



**SPECIALTY METALS RESTRICTIONS
DEPARTMENT OF DEFENSE**

SUMMARIES

DOD Waives Specialty Metals Restrictions For Buys of Commercial-off-the-Shelf Items

The Defense Department Oct. 26 issued new guidance that allows the department to buy commercial-off-the-shelf (COTS) items without regard to the domestic source restrictions that otherwise apply to DOD acquisitions of specialty metals--such as titanium and certain metal alloys--or of end items that contain such metals.

The guidance, which takes the form of a class deviation, narrowly defines a COTS item as one that is offered to the government, without modification, in the same form in which it is sold in the commercial marketplace. "A component can be a COTS item if it is offered to the Government, without modification, as part of an end item purchased by the Government," Director of Defense Procurement and Acquisition Policy Shay Assad explained in the guidance.

"The installation of a component in the end product is not in itself a modification. COTS items that are modified prior to incorporation in the end item are no longer COTS items," he continued. The new class deviation (Class Deviation 2007-O0011) lists 10 U.S.C. 2533(b)(a)(1)--which was included in the fiscal year 2007 defense authorization act to codify the specialty metals domestic source restrictions that previously were addressed by the Berry Amendment--as a statute that is inapplicable to the acquisition of COTS items, in accordance with 41 U.S.C. 431. Section 431 requires that the Federal Acquisition Regulation list provisions of law that are inapplicable to acquisitions of COTS items.

During the legislative back-and-forth that culminated in 10 U.S.C. 2533(b)(a)(1), contractors argued strongly for a commercial item exemption to any specialty metal domestic source restriction, but such an exemption, which was included in the Senate version of the FY 2007 authorization bill, was dropped from the final measure by House and Senate conferees. However, the new class deviation is limited to COTS items, and defines these items more narrowly than the current regulatory definition of commercial item, which can include items "of a type" sold to the commercial marketplace.

DOD initially implemented 10 U.S.C. 2533(b)(a)(1) in a class deviation issued Dec. 6, 2006 (Class Deviation 2006-O0004). "The basic memo of Class Deviation 2006-O0004 remains in effect, except for two minor corrections," Assad said in issuing the new guidance. These corrections

involve the earlier use of the term "end product" and a change in the date applicable to the one-time waiver for inadvertent noncompliance with the restrictions.

The new class deviation remains in effect until incorporated in the Defense Federal Acquisition Regulation Supplement (DFARS) or rescinded. DOD July 2 proposed a DFARS rule that would waive the domestic source restrictions under 10 U.S.C. 2533(b) when the department buys COTS items.

In issuing the proposed rule, DOD said the waiver "is critical to DOD's access to the commercial marketplace." COTS manufacturers make component purchasing decisions based on market factors including cost, quantity, and availability, but "not the county in which the specialty metals in the components are melted," DOD explained.

Given that DOD often acquires commercial items in large quantities, it is costly and burdensome for the department to track the source of the specialty metals it purchases, it said in the proposed rule. Further, since Pentagon purchases of COTS items typically represent a small percentage of a commercial manufacturer's revenue, those companies are often unwilling to incur the large costs required to track the source of COTS speciality metal components, and therefore are unable to provide COTS items to DOD. DOD also said that the domestic nonavailability determination process prescribed under domestic sourcing statute to specialty metals "poses difficulties for DOD in meeting mission-sensitive requirements in a timely manner."

Industry applauded the proposed rule, reinforcing DOD's concerns about the cost and difficulties of compliance with the restrictions. However, House lawmakers, including Rep. Duncan Hunter (R-Calif.), the ranking Republican on the House Armed Services Committee, and an advocate for domestic specialty metals acquisition, argued strongly against the proposed rule. The rule would "gut the law" and repeal large portions of the specialty metals restrictions contained in 10 U.S.C. 2533(b), Hunter and Reps. Robin Hayes (R-N.C.) and Tim Ryan (D-Ohio) said in comments to the department.

The lawmakers argued that the legislative process should be allowed to play out. The House version of the FY 2008 defense authorization bill (H.R. 1585) includes language that would make modifications to the current speciality metals domestic sourcing law. Separately, Hunter said in a Sept. 24 letter to Army Secretary Peter Geren that he believes the United States "must preserve domestic access to certain specialty materials," but the current domestic source law, applied appropriately, allows DOD to fulfill urgent military requirements.

The class deviation and an attachment are available at:
<http://www.acq.osd.mil/dpap/policy/policyvault/2007-1439-DPAP.pdf>.