



ACQUISITION,
TECHNOLOGY
AND LOGISTICS

THE UNDER SECRETARY OF DEFENSE

3010 DEFENSE PENTAGON
WASHINGTON, DC 20301-3010

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.



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

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)