

U.S. Department of Defense Publishes Final Rule on Specialty Metals Restriction

by John E. Jensen and Orest J. Jowyk

The Department of Defense (“DoD”) has published a final rule implementing recent statutory changes in its acquisition of specialty metals. 74 FR 37626, July 29, 2009. The final rule, effective July 29, 2009, implements provisions of both the National Defense Authorization Act for Fiscal Year 2007 (P.L. 109-364) and the National Defense Authorization Act for Fiscal Year 2008 (P.L. 110-181). This final rule made only minor changes to the proposed rule issued last year. 73 FR 42300, July 21, 2008. The rulemaking is significant because it creates a settled scheme designed to protect critical defense industries but also recognizes numerous necessary exceptions to the general requirement that DoD purchase only specialty metal melted or produced in the United States.

Federal law generally restricts DoD from acquiring specialty metals from non-domestic sources. In 1972, Congress added the restriction on acquiring specialty metals to the Berry Amendment, which contained restrictions affecting various products such as textiles. Over the years the statutory restriction on specialty metals grew less workable. The extent of specialty metals in DoD products increased, as did DoD’s interest in acquiring commercial products and concerns about noncompliance by industry. Congress addressed these issues in 2007 and again in 2008. As a technical matter, it removed the restriction from the Berry Amendment and placed it in its own section of the U.S. Code, 10 U.S.C. § 2533b, and with it created a broad statutory scheme of exceptions to the restriction to render it more compatible with industry practice and DoD requirements.

The specialty metals restriction covers two general categories of items: It restricts DoD from acquiring “end items” or “components” containing specialty metals that were not “melted or produced” in the United States in any of six categories of acquisition: aircraft, missile and space systems, ships, tank and automotive items, weapon systems, or ammunition. Second, it restricts DoD from acquiring the specialty metal itself (e.g., raw stock, castings, and forgings) as an end item if it was not melted or produced in the United States, regardless of whether it relates to one of the six categories of acquisition. The two restrictions are

now implemented primarily in two new DFARS clauses: 252.225-7008, Restriction on Acquisition of Certain Articles Containing Specialty Metals (Jul 2009), and 252.225-7008, Restriction on Acquisition of Specialty Metals (Jul 2009), respectively.

The key term in the restriction, “specialty metal,” means any of the following:

- Steel
 - With a maximum alloy content exceeding one or more of the following limits: manganese, 1.65 percent; silicon, 0.60 percent; or copper, 0.60 percent; or
 - Containing more than 0.25 percent of any of the following elements: aluminum, chromium, cobalt, molybdenum, nickel, niobium (columbium), titanium, tungsten, or vanadium;
- Metal alloys consisting of
 - Nickel or iron-nickel alloys that contain a total of alloying metals other than nickel and iron in excess of 10 percent; or
 - Cobalt alloys that contain a total of alloying metals other than cobalt and iron in excess of 10 percent
- Titanium and titanium alloys; or
- Zirconium and zirconium alloys.

The term “end item” means “the final production product when assembled or completed, and ready for issue, delivery, or deployment.” The term “component” means “any item supplied to the Federal Government as part of an end item or of another component.” The restriction applies to end items and components without regard to whether they were produced by the prime contractor or a subcontractor.

Exceptions And Waivers

As implemented by the new DFARS rule and clauses, the specialty metals restriction is subject to 15 listed exceptions or bases for waiver. Many existed before the recent legislation and others are new provisions.

The final rule first provides that any of the following types of DoD acquisitions are wholly exempt from the specialty metals restriction:

- **Small Purchases**—Small purchases, as defined by the simplified acquisition threshold, which is ordinarily \$100,000, but under certain circumstances is \$250,000 or \$1 million.
- **Combat Operations**—Acquisitions outside the United States in support of combat operations.
- **Contingency Operations**—Acquisitions in support of contingency operations.
- **Unusual and Compelling**—Noncompetitive acquisitions based on the unusual and compelling urgency exception of FAR 6.302-2.
- **Commissaries**—Acquisitions by commissaries and other non-appropriated fund instrumentalities of the U.S. Government.

- **Foreign Comparative Testing**—Acquisitions of items for test and evaluation under the foreign comparative testing program (10 U.S.C. 2350a(g)).
- **National Security Waiver**—Acquisitions determined by the Under Secretary of Defense for Acquisition, Technology, and Logistics (“USD(AT&L)”) to be necessary to the national security interests of the United States. This authority is non-delegable and the USD(AT&L) must notify Congressional defense committees of the waiver before executing the determination or, in the case of an urgent national security requirement, within seven days after it is executed. After executing the waiver, the USD(AT&L) must ensure the contractor has a plan to achieve future compliance with the restriction.

The final rule also provides that the following exceptions apply on an item-by-item basis to end products or components:

- **Electronic Components**—The specialty metals restriction does not apply to “electronic components,” unless DoD has determined that domestic availability of a particular electronic component is critical to national security. One significant feature of the final rule is that it clarified that the definition of “electronic components” excludes high performance magnets.
- **Commercially Available Off-the-Shelf (“COTS”) Items**—The restriction does not apply to a COTS item, which is defined as “(A) A commercial item . . . ; (B) Sold in substantial quantities in the commercial marketplace; and (C) Offered to the Government . . . without modification, in the same form in which it is sold in the commercial marketplace,” whether acquired at the prime or subcontract level.

The COTS exception is broad, but it excludes contracts or subcontracts for the acquisition of: (a) specialty metal mill products that have not been incorporated into end items, subsystems, assemblies, or components; (b) forgings or castings of specialty metals that have not been incorporated into COTS end items, subsystems, or assemblies; (c) high performance magnets unless they are incorporated into COTS end items or subsystems; and (d) COTS fasteners unless either (i) the fasteners are incorporated into COTS end items, subsystems, assemblies, or components, or (ii) the fastener manufacturer certifies that during the calendar year at least 50% of all its specialty metal will be melted or produced domestically.

During fiscal year 2009, contractors must report use of the COTS exception in accordance with a new clause, DFARS 252.225-7029, Reporting of Commercially Available Off-the-Shelf Items that Contain Specialty Metals and Are Incorporated Into Noncommercial End Items (Jul 2009). The Final Rule reduced the reporting requirement to COTS items valued at more than \$100 per item.

- **Fasteners That Are Commercial Items**—The restriction does not apply to fasteners that are commercial items purchased from a manufacturer of the fasteners if the fastener manufacturer certifies that during the calendar year at least 50% of all its specialty metal will be melted or produced domestically.
- **Qualifying Countries**—The restriction does not apply to aircraft, missile and space systems, ships, tank and automotive items, weapon systems, or ammunition items manufactured in a “qualifying country” or containing specialty metals melted or produced in a qualifying country. The exception furthers the United States’ trade agreements with the following governments: Australia, Austria, Belgium, Canada, Denmark, Egypt, Federal Republic of Germany, Finland, France, Greece, Israel, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and United Kingdom of Great Britain and Northern Ireland. Manufacturers in qualifying countries actually enjoy more specialty metals sourcing flexibility than do U.S. manufacturers. U.S. manufacturers must ensure that the specialty metals in their products were melted or produced in the United States or a qualifying country, or that the

component containing the specialty metal was manufactured in a qualifying country. Qualifying country manufacturers may include in their products specialty metals melted or produced in any country, including a non-qualifying country.

- **Nonavailability**—The restriction does not apply if domestic specialty metals melted or produced in the United States cannot be acquired as and when needed at a fair and reasonable price in a satisfactory quality, a sufficient quantity, and in the required form. The term “in the required form” does not refer to the particular end item or component, but to “the form of mill product” in the appropriate grade used to make the item. To invoke this exception, the Secretary of the concerned military department (in the case of one contract) or the USD(AT&L) (in the case of multiple contracts) must make a Domestic Nonavailability Determination (“DNAD”), and must publish a notice of intent to make the determination on www.fedbizopps.gov 30 days in advance.
- **Minimal Quantity**—The restriction does not apply to an end item if the total weight of noncompliant specialty metal does not exceed two percent of the total weight of all specialty metal in the end item. This *de minimus* exception can be used with other exceptions. Only the noncompliant specialty metal that is not covered by another exception has to be considered in calculating whether the noncompliant content is less than two percent.
- **Commercial Derivative Military Articles**—The restriction does not apply to aircraft, missile and space systems, ships, tank and automotive items, weapon systems, or ammunition items that DoD has determined constitute “commercial derivative military articles,” if the contractor and subcontractor agree to purchase a certain amount of domestic specialty metal for use in producing both the commercial derivative military article and the related commercial article. A commercial derivative military article is defined as “an item procured by the Department of Defense that is or will be produced using the same production facilities, a common supply chain, and the same or similar production processes that are used for the production of articles predominantly used by the general public or by nongovernmental entities for purposes other than governmental purposes.” An additional new DFARS clause, 252.225-7010, Commercial Derivative Military Article—Specialty Metals Compliance Certificate (Jul 2009), further implements this provision.
- **One-Time Waiver**—Finally, the restriction does not apply to end items or components produced, manufactured, or assembled before October 17, 2006, if final acceptance will take place before September 30, 2010, and if DoD grants a waiver. The contracting officer must determine in writing that it would not be practical or economical to remove or replace the specialty metals, that the contractor or subcontractor have in place a plan to ensure future compliance, and that the non-compliance was not knowing. The determination must be approved by the USD(AT&L) or the service acquisition executive of the military department concerned. The contracting officer also must publish notice of the waiver 15 days after approval of the determination on www.fedbizopps.gov.

For further information, please contact:

John E. Jensen (bio)
Northern Virginia
+1.703.770.7560
john.jensen@pillsburylaw.com

Orest J. Jowyk (bio)
Northern Virginia
+1.703.770.7736
orest.jowyk@pillsburylaw.com

This publication is issued periodically to keep Pillsbury Winthrop Shaw Pittman LLP clients and other interested parties informed of current legal developments that may affect or otherwise be of interest to them. The comments contained herein do not constitute legal opinion and should not be regarded as a substitute for legal advice.

© 2009 Pillsbury Winthrop Shaw Pittman LLP. All Rights Reserved.