



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

AUG 28 2006

MEMORANDUM FOR DISTRIBUTION

Subj: BERRY AMENDMENT COMPLIANCE FOR SPECIALTY METALS

Ref: (a) USD(AT&L) memorandum dated June 1, 2006  
(b) DASN(ACQ) memorandum dated June 5, 2006

Encl: (1) OUSD(AT&L) DPAP memorandum dated August 18, 2006

This memorandum provides information and guidance on the specialty metals requirements of DFARS 225.7002 which derive from 10 U.S.C. 2533a and are also referred to as the Berry Amendment requirements.

In accordance with DFARS 225.7002-1(b), the Department of Defense (DoD) cannot acquire specialty metals unless the metals were melted in the United States. DFARS 225.7002-2 lists exceptions to this requirement which include, among others, acquisitions at or below the simplified acquisition threshold, items for which a Domestic Non-Availability Determination (DNAD) is executed, acquisitions of specialty metals when the acquisition furthers an agreement with a qualifying country (listed in DFARS 225.872), acquisitions in support of contingency operations, or acquisitions where use of other than competitive procedures was approved under FAR 6.302-2.

Unless an exception exists, these requirements apply to prime contracts for Navy and Marine Corps acquisitions of items containing specialty metals. In addition, for aircraft, missile and space systems, ships, tank-automotive, weapons, and ammunition programs, these requirements must flow down to subcontracts at all tiers.

Because it became apparent earlier this year that, on many contracts, neither the Government nor our prime contractors have checked carefully for compliance with the specialty metal requirements, reference (a) (forwarded by reference (b)) was issued to provide guidance on withholding payments for non-compliance under current contracts. It should be noted that the guidance on withholding, as a method of addressing Berry Amendment non-compliance, is applicable only to contracts which were awarded when these issues became apparent earlier this year and isolated instances in the future where noncompliance becomes known only after award. Reliance on withholdings is not an appropriate strategy for dealing with noncompliance in order to make a new award.

Enclosure (1) addresses new contract actions and the resolution of Berry Amendment specialty metal compliance issues before award. This includes new

contracts, modifications for new work, undefinitized contract actions, and options. If the Berry Amendment is applicable to a contract action, no award can be made unless the proposed item is compliant or the acquisition falls under an exception, such as a DNAD. If the action is a new award of an item which has non-compliance issues under previous contracts, all previous non-compliance issues should be addressed in the proposal or negotiations.

Any request for a DNAD from the Secretary of the Navy should be submitted through DASN(ACQ) in accordance with NMCAG G5225.7002-2(b). Such requests must explain what about the contract item is not compliant and contain an analysis of alternatives not requiring a DNAD along with a written certification by the requiring activity as to why such alternatives are not acceptable. While the offeror/contractor may submit market research to support a DNAD request, the contracting activity will need to perform additional research and analysis to meet the requirements of DFARS 225.7002-2(b).

There are various sources for the research and analysis required by the contracting activity. DCMA is compiling a list of approved DNADs which could be searched for related items. A notice in FedBizOpps seeking alternate sources for parts/material is one approach. For uncommon items or limited spot checks, an Urgent Data Request through the Government Industry Data Exchange Program (GIDEP) could be productive. While support contractors could be another approach, the contracting activity should be careful to avoid any potential conflicts of interest. Additionally, NAVSUP's Price Fighters are performing DNAD research and analysis for DCMA and will perform this service for Navy and Marine Corps activities on a reimbursable basis. Please note that DCMA has requested coordination on work by the Price Fighters. The contracting activity should consider the specific case in deciding which approach to use and should supplement that approach as needed to obtain solid support for DNAD requests.

For further information on this issue including the resources discussed above, please contact Katherine Petersen at (703) 614-9641 or e-mail at [Katherine.Petersen@navy.mil](mailto:Katherine.Petersen@navy.mil). Additionally, for information on GIDEP, Jim Stein may be contacted at (703) 614-9646, [James.M.Stein@navy.mil](mailto:James.M.Stein@navy.mil), and for information on Price Fighters, Buster Jones may be contacted at (757) 443-2468, [willard.b.jones@navy.mil](mailto:willard.b.jones@navy.mil). DCMA coordination on Price Fighter work, may be accomplished through Katherine Petersen.

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

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ACQUISITION,  
TECHNOLOGY  
AND LOGISTICS

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

AUG 18 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 Pre-Award Compliance for Specialty Metals

On June 1, 2006, the Under Secretary of Defense (Acquisition, Technology and Logistics) signed a memorandum which addressed contractor post-award disclosures of non-compliance with the specialty metals restriction of the Berry Amendment (10 U.S.C. 2533a). Compliance with the Berry Amendment should be specifically addressed between the contracting officer and the contractor prior to contract award to avoid non-compliance during performance. When the contracting officer is aware of prior non-compliances by a contractor, or otherwise is concerned that compliance may be an issue, the contracting officer should specifically inquire and obtain verification from the contractor that compliant hardware will be delivered.

During market research, the contractor or contracting officer may learn that the cost of a compliant part will exceed the cost of a non-compliant one. The Berry Amendment provides an exception based on a higher cost for compliant parts, only if the cost of the compliant part exceeds the U.S. market price. This does not occur often. Thus, in general, the Berry Amendment requires payment of a higher cost for compliant parts.

A Domestic Non-Availability Determination (DNAD) may be approved in accordance with DFARS 225.7002-2(b). A DNAD should not be issued if an alternative compliant part will be available in sufficient time to meet the Department's needs. A DNAD may be of limited or indefinite duration, depending on whether a domestic source is expected to be available in the future, and whether the Department plans to take action to create a domestic source. If it is expected that a domestic source will become available in the future, the duration of the DNAD should be limited to the period of unavailability.



Enclosure (1)

DoD components should devote resources to create domestic sources only when the industrial capabilities that are impacted are essential to national defense. To determine whether the industrial capabilities impacted are essential to the national defense, consult DoD Handbook 5000.60-H, "Assessing Defense Industrial Capabilities." The Office of the Deputy Under Secretary of Defense (Industrial Policy) can assist with this analysis (contact Mr. Chris Gregor at 703-607-4048).

If resources will be dedicated to establishing a domestic source, the DNAD should be limited to the time required to achieve sufficient domestic capacity. If not, the DNAD may be indefinite in duration, but market research should be continued to determine if other sources can be identified that will satisfy the Berry Amendment. If a domestic source is identified or a substitute part is found, the approving authority should be notified and the DNAD should be terminated.

If a military department secretary, or the USD(AT&L), approves a DNAD, other DoD components may rely upon the DNAD for the same part if it is determined that circumstances are similar (e.g., comparable quantity, time period).

Should you have additional questions, please contact Ms. Nancy Dowling at (703)697-9352 or at [nancy.dowling@osd.mil](mailto:nancy.dowling@osd.mil). The DCMA point of contact is Mr. Dave Ricci at (703) 428-1144 or [dave.ricci@dcma.mil](mailto:dave.ricci@dcma.mil).



Shay D. Assad  
Director, Defense Procurement  
and Acquisition Policy

Enclosure (1)