) in excess of 10 percent;
> (iii) Titanium and titanium alloys; or
> (iv) Zirconium and zirconium base alloys.

DFARS 252.225-7014(a)(2). As required by the Berry Amendment, the DFARS prohibits DOD from acquiring "specialty metals, including stainless steel flatware, unless the metals were melted in steel manufacturing facilities located within the United

States." DFARS 225.7002-1(b); see also DFARS 252.225-7014(b). However, implementing the second category of specialty metal exceptions discussed above, the DFARS excepts certain specialty metal procurements from the reach of the Berry Amendment—acquisitions of specialty metals "melted in a qualifying country or incorporated in an article manufactured in a qualifying country." DFARS 252.225-7014(c); see also DFARS 225.7002-2(l). Table 1 identifies the current "qualifying countries."

Table 1.

Qualifying Countries, under DFARS 225.872-1(a)		
Australia	France	Norway
Austria*	Germany	Portugal
Belgium	Greece	Spain
Canada	Israel	Sweden
Denmark	Italy	Switzerland
Egypt	Luxembourg	Turkey
Finland*	Netherlands	United Kingdom

* Austria and Finland are considered "qualifying countries" on a "purchase-by-purchase" basis. DFARS 225.872-1(b).

Because the U.S. is not listed as a "qualifying country," the plain language of the DFARS appears to prohibit domestic (U.S.) manufacture of items incorporating specialty metals melted in "non-qualifying" foreign countries. This means that, as a general rule, DOD is required to buy products incorporating specialty metals that were melted domestically; if an item is made in America and incorporates, in America, specialty metals that were not melted in America or a "qualifying country," then DOD *may not* acquire the American-made item. Under the exception, however, if an item is made overseas in a "qualifying country" and incorporates, in the "qualifying country," specialty metals that were not melted in America or a "qualifying country," then DOD *may* acquire that foreign-made item.

For example, assume that DOD were to procure jet engines incorporating titanium. A Turkish company, TurkJet, could buy its titanium from a Turkish melter, TurkMetal, incorporate the titanium into the jet engines, and sell the jet engines to the U.S. under an exception to the Berry Amendment. Furthermore, TurkJet could purchase its titanium from *anywhere* (even a non-qualifying country, such as Russia), incorporate the titanium into the jet engines manufactured in Turkey by TurkJet, and sell the jet engines to DOD.

The same is not necessarily true for domestic companies. A U.S. company, U.S. Jet, could buy its titanium from a U.S. melter, U.S. Melt, incorporate the titanium into the jet engines, and sell the jet engines to DOD—this is the preferred scenario under the Berry Amendment. Additionally, U.S. Jet could buy its titanium from TurkMetal, incorporate the titanium into the jet engines in the U.S., and sell the engines to DOD, because the regulations recognize an exception for specialty metals "melted" in qualifying countries. However, U.S. Jet *could not* purchase its titanium from a non-qualifying country (such as Russia) and sell the product to DOD, even though U.S. Jet manufactures its engines in the U.S., using U.S. workers and creating U.S. jobs. The apparent effect of the DFARS regulations in this regard are summarized below in Table 2.

Table 2.

	Article Incorporating Specialty Metals Melted Domestically (U.S.)	Article Incorporating Specialty Metals Melted in a "Qualifying Country"	Article Incorporating Specialty Metals Melted in Other Foreign Countries
U.S. Industry	Permitted, DFARS 225.7002-1(b) & 252.225-7014(b).	Permitted, DFARS 225.7002-2(l) & 252.225-7014(c)(1).	**Not permitted.**
"Qualifying Country" Industry	Permitted, DFARS 225.7002-1(b) & 252.225-7014(b).	Permitted, DFARS 225.7002-2(l) & 252.225-7014(c)(1).	Permitted, DFARS 225.7002-2(l) & 252.225-7014(c)(1).

The effect of this plain reading of the regulation seems to run counter to the policy goals of the Berry Amendment—namely, protecting domestic industry. Instead, the regulation seems to protect "qualifying country" industry against both non-qualifying country industries *and* U.S. domestic industry.

Disagreement with the Regulations—The anomalous result that follows under the regulations has been recognized by U.S. industry. One company's Web site puts it bluntly:

> [T]he only reasonable interpretation of the Berry Amendment is that the United States should be treated as a qualifying country. It would make no sense that an article manufactured, for example, in France using foreign melt could be sold to DOD, but an article or item incorporating the same foreign melt produced in the United States could not be sold to DOD…. This result could not have been intended by DOD.

"Requirements of the Berry Amendment, 10 U.S.C. § 2533(a) [sic] and Defense Federal Acquisition Regulation Supplement (DFARS) 252.225-7014 (Alternate I)," available at *http://www.twmetals.com/DFARS/DFARS_TW_POSITION.htm.*

In support of the foregoing argument, the Web site advances the General Services Board of Contract Appeal's decision in *International Business Machines Corporation* (*IBM*), GSBCA No. 10532-P, 90-2 BCA ¶ 22,824. In that case, the Board considered whether the United States qualified as "a country" under the Trade Agreements Act (TAA), so that items manufactured in the U.S. could be considered "substantially transformed" in a "designated country." The Board concluded that a FAR provision excluding the U.S. from a list of "designated countries" under the TAA was improper because it was not consistent with the language of the underlying statute:

> The origin of a product for TAA purposes depends on where it has been substantially transformed, and, if a product is substantially transformed in the United States, then the origin of that product is the United States, which is undoubtedly "a country." If a product originates in the United States, it follows that the product is not foreign.

Reliance on *IBM* to invalidate the Berry Amendment regulations faces a number of obstacles. First, *IBM* addressed the TAA, not the Berry Amendment. Second, the TAA's language is markedly different from that of the Berry Amendment. The TAA classifies approved and prohibited products based on whether they are "substantially transformed" in a particular country—their country of origin:

> An article is **a product of a country** or instrumentality only if: (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

19 USCA § 2518(4)(B) (emphasis added). Based on this statutory language, GSBCA held that an item "substantially transformed" in the United States could not be the product of a foreign country. Since the TAA authorized the prohibition of "products of a foreign country," and the U.S. is most assuredly not a "foreign country," the Board concluded that the TAA could not have been intended to erect a discriminatory bar to the acquisition of U.S. products.

The language of the Berry Amendment, however, is far more direct and blunt and starts from a different slant. The Berry Amendment requires specialty metals to have been melted *in the United States*, unless necessary:

> (A) to comply with **agreements with foreign governments** requiring the United States to purchase supplies from foreign sources for the purposes of offsetting sales made by the United States Government or United States firms under approved programs serving defense requirements; or
>
> (B) in furtherance of **agreements with foreign governments** in which both such governments agree to remove barriers to purchases of supplies produced in the **other country** or services performed by sources of the other country.

10 U.S.C.A. § 2533a(e)(1) (emphasis added). The Berry Amendment simply does not have the definitional "crack" central to GSBCA's decision in *IBM*.

If one describes the policy underlying the Berry Amendment as that of protecting American industry and American jobs, it is difficult to quarrel with the

proposition that the regulations are in conflict with that policy. Plainly, allowing the apocryphal TurkJet to profit from a contract with the DOD when using Russian titanium while denying U.S. Jet and its employees the same opportunities denies business opportunities and jobs to U.S. industry and U.S. workers, and affirmatively advantages "qualifying country" industry and its employees. It is a basic legal maxim that a statute should not be applied to reach an absurd result. See *Dantran, Inc. v. Department of Labor*, 171 F.3d 58, 65 (1st Cir. 1999) (courts should be reluctant to rubber-stamp an agency's interpretation of its regulations when that interpretation has no plausible link to the goals of the regulatory scheme and would lead to absurd results).

However, if one describes the policy of the Berry Amendment as protecting the specific industries delineated therein and adopts a strict constructionist approach to the statute, the political factors that drive the regulation make the result somewhat more understandable. If the purpose of the specialty metals provisions is to protect U.S. specialty metals producers, then one would expect the regulation to bar *all* purchases of non-U.S. specialty metals. That result is precluded, however, by the statutory exception authorizing the acquisition of foreign specialty metals "in furtherance of agreements with foreign governments in which both such governments agree to remove barriers to purchases of supplies produced in the other country." By accepting "qualifying country" products that incorporate any foreign specialty metals, while rejecting U.S.-made products that do so, the regulations accomplish two complementary objectives under the statute—(1) they accommodate the requirement to comply with international agreements with the qualifying countries while, at the same time, (2) circumscribing, to the maximum extent possible, those circumstances in which foreign specialty metals will be acceptable.

U.S. specialty metals *producers* may not be happy with the exception for qualifying country products; they would be far less happy if U.S. *manufacturers* could also disregard the country of origin of the specialty metals they use in performing DOD contracts. So, when one focuses on the Berry Amendment as the guardian angel, not of U.S. industry and U.S. jobs generally, but of the U.S. specialty metals producers specifically, the "anti-American" effect of the regulations can be seen as a classic legislative trade-off—sacrificing a broader constituency for the benefit of a smaller bloc with a highly effective lobby. This conclusion is consistent with the way that the Berry Amendment has been stitched together over the years, incorporating demands from lobbies and special interests to protect each one's respective "piece of the pie."

Whether the law that results from the above-described process is sound or makes sense is, of course, continuously open to debate in our system. However, any suggestion that the political process was not at work in the development of the Berry Amendment regulations, or that the disadvantageous position in which they place U.S. industry was the product of inadvertence, is plainly dispelled by the administrative history of those regulations. Simply put, DOD knew what it was doing, knew the impact on U.S. industry generally, and consciously chose that path. This conclusion seems to be borne out by a review of the specialty metals regulatory history.

Regulatory History of the Specialty Metals Provision of the Berry Amendment—The Berry Amendment's restrictions on acquiring certain specialty metals was incorporated into the Armed Services Procurement Regulation shortly after the 1976 amendment. This was later incorporated in the DFARS in 1990. To date, the specialty metals provision of the Berry Amendment has undergone three significant regulatory updates, the administrative history of which give life to Bismarck's admonition that people who like sausage and respect the law should never watch either one being made.

A. DAR Case 90-435

On February 14, 1991, in conjunction with a total "plain-language" rewrite of the DFARS, the DAR Council proposed the following contract clause to implement the Berry Amendment restrictions on specialty metals:

(a) Definition. * * * *

(b) The Contractor agrees that any specialty metals incorporated in articles delivered under this contract will be melted in the United States, its possessions, or Puerto Rico.

(c) This clause does not apply to the extent that–

(1) The Secretary or designee determines that a satisfactory quality and sufficient quantity of such articles cannot be acquired when needed at U.S. market prices;

(2) **The acquisition is for an end product of a country listed in subsection 225.872-1** of the Defense FAR Supplement; or

> (3) The acquisition is necessary to comply with agreements with foreign governments requiring the United States to purchase supplies from foreign sources to offset sales made by the U.S. Government or U.S. firms under approved programs.

56 Fed. Reg. 6056, 6166 (proposed Rule for DFARS 252.225-7014) (emphasis added).

In response to this proposed rule, the Department of the Navy, Office of the Assistant Secretary (Research, Development and Acquisition) (RD&A) suggested that the rule be amended to clarify that it applied only to the *specialty metals*, and not the *items incorporating the specialty metals* procured by DoD:

> Change 'The acquisition is for an end product' to 'The specialty metals are the product'. To clarify that only the specialty metals must be the product of the qualifying country, not the end products being acquired under the contract.

Letter dated April 15, 1991, from E.G. Cammack, Director of Procurement Policy for the Department of the Navy (RD&A), to the Defense Acquisition Regulatory Council, regarding Fourth Increment of DFARS Rewrite – DAR Case 90-743D. A similar distinction had previously been noted by the U.S. District Court for the Eastern District of Pennsylvania in interpreting the predecessor regulation. *See Acme of Precision Surgical Co. v. Weinberger*, 580 F. Supp. 490, 506 (E.D. Pa. 1984).

Responding to the Navy's comment on the proposed regulation, the DAR Council recognized the disparate treatment of domestic manufacturers using specialty metals but, oddly, it recommended *no change* to the final rule to resolve the problem:

> Response: Agree. The committee discussed this comment with the OSD Foreign Contracting Office. It was their opinion and that of the committee that the commenter was correct, i.e. that specialty metals from the U.S. or a qualifying country must be used by all manufacturers. Both the current clauses and the proposed clause, however, apply the restriction based on the end product, not the specialty metals. The clauses state that the restriction does not apply when the acquisition is for a qualifying country end product. This means that **a manufacturer in a qualifying country can use specialty metals from any source** if the product meets the overall component test for qualifying country end products. **A domestic manufacturer, however, must use domestic specialty metals.** A third country manufacturer must also use domestic metal, they can not use qualifying country specialty metal.
>
> The statute itself is very general. It allows for an exception as necessary to comply with reciprocal procurement agreements. Since the MOUs [Memoranda of Understanding] do not supersede Appropriations Act restrictions, there is no specific exception required for compliance. By placing this wording in the Appropriations Act, however, the Congress has indicated an intention to provide special treatment for the MOU countries. This treatment could conceivably be either of the options discussed above (or a combination). **The problem with the treatment provided by the current clauses is that it provides a preference for qualifying country manufacturers over domestic companies**.

Memorandum dated May 15, 1991, from Tom Neufer, Chairman, International Acquisition Committee of the Defense Logistics Agency, to DAR Council regarding Review of Public Comments on DAR Case 90-435, Part 225, Foreign Acquisitions (emphasis added).

In reviewing the rule, DOD recognized that the specialty metals regulations, as written, had a disparate impact on U.S. industry by prohibiting U.S. manufacturers from using specialty metals from unlimited sources, while simultaneously allowing foreign "qualifying countries," which are manufacturing products incorporating specialty metals, unlimited sources. Nonetheless, the DAR Council recommended no change, preferring to defer the matter: "Given the nature of this issue, the committee does not propose changes for the final rule. We recommend that a separate case be established so that the issues can be given appropriate opportunity for policy and public review." Consistent with the committee's recommendation to maintain the status quo, the DAR Council implemented the then-final version of DFARS 252.225-7014 without change, thus perpetuating a known disadvantage to U.S. industry. See 60 Fed. Reg. 61586.

B. DFARS Case 97-D007

Subsequently, the DAR Council looked at amending DFARS 252.225-7014 under DFARS Case 97-D007. The regulatory record is not clear as to whether this DFARS case was opened specifically in response to the committee's prior 1991 recom-

mendation in DAR Case 90-435 (although a lapse of six years would clearly seem to suggest otherwise), or in response to a separate inquiry from the DOD. On May 1, 1997, the DAR Council published a proposed rule revising DFARS 252.225-7014(c)(2). 62 Fed. Reg. 23741.

Curiously, despite the fact that the Navy had previously identified obvious problems with the rule, the DAR Council received no public comments on the revision, and DFARS 252.225-7014(c)(2) was amended on March 9, 1998 (as part of Defense Acquisition Circular 91-13) to specify that the requirements of the clause do not apply to specialty metals melted, or incorporated in articles manufactured, in a qualifying country listed in DFARS 225.872-1. The final rule replaced the 1991 version of 252.225-7014(c)(2) by providing an exception when "[t]he specialty metal is melted in a qualifying country or is incorporated in an article manufactured in a qualifying country."

In issuing the revised rule, the DAR Council noted that the change "loosened" restrictions on domestic use of specialty metals:

> **The rule does not affect the already unrestricted sources of specialty metals when acquiring qualifying country end products** or when acquiring components including specialty metals for use in an end product for other than a major program. **The rule does loosen the restriction on domestic specialty metals for prime contractors providing domestic or nonqualifying country end products, permitting them to incorporate specialty metals melted in a qualifying country** (for both major and nonmajor programs); or qualifying country components containing specialty metals of unrestricted source for use in end products for major programs. * * * * One alternative considered was to require that the specialty metals incorporated in articles manufactured in a qualifying country also be melted in a qualifying country. This approach could slightly reduce the extent of foreign competition facing domestic entities. However, this approach appeared to go beyond the requirements of the statute being implemented.

63 Fed. Reg. 11522, 11524 (emphasis added).

While the DAR Council commentary indicates that this revision was designed to "loosen" the source restriction for domestic industries, it did not address the problem identified in the 1991 committee deliberations. Instead, it opted to perpetuate the bias against U.S. industry that the 1991 committee had identified.

C. DFARS Case 2002-D009

DFARS 252.225-7014 was again modified into its current version on March 31, 2003 as part of DFARS Case 2002-D009. 68 Fed. Reg. 15615. The DAR Council stated that the purpose of the change was to expand the ability of a qualifying country manufacturing a product to use components from any other foreign source. The proposed version of DFARS 252.225-7014 read as follows:

> (a) Definitions. * * * *
> (b) Any specialty metals incorporated in articles delivered under this contract shall be melted in the United States, its possessions, or Puerto Rico.
> (c) This clause does not apply to specialty metals (1) **Melted in a qualifying country or incorporated in an article manufactured in a qualifying country**[.]

67 Fed. Reg. 62590 (emphasis added).

The National Electrical Manufacturers Association (NEMA) endorsed this proposed change as having recognized "the multi-national realities of many manufacturing and assembly operations and remove[d] the restriction that a qualifying country end product's [sic] components be manufactured in the same qualifying country." Comment submitted December 3, 2002, from Timothy P. Feldman, Vice President of NEMA, to DAR Council regarding DFARS Case 2002-D009. The DAR Council agreed with this assessment, implementing the proposed rule with no changes. 68 Fed. Reg. 15615, 15616.

But while this change recognized the multinational realties of modern manufacturing, it did so to a limited extent. The change continued the previous practice of ignoring the known disadvantage that the regulations impose on U.S. industry, and continued the practice of offering "qualifying country" manufacturers a preference in their indiscriminate use of specialty metals.

Living with the Regulations—The implications of the specialty metals regulatory scheme for U.S. industry are significant. *First*, as noted by the Navy in connection with the 1991 amendments, the restrictions apply to the specialty metals themselves, *not to the* ***articles*** into which they are in-

corporated. This means that every DOD contractor must know whether its deliverable products incorporate banned metals. *Second*, as noted by NEMA during the 2002 amendments, industry must take into account the realities of modern manufacturing, namely that components, parts, subassemblies, and piece parts—at every level of assembly—come from all corners of the earth. *Third*, while the regulations assume a contractor can account for the origin of each "different" specialty metal incorporated in its final deliverable products at each and every antecedent stage of manufacture and assembly, the reality is that no contractor can track, let alone learn, the origin of each specialty metal, and ensure that it has been melted in an acceptable country. At some point—and it is not all that deep in the subcontract tiering process—contractual "flow down" obligations wash out. The regulatory duty, however, does not.

If a U.S. manufacturer incorporates specialty metals that were not melted in the United States or a qualifying country in a product purchased with DOD dollars, *then that contractor violates the law*. However, a manufacturer in a "qualifying country" need not concern itself with this issue—as long as it manufactures the item it sells, it does not need to monitor or track the country of origin of its specialty metals. In the parlance of Parker Brothers, qualifying country sellers are given a "Get Out of Jail Free" card if they use Russian titanium; U.S. industry, by contrast, "Goes Directly to Jail." Something is wrong with the Berry Amendment—with the exception of those privileged few who successfully supported its creation, the legislative version of Shelley's monster has turned on the balance of the "domestic village."

Waiver of the Specialty Metals and Berry Amendment Restrictions–Current Public Debate—DOD is aware of these problems—so aware that it has waived the specialty metals restrictions on an interim basis for certain DOD procurement classes.

Russian titanium provides the perfect example. In October 2002, the Senate granted Boeing a waiver of the Berry Amendment restrictions, authorizing Boeing to use Russian titanium on more than 100 of its 767 refueling tankers that were to be leased to the U.S. Air Force. See Martyn Chase, *Boeing Waiver Quells Flap Over Russian Titanium Use*, AMERICAN METAL MARKET, Oct. 21, 2002. Although DOD and the Senate vowed that the Berry Amendment would be consistently enforced in the future, another waiver was granted in December 2002, allowing United Technologies Corp. to acquire Russian titanium and avoid the restrictions of the Berry Amendment in manufacturing jet engines for the Boeing C-17. See Frank Haflich, *Latest "Buy America" Waiver Fuels Probe Of Metals Impact*, AMERICAN METAL MARKET, Mar. 25, 2003.

These recent waivers send the clear and unmistakable signal that compliance with the specialty metals provisions—particularly when dealing with fungible piece parts purchased in large lots and pulled from mixed bins—is virtually impossible. The solution, of course, is simple and mirrors the *IBM* result—**amend DFARS 872-1(a) to include the United States on the list of "qualifying countries."** This would put U.S. industry on precisely the same footing as industry in France, Germany, Italy or Spain. Especially considering that the DFARS Council is currently considering a wholesale revision, rewrite, and simplification of the DFARS (see 45 GC ¶ 91), now is the perfect time to correct this regulatory nightmare.

The simple solution, however, is often elusive for U.S. law makers. Rather than neutralizing the process for U.S. industry, Congress seems bent on reinforcing the prejudice that U.S. industry suffers at the hands of qualifying country suppliers. As part of the 2004 Defense Authorization Act, for example, Armed Services Committee chairman Congressman Duncan Hunter (D-Calif.) proposed two provisions to bolster the specialty metals statutes by: (1) requiring contractors delivering commercial products incorporating foreign specialty metals to buy an equal amount of domestic specialty metals following the DOD procurement; and (2) requiring DOD to notify Congress and publish in the Federal Register its intention to grant any Berry Amendment waiver at least fifteen days prior to granting the waiver. However, when the Senate and DOD balked at the Buy American provisions (see 45 GC ¶ 402), the Berry Amendment restrictions were dropped from the final Appropriations Act. According to Pentagon spokesman Glenn Flood, DOD's reason for opposing the new amendments was that any change "would have become a burden not only on the Defense Department but on other agencies

as well so that's why the administration took a firm position to make it go away." Samantha Young, *Titanium Rules Left Unchanged*, LAS VEGAS REVIEW-JOURNAL, Nov. 8, 2003.

Conclusion—Undoubtedly, Shelley's good doctor would have liked nothing better than to close his eyes, turn from his creation, and simply "make it go away," but the law of unintended consequences can never be ignored. So it is with the Berry Amendment. DOD may currently, on a selective and arbitrary basis, ignore the specialty metals requirements of the Berry Amendment, but the statute and its quizzical regulations still loom and still have the force and effect of law. No regulatory scheme makes sense if it: (a) allows French and German companies to deliver Russian titanium to DOD, while (b) subjecting U.S. companies to False Claims Act liability for doing the same. The statute and the regulations should be changed.

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