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February 7, 2006

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

Re: DFARS Case 2005-D002; Defense Federal Acquisition Supplement; Restriction on Carbon, Alloy and Armor Steel Plate

Dear Ms. Williams:

These comments are submitted on behalf of Mittal Steel USA, in response to the Department of Defense's ("DoD") notice published in the Federal Register on December 9, 2005 concerning proposed changes to the Defense Federal Acquisition Regulations (DFARs) concerning restrictions on carbon, alloy and armor steel plate purchases. See Defense Federal Acquisition Supplement; Restriction on Carbon, Alloy, and Armor Steel Plate, 70 Fed. Reg. 73,189 (Dec. 9, 2005, DoD) ("Proposed Rule"). Mittal Steel USA is the largest producer of carbon, alloy and armor steel plate in the United States, with plate producing facilities in Coatesville and Conshohocken, Pennsylvania and Burns Harbor, Indiana.¹

Mittal Steel USA is the only producer in the United States that both melts and rolls armor steel plate. This is done at its Coatesville and Conshohocken facilities. The only other producer in the United States or Canada that both melts and rolls armor steel plate is Algoma Steel of Canada.² Mittal Steel USA recognizes the importance of armor steel plate to our armed services and the Department of Defense and has made an extraordinary effort to supply the DoD with its armor plate needs on a timely basis. Mittal Steel USA did an outstanding job of meeting its commitments to the DoD, reducing lead times by at least 50 percent in recent periods. Mittal Steel USA's plate business has made a significant commitment to support DoD programs and has demonstrated sufficient plate capacity to supply the DoD with its armor steel plate requirements. For this reason, any proposed change to the DFARs concerning carbon, alloy and armor plate is of great interest and potential concern to Mittal Steel USA.

¹ Mittal Steel USA's plate facilities were formerly part of International Steel Group ("ISG"). ISG merged with Mittal Steel USA in 2005.

² Oregon Steel also rolls armor steel plate, but that company has closed its melt shop and relies on purchased slab.

The current DFARs contain provisions that preclude the DoD from acquiring carbon, alloy or armor steel plate unless it is made from steel melted and poured in the United States or Canada or a waiver is obtained. See 48 C.F.R. §§ 225.7011-1, 225.7011-3 and 252.225-7030 (2004). These provisions are intended to implement the following language found in the DoD Appropriations Act, which has not changed since 2002:

None of the funds appropriated or made available in this Act shall be used to procure carbon, alloy, or armor steel plate for use in any Government owned facility or property under the control of the Department of Defense which were not melted and rolled in the United States or Canada.

Pub. L. 108-287, § 8029 (2004).³

As discussed below, the Proposed Rule appears to relax this requirement. The Federal Register notice announcing the Proposed Rule states that changes to sections 225.7011-1 and 225.7011-3 are being proposed to make those sections consistent with the wording of section 252.225-7030 and that the latter section is being split into two parts for clarification. See 70 Fed. Reg. at 73,189. Unfortunately, the proposed changes to sections 225.7011-1, 225.7011-3 and 252.225-7030 and the current wording of section 252.225-7030 do not properly implement the language of Public Law 108-287.

DoD states that it seeks to harmonize the language of sections 225.7011-1 and 225.7011-3 with that of section 252.225-7030 by requiring in section 225.7011-1 and 225.7011-3 that the plate must be used as a “raw material” for the purchasing restriction to apply. While the “raw material” language is found in the current version of section 252.225-7030, it does not appear in the language that has been found in the DoD Appropriations Act language since 2002. See, e.g., Pub. L. 108-287, § 8029 (2004). Requiring that the purchasing restriction apply only to plate used as a “raw material” sets a limitation that does not appear in the law itself. For that reason, the phrase “raw material” should not be appearing in either sections 225.7011-1, 225.7011-3 or 252.225-7030. Plate in any form and for any use should be subject to the purchasing restriction, as intended by § 8029 of Pub. L. 108-287.

In addition, the use of the phrase “raw material” in the regulations is misleading and incorrect. Carbon, alloy and armor steel plate is not a “raw material.” It is a finished steel mill

³ Note that these provisions are distinct from the Berry Amendment, which requires that “specialty metals” used in defense applications be melted and poured in the United States. See 48 C.F.R. § 225.7002-1(b). The definition of “specialty metals” found in 48 C.F.R. § 252.225-7014 includes most high strength, low alloy steel plates, including armor plate. Thus, armor plate and most alloy plate are subject to both the Berry Amendment and Defense Appropriations Act requirements. The proposed changes to 48 C.F.R. §§ 225.7011-1, 225.7011-3 and 252.225-7030 would not change the continuing Berry Amendment procurement requirements.

product that can be used as is in certain application or may be used as an intermediate material for the fabrication of downstream products. Rather than adding the phrase "raw material" to section 225.7011-1, it should be removed from section 252.225-7030 to harmonize the sections.

Even more concerning is the DoD's apparent interpretation of the appropriations language to apply only to plate used in a government-owned facility or a facility leased by the government. See Proposed Rule, 70 Fed. Reg. at 73,190, § 225.7011-1. This would mean that plate purchased by government contractors and delivered to or processed in the contractors' private facilities (those not directly owned or leased by the government) for use in meeting a DoD contract requirement would not be subject to the restrictions in sections 225.7011-1 and 252.225-7030. This interpretation is contrary to the plain language and intent of the law.

The appropriations language used since 2002, prohibits procurement of the subject plate "for use in any Government owned facility or property under the control of the Department of Defense which were not melted and rolled in the United States or Canada." Public Law 108-287, § 8029 (emphasis added). As used in the Federal Acquisition Regulations, government property is defined as

all property owned by or leased to the Government or acquired by the Government under the terms of the contract. It includes both Government-furnished property and contractor-acquired property as defined in this section.

48 C.F.R. § 45.101(a). The regulations in turn provide a definition of property as follows:

"Property," as used in this part, means all property, both real and personal. It includes facilities, material, special tooling, special test equipment, and agency-peculiar property.

Id. Read together, it is clear that any "material" such as armor plate "acquired by the Government under the terms of the contract" are property subject to federal acquisition law, including Public Law 108-287, § 8029. Thus, plate used to fill contracts for DoD, regardless of where those contracts are filled, are materials acquired by the Government under the terms of a contract and should be subject to § 8029. It is therefore incorrect to interpret Public Law 108-287, § 8029 in sections 225.7011 and 252.225-7030 as applying to only carbon, alloy and armor steel plate delivered to or used as raw material on a government-owned or government-leased facility. Had Congress intended such a narrow interpretation of the law, it could have explicitly included such limitations in the language of § 8029. The regulations as proposed, and as currently written are not consistent with Public Law 108-287, § 8029 or the definition of property under the control of the government as used in the Federal Acquisition Regulations. The proposed changes should not be adopted, and the existing language of the regulations should be revised to reflect the plain language and intent of section 8029 of the Defense Appropriations Act.

Mittal Steel USA suggests that the regulations be altered in the following manner (strikeouts indicating language to be removed and italics indicating language added):

225.7011-1 Restriction.

In accordance with section ~~8111 of the Fiscal Year 1992 DoD Appropriations Act (Pub. L. 102-172)~~ *section 8029 of the Fiscal Year 2005 DoD Appropriations Act (Pub. L. 108-287)* and similar sections in subsequent DoD appropriations acts, do not acquire any of the following types of carbon, alloy, or armor steel plate ~~as a raw material~~ for use in a Government-owned facility or ~~a facility~~ *property within the meaning of section 45.101(a)*, under the control of ~~(e.g., leased by)~~ DoD, unless it is melted and rolled in the United States or Canada:

(a) Carbon, alloy, or armor steel plate in Federal Supply Class 9515.

(b) Carbon, alloy, or armor steel plate described by specifications of the American Society for Testing Materials or the American Iron and Steel Institute.

225.7011-3 Contract clause.

Unless a waiver has been granted, use the clause at 252.225-7030, Restriction on Acquisition of Carbon, Alloy, and Armor Steel Plate, in solicitations and contracts that:

(a) Require the delivery to the Government of carbon, alloy, or armor steel plate as a raw material that will be used in a Government-owned facility or ~~a facility~~ *in property within the meaning of section 45.101(a)*, under the control of DoD; or

(b) Require contractors operating in a Government-owned facility or a facility under the control of DoD, *or providing property within the meaning of section 45.101(a) to DoD under the terms of a contract* to purchase carbon, alloy, or armor steel plate ~~as a raw material~~ *for use in that facility or fulfilling that contract.*

PART 252--SOLICITATION PROVISIONS AND CONTRACT
CLAUSES

**252.225-7030 Restriction on Acquisition of Carbon, Alloy, and
Armor Steel Plate.**

As prescribed in 225.7011-3, use the following clause:

Restriction on Acquisition of Carbon, Alloy, and Armor Steel Plate
(XXX 2005)

Carbon, alloy, and armor steel plate shall be melted and rolled in
the United States or Canada if the carbon, alloy, or armor steel
plate:

(a) Is in Federal Supply Class 9515 or is described by
specifications of the American Society for Testing Materials or the
American Iron and Steel Institute; and

(b)(1) Will be delivered to the Government as ~~a raw material~~ for
use in a Government-owned facility or a facility under the control
of the Department of Defense; or

(2) Will be purchased by the Contractor as ~~a raw material~~ for use
in a Government-owned facility or *for use in property within the
meaning of section 45.101(a) to be provided under contract to in a
facility under the control* of the Department of Defense.

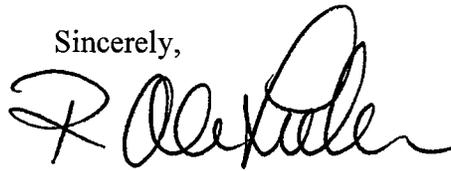
Such changes should conform the language of the regulations to the language and intent of the DoD Appropriations Act. Given the domestic industry's capacity to produce and supply these products in sufficient quantities to meet the DoD's needs, proper interpretation and enforcement of the language in Public Law 108-287, § 8029 should not lead to any difficulty in carbon, alloy or armor plate supply. In addition, Mittal Steel USA supports formal use of the waiver process to address any true availability problems that may arise in the future.

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Please contact the undersigned with any questions concerning these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Alan Lubberda". The signature is fluid and cursive, with a large initial "R" and a long, sweeping tail.

R. Alan Lubberda

Counsel to Mittal Steel USA