



**SPECIALTY METALS RESTRICTIONS  
DEPARTMENT OF DEFENSE**

**SUMMARIES**

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**Rule Waives Specialty Metals Restrictions When Defense Department Buys COTS Items**

The Defense Department Nov. 8 released a final rule waiving the statutory domestic sourcing restrictions that otherwise apply to DOD acquisition of specialty metals when the department is buying commercial off-the-shelf (COTS) items.

Under the rule, a COTS item is defined as any item of supply that is: (i) a commercial item as defined in the Federal Acquisition Regulation (FAR 2.101); (ii) sold in substantial quantities in the commercial marketplace; and (iii) offered to the government, without modification, in the same form it is sold in the commercial marketplace.

"Unless this COTS waiver is implemented, DOD will not have access to many U.S. COTS items that contain noncompliant speciality metals. The status quo is unacceptable if DOD is to meet its commitments to our warfighters," said rule writers said.

The rule is accompanied by a lengthy and detailed discussion of the legal and practical concerns expressed in comments received from 34 supporters and seven opponents of the proposed rule issued in July. This discussion makes clear that the department agrees with the defense industry commenters that said compliance with the specialty metals domestic source restrictions--codified at 10 U.S.C. 2533(b) in accordance with the fiscal year 2007 defense authorization act (Pub. L. 109-364)--is ultimately so costly, time consuming, and burdensome as to deter manufacturers of COTS items from participating in the DOD marketplace, and makes it difficult for the department to fulfill military equipment requirements.

Further, DOD must comply with 10 U.S.C. 2377, which mandates that it procure commercial items to the "maximum extent practicable," the rule writers pointed out.

The DOD final rule:

- creates a new Defense FAR Supplement (DFARS) Section 212.570 to list 10 U.S.C. 2533b as inapplicable to contracts and subcontracts for the acquisition of COTS items; and
- includes acquisitions of COTS items containing specialty metals as an exception to the domestic source restrictions at DFARS 225.7002-2.

The COTS definition does not include "bulk cargo" defined under Section 3 of the Shipping Act of 1984. The rule essentially puts in the DFARS the terms of the class deviation from the FAR that was issued by DOD Oct. 26 to waive specialty metals restrictions in acquisitions of COTS items. The rule is effective immediately, and the rule writers noted that FAR 1.108(d) allows contracting officers, at their discretion, to include FAR and DFARS changes in existing contracts if given "appropriate consideration."

A key issue for many commenters was the costs of complying with requirements to use specialty metals melted or produced in the United States or qualifying countries. "Twenty-seven respondents, more than for any other issue raised, expressed concern that the law increases costs, contributes to longer lead times, and creates quality and availability problems, and that it is either impossible, time consuming, or too burdensome to comply with this statute in the COTS marketplace," the rule writers said.

Even if the price of the specialty metals themselves is not significantly different for U.S. and foreign metals, as two commenters asserted, numerous commenters indicated that DOD incurs greater costs for COTS items that contain specialty metals because manufacturers pass on the expense of having to track and segregate compliant from noncompliant COTS items.

"While the cost of the compliant and noncompliant specialty metal contained in COTS items might be relatively the same, the added costs (which may be significant) to ensure that the final COTS part or sub-assembly is compliant must also be taken into consideration," DOD said. "Further, the cost of setting up dual lines (at which point it is no longer really a COTS item), is usually prohibitive," DOD said.

DOD also said several commenters indicated that COTS producers make purchasing decisions according to costs, quality, delivery time, availability, and maintaining state-of-the-art products, "not on the country in which the specialty metal contained in the components were melted." As a result, it said, DOD frequently finds itself in situations where it is impossible to accept common COTS items that are embedded within the "big six" classes of products covered in the specialty metals law.

DOD used the example of a military truck with an electronically controlled COTS transmission, not modified for military use, where the manufacturer is uncertain whether the specialty metal used in the transmission is compliant with domestic sourcing restrictions. In fact, this scenario recently played out, when the Army's refusal to accept the delivery 1,000 Family of Medium Tactical Vehicles due to domestic sourcing concerns drew an objection from Rep. Duncan Hunter (R-Calif.), the ranking Republican on the House Armed Services Committee and a vigorous proponent of domestic sourcing requirements for specialty metals.

In such a case, DOD has two alternatives, the rule writers said: shut down the supplier's line to obtain compliant transmissions, or process and approve a domestic nonavailability determination (DNAD), which requires extensive market research and documentation. As for the first alternative, DOD said the law does not require manufacturers in the United States to make changes to their processes or systems in order to comply with DOD-unique restrictions.

On the second alternative, DOD said obtaining a DNAD may entail "thousands of hours of work, at considerable cost to the taxpayer and a significant addition in lead-time to the acquisition cycle."

DOD rejected assertions made by some commenters that the department has failed to perform sufficient market research and analysis in issuing DNADs. "DOD takes great care to fully support each DNAD and does not approve a DNAD casually," the rule writers said. "DOD procures commercial items to reduce costs, speed acquisition, reduce development risks, gain access to most leading-edge commercial technology, increase its ability to secure increased production, and leverage the competition inherent in the global commercial market," DOD said.

Commenters who expressed opposition to the rule, including the specialty metals industry and some members of Congress, contend, however, that DOD risks gutting the law on domestic specialty metals restrictions that Congress modified last year in an effort to protect the U.S. industrial base while providing DOD with some flexibilities to procure specialty metals to meet warfighter demands.

In Aug. 1 comments on the then-proposed rule, Reps. Hunter, Robin Hayes (R-N.C.) and Tim Ryan (D-Ohio) said a COTS exemption regarding specialty metals restrictions could establish a precedent where similar exemptions might be applied to other items—such as textiles covered by the Berry amendment. Following the release of the DOD class deviation that served as a precursor to the rule, a spokesperson for Hunter told reporters that the congressman stands by his comments on the proposed rule. Hunter "still has quite a few concerns" that DOD's interpretation of the domestic sourcing restrictions for specialty metals set out in the FY 2007 defense authorization act is inconsistent with congressional intent, the spokesperson said.

Defense authorization language now in the hands of House and Senate conferees could alter the specialty metals debate, as provisions included in the House bill would modify the specialty metals sourcing language Congress agreed to last year and curtail DOD's use of some of the increased flexibilities provided at that time (see related story in this issue).

*The DOD final rule on the COTS waiver of domestic specialty metals restrictions (72 Fed. Reg. 63,113, 11/8/2007) is available at: <http://frwebgate1.access.gpo.gov/cgi-bin/waisgate.cgi?WAIIdocID=562011165864+0+0+0&WAIAction=retrieve>.*