

SHIPMENTS OF DLA PRIME VENDOR CARGO

1. Special Provisions for Defense Logistics Agency (DLA) Prime Vendor Program

1.1 Background.

DLA has entered into contracts with various suppliers and distributors under a "Prime Vendor" program for the supply of various commodities to U.S. Government agencies. These contracts support DLA customers in geographic locations worldwide. The Defense Distribution Center (DDC), is an authorized ordering office for Prime Vendor Shipments through DLA under this contract. The items are shipped overseas under the RDC contract via ocean transportation ordered through DDC. Under the terms of the DLA Prime Vendor contracts, ownership and title to these items, remains with the Prime Vendor while the items move within the Defense Transportation System (DTS). RDC carriers deliver Prime Vendor cargo to the Prime Vendor rather than delivering cargo to the U.S. Government.

1.2 Contractual Intent.

Generally, the terms, conditions and prices of this contract shall apply equally to the transportation of both Government owned and non-Government owned cargo. For example, the standard of liability of a RDC contractor for loss/damage to cargo is the same in both situations. Also, compensation due the RDC contractor for detention of carrier containers, for port storage, for reefer maintenance, and other matters (see paragraph 1.6 below), is the same in both situations. However, experience has demonstrated to the Government that certain matters are properly handled directly between a Prime Vendor and a RDC contractor (the real parties in interest) where non-Government cargo is involved. These matters include:

- Claims procedures and claims dispute resolution procedures related to Prime Vendor cargo and Prime Vendor claims against a RDC Contractor for loss/damage to Prime Vendor cargo;
- RDC Contractor claims against a Prime Vendor for loss/damage to RDC Contractor equipment;
- RDC Contractor claims against a Prime Vendor for detention of RDC Contractor equipment;
- RDC Contractor claims against a Prime Vendor for port storage charges (e.g. while cargo delayed through fault of Prime Vendor or request of Prime Vendor);
- RDC Contractor claims against a Prime Vendor for trucker wait time (e.g. while cargo delayed through fault of Prime Vendor or request of Prime Vendor);
- RDC Contractor claims against a Prime Vendor for reefer maintenance (e.g. while reefer in custody of Prime Vendor, or cargo delayed through fault of Prime Vendor or request of Prime Vendor); and,
- Claims between the Prime Vendor and RDC Contractor for services not ordered by the Government

This stands to reason because the Prime Vendor owns the cargo and because only the Prime Vendor and a RDC contractor have specific, factual knowledge and evidence related to such matters and the delivery location. The contractual intent is for the Prime Vendor and the RDC contractor to address/resolve such matters directly with each other. The Government customer can be harmed when procedures for resolving such matters between the Prime Vendor and a RDC contractor are not established and problems are not resolved directly between the Prime Vendor and the RDC contractor.

1.2.1 The U.S. Government shall not be liable for loss or damage to Prime Vendor cargo. Any discrepancy report or notice of claim for such loss or damage shall be submitted by the DLA Prime Vendor directly to the RDC contractor for resolution, not to DLA or USTRANSCOM. The RDC contractor shall accept such discrepancy report or notice of claim for such loss or damage from the DLA Prime Vendor, as well as any other communications regarding such loss or damage.

1.2.2 The U.S. Government shall not be liable for RDC Contractor claims against a Prime Vendor for loss/damage to RDC Contractor equipment; RDC Contractor claims against a Prime Vendor for detention of RDC Contractor equipment; RDC Contractor claims against a Prime Vendor for port storage charges (e.g. while cargo delayed through fault of Prime Vendor or request of Prime Vendor); RDC Contractor claims against a Prime Vendor for

trucker wait time (e.g. while cargo delayed through fault of Prime Vendor or request of Prime Vendor); RDC Contractor claims against a Prime Vendor for reefer maintenance (e.g. while reefer in custody of Prime Vendor, or cargo delayed through fault of Prime Vendor or request of Prime Vendor); and claims between the Prime Vendor and RDC Contractor for services not ordered by the Government). The RDC contractor shall submit directly to the Prime Vendor, with copy to the RDC Contracting Officer, any claim for damage, detention, port storage, reefer maintenance, or services not ordered by the U.S. Government. If the RDC contractor is unable to communicate directly with the Prime Vendor for any reason, the RDC Contractor shall so advise the RDC Contracting Officer. In those instances, or instances where the resolution of Prime Vendor / RDC Carrier claims is at an impasse, the RDC Contracting Officer will function (in coordination with other Government agencies as appropriate) as a facilitator in order to bring the parties together and work towards resolution of the claim(s).

1.2.3 Notwithstanding the provisions of 1.2.2 above, the RDC contractor may pursue any rights it may have under this contract and may file a claim with the RDC Contracting Officer under the terms of this contract in connection with the transportation of Prime Vendor cargo. An example of such a situation could be where Government action harms the RDC contractor with respect to Prime Vendor cargo transportation and some other part of this contract provides a remedy.

1.2.4 Failure of the Prime Vendor to Satisfy an Arbitral Award, Judgment, or Binding Alternate Dispute Resolution (ADR) Decision

- (i) The RDC contractor may, at any time after the RDC contractor has initiated arbitration, a lawsuit, or demand for binding ADR against a Prime Vendor for amounts due to the RDC contractor by the Prime Vendor, request in writing that the Government agree to guarantee payment in the amount stated in the demand (excluding any amount for dispute resolution proceeding costs, including attorney fees) for arbitration, lawsuit, or demand for binding ADR. Within thirty (30) days of receiving such a request, the Government may, in its sole discretion, either: (1) by modification issue a guarantee to the RDC contractor in the amount of the arbitral demand made by the RDC contractor against the Prime Vendor, or (2) in writing deny such request for a guarantee. In the event that the Government issues a guarantee as described above, payment under that guarantee shall become due thirty (30) days after the RDC contractor provides to the Government a copy of the arbitral award, judgment or binding ADR decision in the RDC contractor's favor, along with a certification that the Prime Vendor has not satisfied such award, judgment or binding ADR decision within thirty (30) days of its effective date. The amount of the payment due shall be the amount of the arbitral award, judgment or binding ADR decision (excluding any amount for dispute resolution proceeding costs, including attorney fees), not to exceed the amount set forth in the arbitral demand or any amended arbitral demand, lawsuit, or demand for binding ADR. If the Government instead elects to deny the issuance of a guarantee, then upon such denial the RDC contractor shall be relieved of its obligation to accept any bookings for cargo tendered for shipment by or on behalf of the Prime Vendor and, if requested bookings are denied, the Government is free to use other carriers. If the Government fails to respond in writing to a request for a guarantee within thirty (30) days of receipt of such request, then such failure shall be treated as a denial of the request, and the RDC contractor shall be relieved of its obligation to accept any bookings for cargo tendered by or on behalf of the Prime Vendor and, if requested bookings are denied, the Government is free to use other carriers.
- (ii) In the event that the Government actually makes payment under a guarantee issued under subsections (i) of this section 1.2.4, the Government shall have a right to assert the Contractor's claim, up to the amount of its payment to the Contractor, against the party whose failure to pay a final arbitral award, judgment, or binding ADR decision resulted in the Government's obligation to pay under the relevant guarantee.
- (iii) The RDC contractor agrees to cooperate with Government efforts to resolve a claim against the party whose failure to pay a final arbitral award, judgment, or binding ADR decision resulted in the Government's obligation to pay under the relevant guarantee. This includes providing documents/correspondence relevant to the claim, producing personnel with knowledge of the claim, and advising on industry practices.

1.3 Third-Party Agreement.

Under the terms of the DLA Prime Vendor contracts, the Prime Vendor will execute a minimum level agreement which can be accepted or expanded by negotiation. The required format for the minimum level Prime Vendor/RDC Carrier Agreement is provided in Attachment 9.

1.3.2. Prime Vendor and RDC Contractor Agreements.

The RDC contractor is not required to negotiate a Prime Vendor/RDC Carrier Agreement (such as Attachment 7) in order to be considered for the award of cargo, however the RDC contractor is encouraged to enter into a written agreement with the Prime Vendor which should, as a guide, use the Prime Vendor/RDC Carrier Agreement (See Attachment 9) to define procedures to submit and process claims and resolve disputes arising in connection with U.S. Government ordered transportation services for non-Government owned cargo. A copy of the agreement and any changes thereto, shall be furnished to the RDC Contracting Officer. The RDC carrier and Prime Vendor may (but are not required to) supplement this minimum level of agreement with additional or more specific terms and conditions consistent with this Agreement and this Attachment 6

1.4 Supplementation Encouraged.

The RDC contractor is encouraged, but not required, to supplement the terms of Attachment 9 with each Prime Vendor by providing additional details, more specific procedures, or other terms that will facilitate claims processing and dispute resolution. Supplementary language must be consistent with Attachment 9 and this Attachment 8. A copy of any supplemental terms must be provided to the RDC Contracting Officer. In negotiating any agreement, the RDC contractor should consider that the Prime Vendor may exercise a right of setoff, if any exists, involving a commercial contract or other remedial action against the RDC contractor. Similarly, the RDC contractor may take remedial action or other actions to protect its interests against the Prime Vendor, including the assertion of a lien, if any exists, on Prime Vendor cargo.

1.5 Third Party Beneficiary.

As noted in Section 1.2, except for the subjects covered in Sections 1.2 and 1.3 (claims procedures and claims dispute resolution procedures related to Prime Vendor cargo, including Prime Vendor claims against a RDC Contractor for loss/damage to Prime Vendor cargo; RDC Contractor claims against a Prime Vendor for loss/damage to RDC Contractor equipment; RDC Contractor claims against a Prime Vendor for detention of RDC Contractor equipment; RDC Contractor claims against a Prime Vendor for port storage charges (e.g. while cargo delayed through fault of Prime Vendor or request of Prime Vendor); RDC Contractor claims against a Prime Vendor for trucker wait time (e.g. while cargo delayed through fault of Prime Vendor or request of Prime Vendor); RDC Contractor claims against a Prime Vendor for reefer maintenance (e.g. while reefer in custody of Prime Vendor, or cargo delayed through fault of Prime Vendor or request of Prime Vendor); and claims between the Prime Vendor and RDC Contractor for services not ordered by the Government), and procedures for ending container detention charges) and except for the modified provisions described in 1.6 or other exceptions specified elsewhere in this contract, the terms, conditions and prices of this RDC contract apply equally to the transportation of both Government owned and non-Government owned cargo. The Prime Vendor/RDC Carrier Agreement (Attachment 9) incorporates the RDC-05 Contract by reference.

1.5.1 Prime Vendor as Third Party Beneficiary.

The Prime Vendor is an express third party beneficiary of the terms, conditions, and prices of this RDC 05 contract when it describes the rights and obligations between the Prime Vendor and RDC Contractor. See the list of subjects at 1.5 and the modified provisions of 1.6. The Prime Vendor's rights as a Third Party Beneficiary exist (and could be most useful) in the absence of a Prime Vendor/RDC Carrier Agreement (Attachment 9). A third party beneficiary is not subject to amendments and modifications of this contract and relevant DLA Prime Vendor contracts.

1.5.2 Carrier as Third Party Beneficiary.

The RDC Contractor is an express beneficiary of the terms, conditions and prices of the DLA Prime Vendor contract when it describes the rights and obligations between the Prime Vendor and RDC Contractor, including descriptions in this contract incorporated by reference into the DLA contract. The RDC Contractor's rights as a Third Party Beneficiary exist (and could be most useful) in the absence of a Prime Vendor/Carrier Agreement (Attachment 7). A third party beneficiary is not subject to amendments and modifications of this contract and relevant DLA Prime Vendor contracts.

1.6 Other RDC Provisions Impacted by the Special Provisions for the DLA Prime Vendor Program.

Unless specified elsewhere in this contract, the terms of Attachment 8, including the additional items below, are the only variations in RDC terms and conditions applicable to the transportation of cargo in the DLA Prime Vendor Program. The purpose of these variations is to acknowledge that such transportation involves Prime Vendor-owned cargo, not Government-owned cargo; that RDC carriers deliver cargo back to the Prime Vendor, not to the Government; and that the real parties in interest for Prime Vendor cargo movements are generally the Prime Vendor and the RDC contractor, not the Government.

- a. Paragraph (d) of FAR 52.212-4, is supplemented in accord with Section 1.4.
- b. FAR 52.233-4 does not apply to claims of breach of the business agreement between the Prime Vendor and the Contractor.
- c. DFARS 252.233-7001 does not apply to disputes between the Prime Vendor and the Contractor. See Section 1.4.
- d. Section 2.7.1, Liens/Seizure of Cargo of the "Additional Clauses" Section of this contract shall not apply to Prime Vendor cargo. (Similarly, the DLA Prime Vendor contract does not prohibit the Prime Vendor from exercising any right of setoff involving a commercial contract or other remedial action to protect its interest with respect to RDC Contractor(s).)
- e. The clause "Application of COGSA for Non-Government Owned Cargo" at Section 2.2 of the "Additional Clauses" Section shall apply to transportation of Prime Vendor Cargo instead of the clause "Application of COGSA" at section 2.1.
- f. Under PWS paragraph 3.G.4, the Prime Vendor, not the Government, pays the Contractor for detention caused by the Prime Vendor. The Prime Vendor and RDC Contractor are not required to use the purchase of a container as a procedure to terminate container detention charges. Under PWS paragraph 3.G.8, the Prime Vendor is required to provide notice, reimbursement, etc. to the RDC Contractor, not the U.S. Government. The Prime Vendor and RDC Contractor are not required to use the purchase of a container as a procedure for resolving container damages.
- g. Under PWS paragraph 3.G.9, the Prime Vendor's representative, not the Ordering Officer, COR, or Contracting Officer, determines theft or disappearance of Contractor equipment. The Prime Vendor and RDC Contractor are not required to use the purchase of a container as a procedure for resolving container theft or disappearance.
- h. Under PWS paragraph 3.G.10.1, the Prime Vendor, not the Government, reimburses the Contractor for onward movement delays cause by the Prime Vendor.
- i. Under PWS paragraph 6.C.2, the Prime Vendor, not the Government, pays the RDC Contractor for detention caused by the Prime Vendor. The Prime Vendor and RDC Contractor are not required to use the purchase of a container as a procedure for terminating container detention charges.
- j. Under Attachment 6, Invoicing and Payment, the Prime Vendor and the RDC Contractor are required to develop their own invoicing and payment procedures for matters between them as described in paragraph A.1 I. Pursuant to Attachment 7, the Prime Vendor and the RDC Contractor may develop their own reports and formats.

1.7 The DLA Contracting Officer will deliver a signed Prime Vendor/RDC Carrier Agreement executed by the Prime Vendor to the RDC Contracting Officer when a specific Prime Vendor is awarded a DLA Prime Vendor contract. The DLA Contracting Officer shall also provide the name, address, and contact information for the specific Prime Vendor, as necessary. The RDC Contracting Officer will forward the agreement to the RDC contractors who

have accepted rates for the Prime Vendor location(s). Once the RDC contractor has signed the agreement(s), the signed agreement(s) is forwarded to the Prime Vendor with a copy forwarded to the RDC Contracting Officer.