



DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
RESEARCH, DEVELOPMENT AND ACQUISITION
1000 NAVY PENTAGON
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JUN - 5 2006

MEMORANDUM FOR DISTRIBUTION

Subj: BERRY AMENDMENT COMPLIANCE FOR SPECIALTY METALS

Encl: (1) USD(AT&L) memorandum dated June 1, 2006
(2) DCMA Interim Instruction on Noncompliance with the Preference for Domestic Specialty Metals Clause dated March 10, 2006

1. USD(AT&L)'s memorandum, enclosure (1), is forwarded for information in regards to contracts that include DFARS 252.225-7014 or its alternate I. The memorandum clarifies issues on conditional acceptance and withholding of payments in connection with items containing parts with Specialty Metals that are not compliant with the Berry Amendment requirements.
2. Enclosure (2) is referenced in the USD(AT&L) memorandum and is attached for convenience.
3. Additional guidance on Corrective Action Plans and Domestic Non-Availability Determinations will be provided by USD(AT&L) in a future memorandum.
4. The point of contact for this issue is Katherine Petersen at (703) 614-9641 or e-mail at Katherine.Petersen@navy.mil.


M. F. LAGGARD
Chief of Staff/Policy
DASN(ACQ)

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Subj: BERRY AMENDMENT COMPLIANCE FOR SPECIALTY METALS

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ACQUISITION,
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THE UNDER SECRETARY OF DEFENSE

3010 DEFENSE PENTAGON
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JUN - 1 2006

MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS
COMMAND (ATTN: ACQUISITION EXECUTIVE)
ASSISTANT SECRETARY OF THE ARMY
(ACQUISITION, LOGISTICS AND TECHNOLOGY)
ASSISTANT SECRETARY OF THE NAVY
(RESEARCH, DEVELOPMENT AND ACQUISITION)
ASSISTANT SECRETARY OF THE AIR FORCE
(ACQUISITION)
DIRECTORS OF THE DEFENSE AGENCIES

SUBJECT: Berry Amendment Compliance for Specialty Metals

The Berry Amendment (10 U.S.C. 2533a) generally restricts the Department's procurement of specialty metals that are not melted in the United States. The Berry Amendment has several exceptions that are implemented in Defense Federal Acquisition Regulation Supplement (DFARS) 225.7002-2. The applicability of any exception should generally be determined prior to issuance of the solicitation, order or contract award. For contracts that include DFARS clause 252.225-7014 or its alternate I, contractors are required to deliver end items that comply with the clause.

It has come to my attention that certain specialty metal parts used in the performance of some defense contracts may be non-compliant with the Berry Amendment. There are a number of potential remedies for these situations, depending on the circumstances of a particular case. I recognize, however, that, in some cases, the delay that would be caused by immediately pursuing certain remedies may seriously impact our ability to meet military needs.

In such instances, a conditional acceptance and withholding of payment may be appropriate until a long-term remedy can be implemented. Conditional acceptance is, as always, at the discretion of the contracting officer, but must clearly protect the rights of the Government to pursue the full range of potential remedies. Such conditional acceptances should follow Defense Contract Management Agency's (DCMA) interim instruction, as revised on March 10, 2006, to include using the attached language in acceptance documents and identifying the specific non-compliant parts. This instruction provides that the Procuring Contracting Officer (PCO) may consider the remedies of rework, replacement, or correction.



Enclosure (1)

There are two equally important matters that Contracting Officers must address when considering a conditional acceptance. The first matter is the financial consideration or offset to the Government to support the conditional acceptance. Withholding the cost of the lowest auditable part that contains the specialty metal (with appropriate burdens) should be sufficient. However, each case of conditional acceptance should be reviewed on its own merits, and I expect each Contracting Officer to use his or her own discretion and sound business judgment in determining what is in the best interests of the *Government*.

Secondly and equally as important is ensuring that the Contractor involved provides a comprehensive corrective action plan in order to correct the non-compliance. It is imperative that contractors be required to provide a corrective action plan within a reasonable period of time, but in no case later than 180 days after conditional acceptance. If a non-compliant part is to be replaced, the plan should address the timeframe for replacement. If replacement is not possible, or otherwise prudent, the plan should address how and when the contractor will be able to produce items that are compliant.

If the contractor asserts that compliance is impossible, the contractor should include in the plan an explanation including a description of the market research that has been conducted and a statement that the contractor has been unable to identify alternative domestic replacement items. The corrective action plans will be reviewed to determine whether a Domestic Non-Availability Determination (DNAD) under DFARS 225.7002-2(b) should be issued.

Corrective action plans may be submitted on a shipment, contract, program, or broader basis. Procuring Contracting Officers will be responsible for reviewing corrective action plans submitted on a shipment, contract, or program basis to determine whether a DNAD should be issued. Copies should be provided to the cognizant Administrative Contracting Officer (ACO). For corrective action plans submitted on a broader basis, Administrative Contracting Officers will be responsible for coordinating review of the plans and, when appropriate, preparing a proposed DNAD and taking action to forward it to me for approval. Oversight of contractors' compliance with plans will be by the cognizant ACO.

Further guidance regarding the content of corrective action plans will be provided later. My point of contact for contract administration issues is Mr. Dave Ricci at DCMA, (703) 428-1144, dave.ricci@dcma.mil. For all other questions, my point of contact is Ms. Nancy Dowling, OUSD(AT&L)/DPAP, (703) 697-9352, nancy.dowling@osd.mil.



Kenneth J. Krieg

Attachment:
As stated

Enclosure (1)

Conditional Acceptance & Withhold Language

The following language will be used in all conditional acceptance documents and attached to the receiving report for all conditional acceptances of items containing nonconforming specialty metals:

1. This item is conditionally accepted with parts that have, or may have been, manufactured with non-compliant specialty metals as described in [*Identify letter or other document from contractor disclosing the actual or potential noncompliance*] pending completion of the contractor's investigation and Government concurrence. The contractor remains liable for any noncompliance with 10 U.S.C. 2533a as implemented in DFARS clause 252.225-7014, Preference for Domestic Specialty Metals, and Alternate I to the clause, where applicable. Further, acceptance of this part does not constitute a waiver by the Government of any rights, contractual, statutory, or otherwise, relating to any matter involving the production or delivery of this part, and does not waive any claim by the United States for fraud, false claims, or any other conduct on the part of any party which may be actionable under law.
2. Payments due under this contract shall include a withhold in the amount of [*Insert amount*] based upon the contracting officer's assent to the contractor's representation of the estimated cost of the nonconforming specialty metal parts, plus applicable burden and profit.

(End)

Enclosure (1)

Specialty Metals Clause Compliance

Revision: March 10, 2006

(Version As of March 10, 2006)

DCMA Requirements:

INTERIM INSTRUCTION

NONCOMPLIANCE WITH THE PREFERENCE FOR DOMESTIC SPECIALTY METALS CLAUSE, DFARS 252.225-7014

Background:

The DFARS 252.225-7014 Clause, *Preference for Domestic Specialty Metals* implements a portion of the "Berry Amendment" (codified at 10 USC 2533a). It requires certain "specialty metals" incorporated in articles delivered under DoD contracts be melted in the United States or a "qualifying country" (or incorporated in an article manufactured in a qualifying country), unless specific exceptions apply or a Secretarial exception of restrictions is granted. The legislative history of the Berry Amendment indicates the purpose of the amendment was and is to maintain and support the defense industrial base for those items it covers. In the case of specialty metals, the "Berry Amendment" recognizes the strategic importance of maintaining a domestic smelting capability for certain important specialty metals. The Defense Contract Management Agency has learned that some items containing foreign specialty metals that do not comply with DFARS restrictions are being delivered under some DoD contracts. This instruction provides an interim process for conditional acceptance of supplies required by our customers until a long-term Departmental remedy can be implemented by OSD.

Reporting Requirements:

DCMA Contract Management Offices (CMOs) will identify to DCMA HQ all suppliers (both prime contractors and subcontractors) that have disclosed that items deliverable under, or to be incorporated into an item to be delivered under, a DoD contract contain, or may contain, specialty metals that do not comply with DFARS restrictions. Note that the burden of disclosure rests on the prime contractors tendering product for acceptance. Reporting will be through the DCMA Specialty Metals Community of Practice (CoP) (Course ID AA1-OCB-6). A consolidated list of those suppliers will be maintained there. The purpose is to assist DCMA's Contracting Officers (and Quality Assurance personnel) in identifying potential issues in the contracts they are administering. Specific instructions for completing this reporting requirement (and the list of suppliers) are found in the "Supplier" Tab on the aforementioned CoP.

Conditional Acceptance Process for Products Containing Nonconforming Specialty Metals:

General Policy

- Any substantive departure from this instruction must be approved by DCMA Headquarters (DCMA-OC).

Enclosure (2)

DCMA will not accept products containing nonconforming specialty metals unless notified in writing by the procuring activity that an exception applies (Ref: DFARS 225.7002-2) or the procuring activity authorizes DCMA to accept the product conditionally and, at a minimum, withholds the cost of the lowest auditable non-compliant specialty metal part plus appropriate burden from payments due against the contract. This Conditional Acceptance option should be very limited in application. In order to protect the Government's interest:

- The documentation that the contractor uses to disclose the actual or potential noncompliance must specifically identify the lowest part, assembly, configuration item, system, configuration baseline, contract, and program; and
- The contractor shall specifically identify impacted Critical Safety Items (CSIs) along with the specialty metal involved. Documented evidence that the affected CSI meets all performance requirements should also be provided.
- The procuring activity will normally calculate the appropriate withhold with DCMA assistance. Upon request, DCMA will determine the appropriate withhold in accordance with the instruction provided below for "Calculation of Withholds."
- The contractor shall attach a copy of the conditional acceptance document (signed and dated by the PCO or ACO) authorizing the conditional acceptance to the receiving report. The specific language to be used is provided below in "Conditional Acceptance & Withhold Language." In addition to that language, all documents authorizing conditional acceptance shall include on the "Subject" line; "Berry Amendment Withhold" and the Contract Number. For Fixed-Price Contracts, the document will also specify the total amount withheld (at the contract level) for the items on that receiving report.
- For Fixed-Price Contracts, the contractor shall attach a schedule (signed by the PCO or ACO) specifically identifying the amounts to be withheld at line item level (as discussed below in "Identification of Withhold Amounts") to the receiving report.
- By following this instruction for preparing contractor invoices, invoicing can be performed in Wide Area Work Flow (WAWF) and the contractor can continue to comply with electronic invoicing requirements. See "Invoicing" below for more information.
- DCMA Administrative Contracting Officers will notify their local counsel of all potential noncompliance with DFARS 252.225-7014, Preference for domestic specialty metals, and obtain legal coordination prior to authorizing any conditional acceptances and providing pricing support for calculation of the withhold amounts prepared by DCMA.
- This instruction can be generally applied to all contracts administered by DCMA. Certain portions, e.g., Identification of Affected Contracts, are only applicable to contracts administered with and paid through MOCAS.

Calculation of Withholds

Working with the PCO, DCMA should look to the lowest level subcontracted item containing prohibited foreign specialty metal and subject to DFARS 252.225-7014, Alternate I, flow down clause. The burdened cost of the offending specialty metal part should include such factors as add-on's for freight, material handling and profit. Burdens will be applied at the prime contractor level and will incorporate burdens from each applicable subcontract tier. This will be the minimum amount to be withheld.

Other options for calculating the amount to be withheld may be used or directed by the PCO. For example, the PCO may consider the cost of rework, replacement, or correction of the item to eliminate the nonconformance. The amount withheld should be adequate to ensure the contractor will ultimately comply with the terms and conditions of the contract.

If the contractor has not identified specific part numbers from suppliers for items containing nonconforming specialty metals, the amount withheld from the contract or line item should cover

all specialty metal parts contained in the end item from the supplier of suspect parts.

The withhold amount will NOT be calculated by determining the value of specialty metal in a part or component. If the PCO decides to calculate the withhold amount in that manner, the PCO will be required to sign all documents (e.g., Conditional Acceptance Document, Schedule, etc.) relating to the conditional acceptance of the items. Note that this is the calculation methodology most commonly endorsed by Industry but it has not been accepted by DoD or DCMA.

Conditional Acceptance & Withhold Language

The following language will be used in all conditional acceptance documents and attached to the receiving report for all conditional acceptances of items containing nonconforming specialty metals:

1. This item is conditionally accepted with parts that have, or may have been, manufactured with noncompliant specialty metals as described in [Identify letter or other document from contractor disclosing the actual or potential noncompliance] pending completion of the contractor's investigation and Government concurrence. The contractor remains liable for any noncompliance with 10 U.S.C. 2533a as implemented in DFARS clause 252.225-7014, Preference for Domestic Specialty Metals, and Alternate I to the clause, where applicable. Further, acceptance of this part does not constitute a waiver by the Government of any rights, contractual, statutory, or otherwise, relating to any matter involving the production or delivery of this part, and does not waive any claim by the United States for fraud, false claims, or any other conduct on the part of any party which may be actionable under law.
2. Payments due under this contract shall include a withhold in the amount of [Insert amount] based upon the contracting officer's assent to the contractor's representation of the estimated cost of the nonconforming specialty metal parts, plus applicable burden and profit.

(End)

Invoicing

For invoices submitted through WAWF Web-Input, the contractor shall bill for the "revised" approved unit price (the net of the contract unit price reduced by the amount withheld) and include in the Comment Section the words "Berry Amendment Withhold" and the contract unit price. For invoices submitted by hard copy, the unit price shown must match the contract price and the contractor shall include a comment line that includes the words "Berry Amendment Withhold" and the amount of the approved withhold. No means other than WAWF Web-Input or hard copy shall be used to invoice for items accepted conditionally because of specialty metal noncompliances.

Identification of Withhold Amounts

For Fixed-Price Contracts, in addition to the "Conditional Acceptance & Withhold Language" above, a schedule (either included in the language above or separately attached to the receiving report) specifically identifying the amounts to be withheld must be included with invoices. Written approval by the PCO or ACO must be evident on this schedule. The schedule must identify the amount to be withheld for every line item affected and show the "revised" approved unit price. (Note: This information will facilitate any future price reduction modifications required—withholds for Specialty Metals noncompliances will not be uniquely recorded in MOCAS as a result of the

Enclosure (2)

DFAS payment process.)

For Cost-Reimbursement Contracts, the PCO or ACO must send written notice to the contractor directing them not to bill the Government in the final voucher for withheld amounts, i.e., remove the withheld costs in accordance with the billing instructions contained in the contract. (Whether the amounts withheld will be identified at the contract level or line item level will depend on billing instructions contained in the contract.) This notice need not be furnished to the payment office, but the ACO should send a copy of the notice to the cognizant DCAA auditor.

Contract Financing Payments

There is no requirement under this Conditional Acceptance Instruction to withhold any portion of interim payments under Cost-Reimbursement Contracts or reduce contract financing payments.

Identification of Affected Contracts

A consistent method of identifying contracts in MOCAS affected by specialty metal nonconformance is required to provide visibility into this issue and facilitate resolution and closeout.

- For every contract affected, regardless of contract type, the ACO will direct a DCMA "Trusted Agent" to insert a MOCAS special provision code "Y," Specialty Metals Withholding Required.
 - [Note that changes are in the process of being made to the appropriate table in MOCAS to allow for this---CMOs will be notified when this feature is available.]
- For every line item affected, on Fixed-Price Contracts, the CMO will insert a special pay code and enter "SPC-Y" to begin the description. Additional comments may be entered at the discretion of the CMO. (Reference: Inputting Special Payment Instructions)
- DFAS Columbus will establish a special withhold code "TBD," which will allow all "Berry Amendment" disbursements to be identified by contract.
- There is no requirement to add any comments into the MOCAS ACO Notebook feature.

Legal Review

CMOs must work closely with their local counsel and Contract Integrity Center (CIC) Counsel on all potential violations. All conditional acceptances and pricing support for calculation of the withhold amounts prepared by DCMA will be coordinated through the Office of Counsel prior to authorization of conditional acceptance or approval of contract withholds.

Automation Requirements: MOCAS

Enclosure (2)