

Pub. L. 110-181, div. A, title VIII, §829, Jan. 28, 2008, 122 Stat. 229, as amended by Pub. L. 111-383, div. A, title VIII, §821(a), Jan. 7, 2011, 124 Stat. 4267; Pub. L. 112-81, div. A, title VIII, §822, Dec. 31, 2011, 125 Stat. 1502, provided that:

“(a) **AUTHORITY TO PROCURE.**—The Secretary of Defense may procure fire resistant rayon fiber for the production of uniforms that is manufactured in a foreign country referred to in subsection (d) if the Secretary determines either of the following:

“(1) That fire resistant rayon fiber for the production of uniforms is not available from sources within the national technology and industrial base.

“(2) That—

“(A) procuring fire resistant rayon fiber manufactured from suppliers within the national technology and industrial base would result in sole-source contracts or subcontracts for the supply of fire resistant rayon fiber; and

“(B) such sole-source contracts or subcontracts would not be in the best interests of the Government or consistent with the objectives of section 2304 of title 10, United States Code.

“(b) **SUBMISSION TO CONGRESS.**—Not later than 30 days after making a determination under subsection (a), the Secretary shall submit to Congress a copy of the determination.

“(c) **APPLICABILITY TO SUBCONTRACTS.**—The authority under subsection (a) applies with respect to subcontracts under Department of Defense contracts as well as to such contracts.

“(d) **FOREIGN COUNTRIES COVERED.**—The authority under subsection (a) applies with respect to a foreign country that—

“(1) is a party to a defense memorandum of understanding entered into under section 2531 of title 10, United States Code; and

“(2) does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country.

“(e) **NATIONAL TECHNOLOGY AND INDUSTRIAL BASE DEFINED.**—In this section, the term ‘national technology and industrial base’ has the meaning given that term in section 2500 of title 10, United States Code.”

TRAINING FOR DEFENSE ACQUISITION WORKFORCE ON THE REQUIREMENTS OF THE BERRY AMENDMENT

Pub. L. 109-163, div. A, title VIII, §832, Jan. 6, 2006, 119 Stat. 3388, provided that:

“(a) **TRAINING DURING FISCAL YEAR 2006.**—The Secretary of Defense shall ensure that each member of the defense acquisition workforce who participates personally and substantially in the acquisition of textiles on a regular basis receives training during fiscal year 2006 on the requirements of section 2533a of title 10, United States Code (commonly referred to as the ‘Berry Amendment’), and the regulations implementing that section.

“(b) **INCLUSION OF INFORMATION IN NEW TRAINING PROGRAMS.**—The Secretary shall ensure that any training program developed or implemented after the date of the enactment of this Act [Jan. 6, 2006] for members of the defense acquisition workforce who participate personally and substantially in the acquisition of textiles on a regular basis includes comprehensive information on the requirements described in subsection (a).”

APPLICATION OF EXCEPTION TO SEAFOOD PRODUCTS

Pub. L. 108-287, title VIII, §8118, Aug. 5, 2004, 118 Stat. 998, as amended by Pub. L. 113-291, div. A, title X, §1071(b)(4), Dec. 19, 2014, 128 Stat. 3506, provided that: “Notwithstanding any other provision of law, section 2533a(f) of title 10, United States Code, shall hereafter not apply to any fish, shellfish, or seafood product. This section applies to contracts and subcontracts for the procurement of commercial items notwithstanding section 1906 of title 41, United States Code.”

§ 2533b. Requirement to buy strategic materials critical to national security from American sources; exceptions

(a) **REQUIREMENT.**—Except as provided in subsections (b) through (m), the acquisition by the Department of Defense of the following items is prohibited:

(1) The following types of end items, or components thereof, containing a specialty metal not melted or produced in the United States: aircraft, missile and space systems, ships, tank and automotive items, weapon systems, or ammunition.

(2) A specialty metal that is not melted or produced in the United States and that is to be purchased directly by the Department of Defense or a prime contractor of the Department.

(b) **AVAILABILITY EXCEPTION.**—(1) Subsection (a) does not apply to the extent that the Secretary of Defense or the Secretary of the military department concerned determines that compliant specialty metal of satisfactory quality and sufficient quantity, and in the required form, cannot be procured as and when needed. For purposes of the preceding sentence, the term “compliant specialty metal” means specialty metal melted or produced in the United States.

(2) This subsection applies to prime contracts and subcontracts at any tier under such contracts.

(c) **EXCEPTION FOR CERTAIN ACQUISITIONS.**—Subsection (a) does not apply to the following:

(1) Acquisitions outside the United States in support of combat operations or in support of contingency operations.

(2) Acquisitions for which the use of procedures other than competitive procedures has been approved on the basis of section 2304(c)(2) of this title, relating to unusual and compelling urgency of need.

(d) **EXCEPTION RELATING TO AGREEMENTS WITH FOREIGN GOVERNMENTS.**—Subsection (a)(1) does not preclude the acquisition of a specialty metal if—

(1) the acquisition 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; and

(2) any such agreement with a foreign government complies, where applicable, with the requirements of section 36 of the Arms Export Control Act (22 U.S.C. 2776) and with section 2457 of this title.

(e) **EXCEPTION FOR COMMISSARIES, EXCHANGES, AND OTHER NONAPPROPRIATED FUND INSTRUMENTALITIES.**—Subsection (a) does not apply to items purchased for resale purposes in commissaries, exchanges, and nonappropriated fund

instrumentalities operated by the Department of Defense.

(f) EXCEPTION FOR SMALL PURCHASES.—Subsection (a) does not apply to acquisitions in amounts not greater than the simplified acquisition threshold referred to in section 2304(g) of this title.

(g) EXCEPTION FOR PURCHASES OF ELECTRONIC COMPONENTS.—Subsection (a) does not apply to acquisitions of electronic components, unless the Secretary of Defense, upon the recommendation of the Strategic Materials Protection Board pursuant to section 187 of this title, determines that the domestic availability of a particular electronic component is critical to national security.

(h) APPLICABILITY TO ACQUISITIONS OF COMMERCIAL PRODUCTS.—(1) Except as provided in paragraphs (2) and (3), this section applies to acquisitions of commercial products, notwithstanding sections 1906 and 1907 of title 41.

(2) This section does not apply to contracts or subcontracts for the acquisition of commercially available off-the-shelf items, as defined in section 104 of title 41, other than—

(A) contracts or subcontracts for the acquisition of specialty metals, including mill products, such as bar, billet, slab, wire, plate and sheet, that have not been incorporated into end items, subsystems, assemblies, or components;

(B) contracts or subcontracts for the acquisition of forgings or castings of specialty metals, unless such forgings or castings are incorporated into commercially available off-the-shelf end items, subsystems, or assemblies;

(C) contracts or subcontracts for commercially available high performance magnets unless such high performance magnets are incorporated into commercially available off-the-shelf end items or subsystems; and

(D) contracts or subcontracts for commercially available off-the-shelf fasteners, unless such fasteners are—

(i) incorporated into commercially available off-the-shelf end items, subsystems, assemblies, or components; or

(ii) purchased as provided in paragraph (3).

(3) This section does not apply to fasteners that are commercial products that are purchased under a contract or subcontract with a manufacturer of such fasteners, if the manufacturer has certified that it will purchase, during the relevant calendar year, an amount of domestically melted specialty metal, in the required form, for use in the production of such fasteners for sale to the Department of Defense and other customers, that is not less than 50 percent of the total amount of the specialty metal that it will purchase to carry out the production of such fasteners.

(i) EXCEPTIONS FOR PURCHASES OF SPECIALTY METALS BELOW MINIMUM THRESHOLD.—(1) Notwithstanding subsection (a), the Secretary of Defense or the Secretary of a military department may accept delivery of an item containing specialty metals that were not melted in the United States if the total amount of noncompliant specialty metals in the item does not exceed 2 percent of the total weight of specialty metals in the item.

(2) This subsection does not apply to high performance magnets.

(j) STREAMLINED COMPLIANCE FOR COMMERCIAL DERIVATIVE MILITARY ARTICLES.—(1) Subsection (a) shall not apply to an item acquired under a prime contract if the Secretary of Defense or the Secretary of a military department determines that—

(A) the item is a commercial derivative military article; and

(B) the contractor certifies that the contractor and its subcontractors have entered into a contractual agreement, or agreements, to purchase an amount of domestically melted specialty metal in the required form, for use during the period of contract performance in the production of the commercial derivative military article and the related commercial article, that is not less than the greater of—

(i) an amount equivalent to 120 percent of the amount of specialty metal that is required to carry out the production of the commercial derivative military article (including the work performed under each subcontract); or

(ii) an amount equivalent to 50 percent of the amount of specialty metal that is purchased by the contractor and its subcontractors for use during such period in the production of the commercial derivative military article and the related commercial article.

(2) For the purposes of this subsection, the amount of specialty metal that is required to carry out the production of the commercial derivative military article includes specialty metal contained in any item, including commercially available off-the-shelf items, incorporated into such commercial derivative military article.

(k) NATIONAL SECURITY WAIVER.—(1) Notwithstanding subsection (a), the Secretary of Defense may accept the delivery of an end item containing noncompliant materials if the Secretary determines in writing that acceptance of such end item is necessary to the national security interests of the United States.

(2) A written determination under paragraph (1)—

(A) may not be delegated below the level of the Deputy Secretary of Defense or the Under Secretary of Defense for Acquisition and Sustainment;

(B) shall specify the quantity of end items to which the waiver applies and the time period over which the waiver applies; and

(C) shall be provided to the congressional defense committees prior to making such a determination (except that in the case of an urgent national security requirement, such certification may be provided to the defense committees up to 7 days after it is made).

(3)(A) In any case in which the Secretary makes a determination under paragraph (1), the Secretary shall determine whether or not the noncompliance was knowing and willful.

(B) If the Secretary determines that the noncompliance was not knowing or willful, the Secretary shall ensure that the contractor or subcontractor responsible for the noncompliance

develops and implements an effective plan to ensure future compliance.

(C) If the Secretary determines that the non-compliance was knowing or willful, the Secretary shall—

- (i) require the development and implementation of a plan to ensure future compliance; and
- (ii) consider suspending or debarring the contractor or subcontractor until such time as the contractor or subcontractor has effectively addressed the issues that lead to such noncompliance.

(D) **SPECIALTY METAL DEFINED.**—In this section, the term “specialty metal” means any of the following:

(1) 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.

(2) 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.

(3) Titanium and titanium alloys.

(4) Zirconium and zirconium base alloys.

(m) **ADDITIONAL DEFINITIONS.**—In this section:

(1) The term “United States” includes possessions of the United States.

(2) The term “component” has the meaning provided in section 105 of title 41.

(3) The term “acquisition” has the meaning provided in section 131 of title 41.

(4) The term “required form” shall not apply to end items or to their components at any tier. The term “required form” means in the form of mill product, such as bar, billet, wire, slab, plate or sheet, and in the grade appropriate for the production of—

(A) a finished end item delivered to the Department of Defense; or

(B) a finished component assembled into an end item delivered to the Department of Defense.

(5) The term “commercially available off-the-shelf”, has the meaning provided in section 104 of title 41.

(6) The term “assemblies” means items forming a portion of a system or subsystem that can be provisioned and replaced as an entity and which incorporates multiple, replaceable parts.

(7) The term “commercial derivative military article” means an item procured by the Department of Defense that is or will be produced using the same production facilities, a common supply chain, and the same or similar production processes that are used for the production of articles predominantly used by the general public or by nongovernmental entities for purposes other than governmental purposes.

(8) The term “subsystem” means a functional grouping of items that combine to perform a major function within an end item,

such as electrical power, attitude control, and propulsion.

(9) The term “end item” means the final production product when assembled or completed, and ready for issue, delivery, or deployment.

(10) The term “subcontract” includes a subcontract at any tier.

(Added Pub. L. 109-364, div. A, title VIII, §842(a)(1), Oct. 17, 2006, 120 Stat. 2335; amended Pub. L. 110-181, div. A, title VIII, §804(a)-(f), Jan. 28, 2008, 122 Stat. 208-211; Pub. L. 111-350, §5(b)(39), Jan. 4, 2011, 124 Stat. 3845; Pub. L. 111-383, div. A, title X, §1075(f)(2), Jan. 7, 2011, 124 Stat. 4376; Pub. L. 113-291, div. A, title X, §1071(a)(10), Dec. 19, 2014, 128 Stat. 3505; Pub. L. 115-232, div. A, title VIII, §837(c), Aug. 13, 2018, 132 Stat. 1875; Pub. L. 116-92, div. A, title IX, §902(77), Dec. 20, 2019, 133 Stat. 1552.)

AMENDMENTS

2019—Subsec. (k)(2)(A). Pub. L. 116-92 substituted “Under Secretary of Defense for Acquisition and Sustainment” for “Under Secretary of Defense for Acquisition, Technology, and Logistics”.

2018—Subsec. (h). Pub. L. 115-232, §837(c)(1), substituted “Products” for “Items” in heading.

Subsec. (h)(1), (3). Pub. L. 115-232, §837(c)(2), substituted “commercial products” for “commercial items”.

2014—Subsec. (h)(1). Pub. L. 113-291, §1071(a)(10)(A)(i), substituted “sections 1906 and 1907 of title 41” for “sections 34 and 35 of the Office of Federal Procurement Policy Act (41 U.S.C. 430 and 431)”.

Subsec. (h)(2). Pub. L. 113-291, §1071(a)(10)(A)(ii), substituted “section 104 of title 41” for “section 35(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 431(c))” in introductory provisions.

Subsec. (m)(2). Pub. L. 113-291, §1071(a)(10)(B)(i), substituted “section 105 of title 41” for “section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403)”.

Subsec. (m)(3). Pub. L. 113-291, §1071(a)(10)(B)(ii), substituted “section 131 of title 41” for “section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403)”.

Subsec. (m)(5). Pub. L. 113-291, §1071(a)(10)(B)(iii), substituted “section 104 of title 41” for “section 35(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 431(c))”.

2011—Subsec. (a)(2). Pub. L. 111-383, §1075(f)(2)(A), made technical amendment to directory language of Pub. L. 110-181, §804(a)(3). See 2008 Amendment note below.

Subsec. (h). Pub. L. 111-350, §5(b)(39)(A), which directed substitution of “section 1906 of title 41” for “section 34 of the Office of Federal Procurement Policy Act (41 U.S.C. 430)”, could not be executed because the words “section 34 of the Office of Federal Procurement Policy Act (41 U.S.C. 430)” did not appear in text.

Subsec. (j). Pub. L. 111-350, §5(b)(39)(B), which directed substitution of “section 105 of title 41” for “section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403)” in subsec. (j), could not be executed because the words “section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403)” did not appear in subsec. (j) after the amendment by Pub. L. 110-181, §804(d).

Subsec. (m)(3) to (10). Pub. L. 111-383, §1075(f)(2)(B), made technical amendment to directory language of Pub. L. 110-181, §804(e). See 2008 Amendment note below.

2008—Subsec. (a). Pub. L. 110-181, §804(a)(1), substituted “Except as provided in subsections (b) through (m), the acquisition by the Department of Defense of the following items is prohibited:” for “Except as provided in subsections (b) through (j), funds appropriated or otherwise available to the Department of Defense

may not be used for procurement of—” in introductory provisions.

Subsec. (a)(1). Pub. L. 110–181, §804(a)(2), substituted “The following” for “the following” and substituted period for “; or” at end.

Subsec. (a)(2). Pub. L. 110–181, §804(a)(3), as amended by Pub. L. 111–383, §1075(f)(2)(A), substituted “A specialty” for “a specialty”.

Subsec. (c). Pub. L. 110–181, §804(f)(1), substituted “Acquisitions” for “Procurements” in heading and pars. (1) and (2).

Subsec. (d). Pub. L. 110–181, §804(f)(2), substituted “acquisition” for “procurement” in introductory provisions and par. (1).

Subsec. (f). Pub. L. 110–181, §804(f)(3), substituted “acquisitions” for “procurements”.

Subsec. (g). Pub. L. 110–181, §804(c), (f)(3), substituted “acquisitions” for “procurements” and “electronic components, unless the Secretary of Defense, upon the recommendation of the Strategic Materials Protection Board pursuant to section 187 of this title, determines that the domestic availability of a particular electronic component is critical to national security.” for “commercially available electronic components whose specialty metal content is de minimis in value compared to the overall value of the lowest level electronic component produced that contains such specialty metal.”

Subsec. (h). Pub. L. 110–181, §804(b), amended heading and text generally. Prior to amendment, text read as follows: “This section applies to procurements of commercial items notwithstanding section 34 of the Office of Federal Procurement Policy Act (41 U.S.C. 430).”

Subsecs. (i) to (m). Pub. L. 110–181, §804(d), added subsecs. (i) to (k) and redesignated former subsecs. (i) and (j) as (l) and (m), respectively.

Subsec. (m)(3) to (10). Pub. L. 110–181, §804(e), as amended by Pub. L. 111–383, §1075(f)(2)(B), added pars. (3) to (10).

EFFECTIVE DATE OF 2011 AMENDMENT

Pub. L. 111–383, div. A, title X, §1075(f)(2), Jan. 7, 2011, 124 Stat. 4376, provided that amendment by section 1075(f)(2) is effective as of January 28, 2008, and as if included in Public Law 110–181 as enacted.”

EFFECTIVE DATE

Pub. L. 109–364, div. A, title VIII, §842(a)(4)(A), Oct. 17, 2006, 120 Stat. 2337, provided that: “Section 2533b of title 10, United States Code, as added by paragraph (1), shall apply with respect to contracts entered into after the date occurring 30 days after the date of the enactment of this Act [Oct. 17, 2006].”

REGULATIONS

Pub. L. 110–181, div. A, title VIII, §804(g), Jan. 28, 2008, 122 Stat. 211, provided that: “Not later than 120 days after the date of the enactment of this Act [Jan. 28, 2008], the Secretary of Defense shall prescribe regulations on the implementation of this section [amending this section and enacting provisions set out as a note under this section] and the amendments made by this section, including specific guidance on how thresholds established in subsections (h)(3), (i) and (j) of section 2533b of title 10, United States Code, as amended by this section, should be implemented.”

REVIEW OF REGULATORY DEFINITION RELATING TO PRODUCTION OF SPECIALTY METALS

Pub. L. 111–383, div. A, title VIII, §823, Jan. 7, 2011, 124 Stat. 4269, which required the Secretary to review the definition of “produce” as used within subpart 252.2 of the defense supplement to the Federal Acquisition Regulation, was repealed by Pub. L. 115–232, div. A, title VIII, §812(b)(57), Aug. 13, 2018, 132 Stat. 1850.

REVISION OF DOMESTIC NONAVAILABILITY DETERMINATIONS AND RULES

Pub. L. 110–181, div. A, title VIII, §804(h), Jan. 28, 2008, 122 Stat. 211, which provided that, with exceptions, any

domestic nonavailability determination under section 2533b of this title would be reviewed and amended to comply with the amendments made by section 804 of Pub. L. 110–181, was repealed by Pub. L. 115–232, div. A, title VIII, §812(b)(58), Aug. 13, 2018, 132 Stat. 1850.

REQUIREMENTS RELATING TO WAIVERS OF CERTAIN DOMESTIC SOURCE LIMITATIONS RELATING TO SPECIALTY METALS

Pub. L. 110–181, div. A, title VIII, §884, Jan. 28, 2008, 122 Stat. 264, provided that:

“(a) NOTICE REQUIREMENT.—At least 30 days prior to making a domestic nonavailability determination pursuant to section 2533b(b) of title 10, United States Code, that would apply to more than one contract of the Department of Defense, the Secretary of Defense shall, to the maximum extent practicable and in a manner consistent with the protection of national security information and confidential business information—

“(1) publish a notice on the website maintained by the General Services Administration known as FedBizOpps.gov (or any successor site) of the Secretary’s intent to make the domestic nonavailability determination; and

“(2) solicit information relevant to such notice from interested parties, including producers of specialty metal mill products.

“(b) DETERMINATION.—(1) The Secretary shall take into consideration all information submitted pursuant to subsection (a) in making a domestic nonavailability determination pursuant to section 2533b(b) of title 10, United States Code, that would apply to more than one contract of the Department of Defense, and may also consider other relevant information that cannot be made part of the public record consistent with the protection of national security information and confidential business information.

“(2) The Secretary shall ensure that any such determination and the rationale for such determination is made publicly available to the maximum extent consistent with the protection of national security information and confidential business information.”

ONE-TIME WAIVER OF SPECIALTY METALS DOMESTIC SOURCE REQUIREMENT

Pub. L. 109–364, div. A, title VIII, §842(b), Oct. 17, 2006, 120 Stat. 2337, which provided that the Secretary of Defense or the Secretary of a military department could accept specialty metals in an item produced, manufactured, or assembled in the United States before Oct. 17, 2006, with respect to which the contracting officer for the contract determines that the contractor is not in compliance with section 2533b of this title, subject to certain conditions, was repealed by Pub. L. 115–232, div. A, title VIII, §812(b)(59), Aug. 13, 2018, 132 Stat. 1850.

§ 2533c. Prohibition on acquisition of sensitive materials from non-allied foreign nations

(a) IN GENERAL.—Except as provided in subsection (c), the Secretary of Defense may not—

(1) procure any covered material melted or produced in any covered nation, or any end item that contains a covered material manufactured in any covered nation, except as provided by subsection (c); or

(2) sell any material from the National Defense Stockpile, if the National Defense Stockpile Manager determines that such a sale is not in the national interests of the United States, to—

(A) any covered nation; or

(B) any third party that the Secretary reasonably believes is acting as a broker or agent for a covered nation or an entity in a covered nation.

(b) APPLICABILITY.—Subsection (a) shall apply to prime contracts and subcontracts at any tier.