JAN 25 2007

GSA Office of the Chief Acquisition Officer

GSA Acquisition Letter V-07-02

MEMORANDUM FOR GSA CONTRACTING ACTIVITIES

FROM: for EMILY W. MURPHY
CHIEF ACQUISITION OFFICER

SUBJECT: Implementation of Berry Amendment Contracting Requirements for Assisted Acquisitions Using DoD Funds

1. Purpose: The Berry Amendment, 10 U.S.C. 2533a, restricts the source for certain food, clothing, fabrics, specialty metals, and hand or measuring tools when purchased with DoD funds.

2. Background: The Berry Amendment is implemented and prescribed at DFARS 225.7001 and 225.7002 and in clauses 252.225-7012, Preference for Certain Domestic Commodities, 252.225-7014, Preference for Domestic Specialty Metals, and 252.225-7015, Restriction on Acquisition of Hand or Measuring Tools. The DFARS web site is located at http://www.acq.osd.mil/dpap/dars/dfars/index.htm.

3. Effective Date: Immediately.

4. Termination: This Acquisition Letter remains in effect until the General Services Acquisition Manual (GSAM) is amended.

5. Applicability: The Berry Amendment applies solely to acquisitions made using DoD funds.

6. **Policy:**

a. Specialty Metals: The National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364, at Section 842) revises the Berry Amendment requirements and establishes a new specialty metals provision, 10 U.S.C. 2533b, Requirement to buy strategic materials critical to national security from American Sources; exceptions. In order to implement the additional changes made by the Authorization Act, DoD has issued the attached Memorandum entitled "Class Deviation—Restriction on Procurement of Specialty Metals." The Memorandum revises clause, DFARS 252.225-7014, Preference for Domestic Specialty Metals (Jun 2005) (DEVIATION) and its

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
www.gsa.gov

ALTERNATE I (APR 2003) (DEVIATION). The clause prescription provided in the DoD Memorandum explains its applicability and provides a relatively simple definition of "component."

b. All Acquisitions Made Using DoD Funds: The Berry Amendment applies domestic-source requirements to many commodities in addition to specialty metals, e.g., textiles used in automobile seats. GSA acquisition personnel are instructed to review requests for assisted services from DoD for Berry Amendment applicability and include the appropriate DFARS clause(s) in the resulting procurements.

GSAM 525.570, Procurement of hand or measuring tools or stainless steel flatware for DoD, is out of date, and associates are directed to defer instead to the DFARS coverage referenced above (see DFARS 252.225-7015, Restriction on Acquisition of Hand or Measuring Tools). The GSAM will be updated once the revised DFARS coverage is finalized.

ATTACHMENT: Director, Defense Procurement and Acquisition Policy, Memorandum 2006-O0004 dated December 6, 2006, entitled "Class Deviation—Restriction on Procurement of Specialty Metals"

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION,
TECHNOLOGY
AND LOGISTICS

DEC 0 6 2006

In reply refer to
DAR Tracking Number: 2006-O0004

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: Class Deviation—Restriction on Procurement of Specialty Metals

Section 842 of the John Warner National Defense Authorization Act (NDAA) for Fiscal Year 2007 (Pub. L. 109-364) is entitled "Protection of Strategic Materials Critical to National Security" Section 842 establishes a new specialty metals provision, 10 USC 2533b.

Many requirements of the new law reflect regulations previously established in the Defense Federal Acquisition Regulations Supplement (DFARS). The statutory definition for specialty metals is the same as in the current DFARS. The new law codifies current DFARS regulation that requires flow down of the specialty metals restriction to all tiers of subcontractors when acquiring aircraft, missile and space systems, ships, tank and automotive items, weapon systems, or ammunition. The new law restricts not only the procurement of the specialty metal in these items, but restricts procurement of the end items, and components thereof, that contain specialty metals. Therefore, in any contract awarded after November 15, 2006, the Department can no longer continue the practice of withholding payment while conditionally accepting noncompliant items in these categories.

The enclosed Class Deviation and the planned change to DFARS 252.225-7014 entitled "Preferences for Domestic Specialty Metals" defines "component" to mean those first-tier parts and assemblies that are incorporated directly into the end product (*i.e.*, first-tier components). Parts and assemblies that are incorporated directly into first-tier components are also components (*i.e.*, second-tier components). Third-tier and below parts or assemblies are not components. When the Government purchases an end product that is in one of the six product categories listed in subsection 2533b(a)(1), components, including all parts and assemblies at all tiers, must be compliant. When the Government purchases first-tier components separately, components, including all parts and assemblies at all tiers, must be compliant. When the Government purchases second-tier

components separately, all parts and assemblies at all tiers must be compliant. However, if the Government purchases third-tier and below parts or assemblies separately, those parts and assemblies are not components. Items that are not incorporated into the end product, such as factory test equipment and ground support equipment, are not components.

Any specialty metal (e.g. raw stock) acquired directly by the Government or by a Prime Contractor for delivery to the Government must be melted or produced in the United States.

A new one-time waiver is now established for contracts under which specialty metals were incorporated into items produced, manufactured, or assembled in the United States prior to November 16, 2006, and where final acceptance by the Government takes place after that date. A one-time waiver requires a written determination by the contracting officer, approval from the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L) or the Service Acquisition Executive of the Military Department concerned, and notification in FedBizOpps.gov within 15 days from the time the contracting officer makes the required determination.

The House of Representatives, Committee on Armed Services Report for the FY07 NDAA (H.R. Report 109-452, p. 361) recognized that many suppliers have been "inadvertently non-compliant" with the specialty metals provision of the Berry Amendment. Thus, the new provision allows for a period for suppliers at all levels of the supply chain to become compliant with section 2533b of title 10. For past violations, in order to be consistent with the approach of the new law, contracting officers should determine whether the violation was of the inadvertent type recognized by the Congress.

For example, for violations involving commercial items, it is likely that non-compliance was inadvertent. If so, the appropriate amount and form of consideration, if any, due to the Government, should be determined by the contracting officer on a case by case basis. When making the required determination, the contracting officer should obtain and may rely on contractors' representations that "the non-compliance is not knowing or willful." The contractor should be reminded of the importance of having adequate procedures in place to ensure compliance in the future. Many contractors have already prepared a corrective action plan to ensure future compliance. Given the breadth of the noncompliance problem, as indicated in the June 1, 2006 memorandum from Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L), the guidance regarding the submittal of corrective action plans on a broad basis to the Defense Contract Management Agency (DCMA) is still applicable.

10 U.S.C. §2533b provides another new exception for commercially available electronic components whose specialty metal content is de minimis in value compared to the overall value of the lowest level component produced that contains such specialty metal. The Department will use "does not exceed 10 percent" for the de minimis standard for specialty metals contained in electronic components. See the attached clause

252.225-7014 (DEVIATION) paragraph (a)(3) for the definition of "electronic component" and paragraph (c)(2) for implementation of the de minimis standard.

The new law provides for a revised domestic non-availability exception. USD(AT&L) or the Secretary of the Military Department concerned can grant a Domestic Non-Availability Determination (DNAD) if compliant specialty metal cannot be procured as and when needed in the required form. For example, domestic specialty metal may not be available in the bar stock required to produce fasteners or the specialty metal may not be available, as and when needed, in the forged or milled form that is required. When considering a DNAD, one of the factors that should be addressed is whether the price of compliant metal is fair and reasonable, in accordance with FAR 15.402. This may be a relevant factor in determining whether "compliant specialty metal of satisfactory quality and sufficient quantity, and in the required form, cannot be procured as and when needed. Existing DNADs should be reviewed to ensure that they are consistent with the new law.

Other than the exception for procurements by vessels in foreign waters, which has been deleted from the new law, the other existing exceptions remain, including the exception for procurements from sources in qualifying countries.

This class deviation authorizes use of the attached clause and its alternate in new contracts in lieu of the existing DFARS clause 252.225-7014, Preference for Domestic Specialty Metals, and its Alternate I. This class deviation is effective immediately and remains in effect until incorporated in the DFARS or until rescinded. For questions concerning this deviation, please contact Nancy Dowling, 703-697-9352, or nancy.dowling@osd.mil.

Shay D. Assad
Director, Defense Procurement
And Acquisition Policy

Attachment:
As stated

Cc:
DSMC, Ft. Belvoir

Deviation 2006-O0004
Restriction on Acquisition of Specialty Metals

Clause Prescription:
Unless an exception applies—

(a) Use the clause 252.225-7014, Preference for Domestic Specialty Metals (DEVIATION), as provided in this deviation, in solicitations and contracts exceeding the simplified acquisition threshold that require delivery of specialty metals.

(b) Use the clause with its Alternate I (DEVIATION) in solicitations and contracts exceeding the simplified acquisition threshold and requiring delivery of an article containing specialty metal, if the article is an end product, or a component thereof, in any of the following product categories:

(i) Aircraft.
(ii) Missile and space systems.
(iii) Ships.
(iv) Tank and automotive items.
(v) Weapon systems.
(vi) Ammunition.

"Automotive item" means a self-propelled military transport vehicle, primarily intended for personnel and cargo carrying, such as a car, truck, or van. The term does not include construction equipment (such as a bulldozers, excavators, lifts, or loaders) or other self-propelled equipment (such as cranes or aircraft ground support equipment).

"Component" means those first-tier parts and assemblies that are incorporated directly into the end product (i.e., first-tier components). Parts and assemblies that are incorporated directly into a first-tier component are also components (i.e., second-tier components). Third-tier and below parts and assemblies are not components.

252.225-7014 Preference for Domestic Specialty Metals.

PREFERENCE FOR DOMESTIC SPECIALTY METALS (JUN 2005)(DEVIATION)

(a) *Definitions.* As used in this clause—

(1) "Qualifying country" means any country listed in subsection 225.872-1 of the Defense Federal Acquisition Regulation Supplement.

(2) "Specialty metals" means any of the following:

(i) 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.

(ii) 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.

(iii) Titanium and titanium alloys.

(iv) Zirconium and zirconium base alloys.

(b) Any specialty metals delivered under this contract shall be melted or produced in the United States or its outlying areas or a qualifying country.

(End of clause)

ALTERNATE I (APR 2003) (DEVIATION)

(a) *Definitions.* As used in this clause—

(1) "Electronic component" means an item that operates by controlling the flow of electrons or other electrically charged particles in circuits, using interconnections of electrical devices such as resistors, inductors, capacitors, diodes, switches, transistors, or integrated circuits. An item can be an "electronic component" regardless of the tier of the end product at which it is installed.

(3) "End product" means supplies delivered under a line item of this contract.

(4) "Qualifying country" means any country listed in subsection 225.872-1 of the Defense Federal Acquisition Regulation Supplement.

(5) "Specialty metals" means any of the following:

(i) 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.

(ii) 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.

(iii) Titanium and titanium alloys.

(iv) Zirconium and zirconium base alloys.

(b) Any specialty metals incorporated in articles delivered under this contract shall be melted or produced in the United States or its outlying areas.

(c) This clause does not apply to specialty metals—

(1) Melted in a qualifying country or incorporated in an article manufactured in a qualifying country; or

(2) Incorporated in a commercially available electronic component, if the value of the specialty metal content in the electronic component does not exceed 10 percent of the overall value of the lowest level electronic component, containing specialty metal, that is—

(i) Produced by the Contractor; or

(ii) If the Contractor does not produce the electronic component, produced by the subcontractor from which the electronic component was acquired.

(d) The Contractor shall insert the substance of this clause, including this paragraph (d), in all subcontracts for items containing specialty metals.

(End of clause)

2006-O0004
Class Deviation—Restriction on Acquisition of Specialty Metals

EXAMPLE 1 Application to end products and components in one of the six major programs.

The restriction on acquisition of specialty metals covers articles that are end products, or components thereof, of the listed programs. The term "component" is defined in the deviation to apply only to parts and assembled articles at the first and second tier. First-tier components are those articles incorporated directly into the end product. Second-tier components are those articles incorporated into the first-tier components.

Therefore, if a spare rocket motor were purchased as acontract line item, that spare rocket motor is a first tier component of the missile and would still be covered, even if purchased separately from the missile system. If for example, the rocket motor contains a power supply (second tier item, and it was purchased as a separate item, it would also be covered by the new specialty metals provision. If, however, a third tier or lower level assembly or part e.g., the printed circuit board contained within the rocket motor power supply ispurchased separately from the missile system (i.e. under a separate contract line item), the restriction does not apply.

The restriction does not cover test equipment or ground support equipment, because those are not components of the missile system.

EXAMPLE 2. De minimus value of specialty metals in electronic components.

A contractor is providing an aircraft as the end product, but purchases radio communication equipment for the aircraft from a subcontractor. The subcontractor is the producer of the radio communication equipment, buying electronic parts to assemble. The radio communication equipment is the electronic component for which the value of the specialty metal content must be less than 10% of the value of the radio communication equipment. The individual electronic parts assembled into the radio communication equipment are not the electronic components against which the de minimis value of the specialty metal must be calculated, because they are not produced by the subcontractor. It is not necessary to know the exact value of the specialty metal, only to reasonably estimate that is less than 10 percent of the total value.