

June 25, 2002

via E-mail and Facsimile

Defense Acquisition Regulations Council
Attn: Amy Williams, OUSD (AT&L)DP(DAR)
IMD 3C132
3062 Defense Pentagon
Washington, DC 20301-3062

**Re: Codification and Modification of Berry Amendment:
Interim Rule with Request for Comments (DFARS Case 2002-D002)**

Dear Ms. Williams:

On behalf of the Specialty Steel Industry of North America (“SSINA”), we provide this submission in response to the Department of Defense’s (“DoD’s”) request for comments on an interim rule amending the Defense Federal Acquisition Regulation Supplement (“DFARS”) to implement section 832 of the National Defense Authorization Act for Fiscal Year 2002, which codified and modified the Berry Amendment. 67 Fed. Reg. 20,697 (Apr. 26, 2002). Located in Washington, D.C., SSINA is the national trade association representing U.S. producers of specialty metals, including stainless steel, alloy tool steel, superalloys and other high performance materials that fall under the coverage of the Berry Amendment.

Subject to certain exceptions, the Berry Amendment requires the Defense Department to acquire food, clothing, certain textile products, specialty metals and other items (collectively, “covered items”) from domestic sources. 10 U.S.C. § 2533a(a)-(b). Codification of the amendment in Section 832 resulted in certain changes in the scope of the Amendment. It is important in the development of these regulations that the Department properly implement these changes.

As set forth below, there are provisions in the proposed regulations that are inconsistent with the statutory language contained in section 832. These inconsistencies could undermine the effectiveness of the provision. Additionally, DoD must review the existing Solicitation Provisions and Contract Clauses applicable to specialty metals, to ensure that these provisions are consistent with the changes effectuated by section 832.

List of Restrictions (§225.7002-1)

SSINA is concerned with the language proposed by DoD to implement the statutory restrictions embodied in the Berry Amendment with respect to specialty metals, including stainless steel flatware. Specifically, the regulatory language contained in proposed 48 C.F.R.

§ 225.7002-1(b) appears to treat specialty metals differently from the items listed in proposed 48 C.F.R. 225.7002-1 (a). For example, the introductory language in § 225.7002.1(a) provides that “Any of the following items, either as end products or components...” (emphasis added) are subject to restriction. The language in § 225.7002.1(b), which exclusively addresses specialty metals, does not affirmatively state that the restriction is applicable to components or end products containing the item, even though the restriction is similarly applicable. At best, this inconsistency creates uncertainty with respect to a contractor’s obligation to buy a component or end product that has been produced with specialty metals covered by the Amendment. At worst, the inconsistency improperly limits the scope of the Amendment. The final regulations must eliminate the inconsistency and confirm that the Amendment’s restrictions extend not only to the procurement of specialty metals produced in the United States, but also to components and end products produced from such specialty metals.¹

Exceptions (§225.7002-2)

The proposed regulations in 48 C.F.R. § 225.7002-2(k) create an exception to the Amendment for purchases of specialty metals by subcontractors at any tier for programs other than: (1) Aircraft; (2) Missile and space systems; (3) Ships; (4) Tank-automotive; (5) Weapons; and (6) Ammunition. Section 832 does not provide for such an exception. On the contrary, all DoD purchases are covered. Accordingly, the proposed regulation is an unwarranted restriction on the applicability of the Amendment and should be deleted.

Further, the proposed regulatory language provided in 48 C.F.R. § 225.7002-2(l) implementing the statutory exception for specialty metals and chemical warfare protective clothing (10 U.S.C. § 2533a (e)), is different from the language in the statute. The statute provides that the exception is applicable when the offshore procurement is necessary to comply with an agreement requiring the United States to purchase offshore supplies in connection with certain approved offset sales; or in furtherance of an agreement with a foreign government to remove barriers to purchases of supplies produced in the other country; and such agreement complies, where applicable, with section 36 of the Arms Export Control Act (22 U.S.C. 2776) and with 10 U.S.C. 2457. The proposed regulation, on the other hand, limits the scope of the exception to situations where the acquisition furthers an agreement with a qualifying country. The inconsistency between the statutory language and regulatory proposal as currently drafted must be clarified or eliminated.

Solicitation Clauses (§252.225-7014)

As previously noted there were no proposed changes in the solicitation clause applicable to specialty metals and contained in § 252.225-7014. The Department should review the current language of the clause and determine whether it is consistent with Section 832. SSINA would note, for example, that Alternate 1 (Mar 1998), and particularly part (d), is consistent with the

¹ The proposed Amendment does attempt to provide a specific definition for what constitutes a U.S. produced specialty metal. See 225.7002-1(b). While this definition is not based on any specific element of the statute, the domestic industry is not opposed to the definition.

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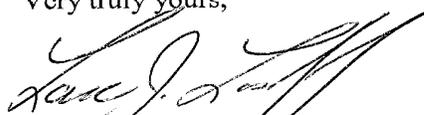
language of section 832 and the intent to apply the restriction to every subcontract or purchase order awarded under this contract. The previous language of the clause, which states that "the clause does not apply to the extent that the specialty metal is purchased by a subcontractor at any tier" is inconsistent with the statute and should be deleted. It is our understanding that DoD correctly utilizes Alternate 1 in setting forth the Berry Amendment preference. Accordingly, continued inclusion of the previous language in the DFARS is unnecessary.

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For the above reasons, SSINA requests that the Department of Defense revise proposed sections 225.7001-2 in accordance with these comments. Such changes to the interim rule would ensure that DoD is honoring Congressional intent in meeting its obligations under the Berry Amendment.

Please direct any questions or comments to the undersigned.

Very truly yours,



DAVID A. HARTQUIST

LAURENCE J. LASOFF

Counsel

Specialty Steel Industry of North America