



DEPARTMENT OF THE NAVY
OFFICE OF THE ASSISTANT SECRETARY
RESEARCH, DEVELOPMENT AND ACQUISITION
1000 NAVY PENTAGON
WASHINGTON DC 20350-1000

JAN 19 2007

MEMORANDUM FOR DISTRIBUTION

Subj: Implementation Guidance for Pre-Award Berry Amendment Compliance

Encl: (1) OUSD(AT&L) DPAP memorandum dated September 21, 2006
(2) Business Rules for Specialty Metals
(3) SECNAV Domestic Non-availability Determination (DNAD) Format

This memorandum forwards enclosure (1) which provides guidance on the pre-award specialty metals requirements of DFARS 225.7002. This guidance was written before the FY2007 National Defense Authorization Act; therefore, DFARS 225.7002 and the guidance will probably be revised in the future. Enclosure (2) delineates a set of business rules developed for DoN application of Berry restrictions. The format for a DNAD and supporting analysis at enclosure (3) is forwarded for use on a discretionary basis.

For further information on this issue, please contact Katherine Petersen at (703) 614-9641 or e-mail at Katherine.Petersen@navy.mil.


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

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(continued next page)

Subj: Implementation Guidance for Pre-Award Berry Amendment Compliance

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ACQUISITION,
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OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

September 21, 2006

MEMORANDUM 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: Implementation Guidance for Pre-Award Berry Amendment Compliance

On August 18, 2006, I issued a memorandum which stressed the importance of addressing contractor compliance with the specialty metals restriction of the Berry Amendment (10 U.S.C. 2533a) prior to award of contracts in order to ensure compliance with the Berry Amendment.

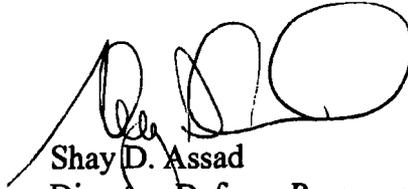
This memorandum stated that when a contracting officer is aware of prior non-compliances by a contractor, the contracting officer should specifically inquire and obtain verification from the contractor that compliant hardware will be delivered. We recognize, however, that a contractor may not always be able to identify suppliers prior to award, making this verification difficult.

In such cases, if the potential contractor states his intent without condition to deliver compliant equipment, the contracting officer should document that statement in the post-negotiation business clearance and he/she may rely upon the contractor's statement. If during contract performance a contractor discovers that an item from one of its suppliers is not compliant, the contracting officer will require the contractor to provide a corrective action plan and to conduct market research and supply documentation necessary to support a domestic non-availability determination in accordance with DFARS 225.7002-2(b).



Enclosure (1)

If a domestic non-availability determination (DNAD) that would cover the item is in process, the contracting officer may award a contract which includes Defense Federal Acquisition Regulation Supplement (DFARS) 252.225-7014. If the DNAD is not approved, the contractor is required to deliver compliant items.

A handwritten signature in black ink, appearing to read 'Shay D. Assad', written over a horizontal line.

Shay D. Assad
Director, Defense Procurement
and Acquisition Policy

Enclosure (1)

BUSINESS RULES FOR SPECIALTY METALS

1. If the end item or component contains specialty metals, include DFARS 252.225-7014 (Deviation 2006-O0004) in the solicitation/contract unless an exception applies. Include DFARS 252.225-7014 Alternate I (Deviation 2006-O0004) if the end item is an aircraft, missile or space system, ship, tank or automotive item, weapon system, or ammunition containing specialty metal or a component thereof. Electronics bought on a prime contract do not require Alternate I unless they are a first or second tier component of an end item listed above. Such solicitations/contracts should be identified by code A7 under the Defense Priorities and Allocations System. These requirements also apply to new letter contracts.

2. The DFARS clauses also apply to contracts for services if tier 1 or tier 2 components will be delivered to and accepted by the Government during or upon completion of the contract. If the contractor will retain ownership of all supplies, the DFARS clauses are not required.

3. Determine whether an exception other than a Domestic Non-Availability Determination (DNAD) applies. The other exceptions are:

- Procurements outside the US in support of combat operations or in support of contingency operations.
- Procurements for which the use of procedures other than competitive procedures have been approved under FAR 6.302-2, Unusual and compelling urgency.
- Procurements complying with or furthering agreements with qualifying countries listed in DFARS 225.872-1.
- Purchases for resale purposes in commissaries, exchanges, and non-appropriated fund instrumentalities operated by DoD.
- Procurements in amounts not greater than the simplified acquisition threshold.
- Procurements of commercially available electronic components whose specialty metal content is de minimis (not exceeding 10%) in comparison to the overall value of the lowest level electronic component produced that contains such specialty metal.

“Commercial” is not an exception except in the case of electronic components containing de minimis specialty metal. It is also not an acceptable basis for a DNAD by itself.

4. Determine whether the contractor(s) will accept the required DFARS clauses. If the Government is aware of non-compliance by the Contractor under a prior contract, the Contracting Officer must specifically inquire about compliance under the new contract and receive a response indicating an intention to comply. If the contractor accepts the DFARS clause(s) a contract may be signed. Any issues arising later as to compliance must be resolved before acceptance. Conditional acceptance is not an option under contracts issued after October 17, 2006.

5. If the contractor will not accept the required DFARS clause(s), determine whether an existing DNAD applies or whether a DNAD is in process under a different procurement. If no other exception applies and no DNAD exists, a DNAD must be approved or in

process before signing the contract. Contracting Officers have no authority to award contracts in the absence of a DNAD with the intention of using withholdings to resolve non-compliance.

6. If a DNAD applies to a specific part of the component or end item, the DFARS clause(s) must still be included as being applicable to the remainder of the component or end item.

7. In regard to the September 21, 2006 DPAP memo on Implementation Guidance for Pre-Award Berry Amendment Compliance, a DNAD is considered "in process" if a DNAD, not limited to a specific contract, was requested under a previous contract. The process may also be considered to have begun when a contractor requests, or indicates in writing its intent to request, a DNAD for an item or component under the solicitation. Such a request must have sufficient information for the Contracting Officer to determine what material or part is non-compliant and whether efforts have been made to become compliant. Contracting Officers should document the file by means of the business clearance as to how or why a DNAD was determined to be in process. If award is made based on an indication that a DNAD will be requested, the Contracting Officer should establish a time frame for submittal. This should not be more than 180 days and generally less than 90 days. Awards made pending a DNAD must contain the Preference for Domestic Specialty Metals clause(s) as appropriate.

8. If using a previously approved DNAD, the Contracting Officer must determine who signed the DNAD, whether it covers the specific non-compliant parts and material, and whether it applies to all contracts. If the DNAD was signed by USD(AT&L) for all contracts and covers the specific non-compliant parts and material, it may be relied upon as is. If USD(AT&L) signed the DNAD based on specific quantities, time periods, or other factors, the Contracting Officer must determine that substantially similar conditions apply before relying on the DNAD. If the DNAD was signed by anyone other than USD(AT&L), a review and approval by SECNAV that DoN's circumstances are substantially the same must be obtained.

9. In regards to whether an item is compliant at time of delivery, prime contractors need not consider the content of GFE. GFE compliance should be determined under the Government's contract for those items to be furnished as GFE.

10. Content of DNAD Requests to SECNAV:

- Material, quantity, length of time DNAD is needed
- Current detailed market research justifying the non-availability of item(s) as and when needed in satisfactory quality and sufficient quantity and in the correct form
- Analysis of alternatives that would not require a domestic non-availability determination
- Written certification by the requiring activity, with specificity, why such alternatives are unacceptable.

- Report and recommendation of the Requiring Activity Commander discussing the supply and procurement situation (mission impacts) and other relevant information, such as commercial practices, in greater detail
- Potential political ramifications, Congressional involvement, small business concerns, etc.
- Expected outcome if a DNAD is not approved

Most of this information must be supplied by the requiring activity – not the contractor.



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DETERMINATION OF DOMESTIC NON-AVAILABILITY

In accordance with 10 U.S.C. 2533b and Defense Federal Acquisition Regulation (DFARS) 225.7002-2(b), I hereby make the following determination concerning acquisition of the _____ [identify the program affected or, if the material/part concerned affects multiple programs, identify the specific material/part] _____.

FINDINGS

1. 10 U.S.C. 2533b requires that, unless meeting an exception in the law, funds that were appropriated or are otherwise available to the Department of Defense may not be used for procurement of ___ [identify applicable class of end item, component thereof, or directly purchased specialty metal. Classes of end items are: aircraft, missile and space systems, ships, tank and automotive items, weapons systems, or ammunition] ___ which contains specialty metals unless the metals were melted or produced in the United States. This requirement does not apply to the extent that the Secretary of the Navy determines that compliant specialty metal of satisfactory quality and sufficient quantity, and in the correct form, cannot be procured as and when needed.
2. The ___ [name of contracting activity] ___ has an acquisition for ___ [identify specific item at prime contract level] ___. It was determined that this acquisition is subject to the 10 U.S.C. 2533b requirements to buy strategic materials critical to national security from U.S. sources and did not fall under any of the statutory exceptions. Therefore, the implementing clause DFARS 252.225-7014, Preference for Domestic Specialty Metals, [and Alternate I, if applicable] was/were included in the solicitation. ___ [Identify prime contractor] ___ has asserted that ___ [identify non-compliant end item, component, part, or material] ___ cannot be obtained containing specialty metals melted or produced in the U.S. and has requested approval of a determination that this ___ [item/material] ___ is not available from domestic sources.
3. ___ [Provide detail to explain what portion of the specific item being procured at the prime contract level is compliant and what is not compliant. Specify whether the DNAD is for a program as a whole, a specific contract, or certain deliveries.] ___.
4. ___ [Summarize the market research and analysis supporting the assertion of non-availability. Such research and analysis should address the aspects of satisfactory quality, sufficient quantity, correct form, and time requirements including dates needed for incorporation into the prime contract level end items. Address whether research included

Enclosure (3)

availability of items/materials from qualifying countries. A detailed form of this research should accompany the request for a DNAD.]

5. ___ [Summarize the analysis of alternatives to a DNAD required by DFARS 225.7002-2(b)(2)(i). The actual analysis should accompany the request for a DNAD. If the acquisition was competitive, address whether any other responding contractor(s) asserted compliant items would be delivered and, if so, explain why the contract will be awarded to a contractor proposing a non-compliant item.] ___.

6. ___ [Address and summarize the requiring activity's written certification, in accordance with DFARS 225.7002-2(b)(2)(ii), that such alternatives are unacceptable. The signed certification should accompany the request for a DNAD.] ____.

DETERMINATION

Based on the findings above, I have determined that ___ [specify item/material] ___ is not available from a domestic source in a satisfactory quality and sufficient quantity and in the correct form for the ___ [specify program or contract and time frame, if applicable] ___ in accordance with 10 U.S.C. 2533b(b) as implemented by DFARS 225.7002-2(b).

[NAME]
SECRETARY OF THE NAVY

DATE

AVAILABILITY ANALYSIS FOR _____

1. Purpose

The purpose of this analysis is to evaluate whether _____ of satisfactory quality and sufficient quantity, and in the correct form, can be procured as and when needed for Contract _____ (or in support of the _____ program).

2. Methodology

Explain how parts containing the specialty metal were identified and what the parts are. Specify the specialty metals involved to the degree possible.

If this request covers a group of parts and a representative sample was selected, explain the total number of parts involved and the procedures for selecting the sample. An example would be that a list of all parts was assembled and a random number generator was used to select a specific percentage of the items. Note whether such selection was made by the contractor or the Government.

Identify whether information about the parts/material was provided by a prime contractor or subcontractor for the end item or component involved.

3. Issues

Summarize issues investigated relative to contractor's assertion of non-availability. Examples are: predominant industry location, status of industry in qualifying countries, alternative materials/parts, US Government market share, cost of changes, Original Equipment Manufacturer, Qualified Parts List, or any other qualification (such as FAA approval) required.

4. Findings

a. Materials/Suppliers - Discuss manufacturers contacted, location of manufacturer and sources of supply, whether the manufacturer can track specialty metals to source, degree of compliance/non-compliance asserted, willingness to analyze parts for compliance if not already known, any conclusions as to veracity of compliance statements. If the manufacturer states its parts are compliant but the sources of supply (vendors) contradict or undermine this statement, this should be noted. If a manufacturer or supplier's interpretation of the Berry Amendment requirements is incorrect, this should be noted.

Examples of this would be an assumption that remelting of a specialty metal qualified or that the small purchase exception is applicable at lower tiers of subcontracting. If more than one part or type of specialty metal is involved in the DNAD, each should be treated in a separate section.

b. State of Industry - Discuss research done on the industry overall. This would include studies done by other organizations, annual industry sales and the US Government market share, information obtained from sources such as the Department of Commerce or National Association of Manufacturers, internet surveys conducted, information obtained from other DNADs, commercial aspects of the industry. Discuss what portion of manufacturers and/or suppliers are represented in this document and efforts to identify additional sources through means such as notices in the Commerce Business Daily or Urgent Data Requests through the Government Industry Data Exchange Program.

c. Other Issues - Discuss any other issues relevant to this DNAD such as logistics considerations or whether an item is a critical capability for DoD.

d. Alternatives Considered and Effects of Compliance - Explain the economic and schedule consequences if compliance were mandated. This would include costs and time to build facilities, costs of insuring compliant metals were segregated in the supply system, redesign costs, or costs of any other alternative considered.

5. Recommendation/Signatures

Briefly, summarize findings and give recommendation. If analysis was performed by a contractor or an organization other than the requiring activity, signatures should be identified to that organization/contractor and certification of why alternatives are not acceptable should be provided separately.

If this analysis was performed by the requiring activity, the certification as to why alternatives are not acceptable should be included in this section along with the requiring activity signatures.