



How to Sell Fasteners and Remain DFARS Compliant

A Presentation for the Pacific West Fastener Association
on Laws, Regulations, and Compliance Requirements for DoD Contracts

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Agenda



- ▶ **General Information Resources**
- ▶ **DoD's Procurement Environment**
- ▶ **Buy American Act (BAA) – Basics and Compliance Issues**
- ▶ **Trade Agreements Act and Implications for BAA Application and Compliance**
- ▶ **10 USC 2533a, “The Berry Amendment”**
- ▶ **10 USC 2533b, “Specialty Metals Restrictions”**
- ▶ **DFARS Final Rule implementing FY08 NDAA Sections 804 and 884**
- ▶ **Fastener Exception**
- ▶ **Specialty Metals Block Change**



General Information Resources

- ▶ Defense Acquisition University Continuous Learning Modules
 - Buy American Act
 - Berry Amendment training – 2,115 students completed training between 6/25 and 12/15
 - Now split into two parts – 10 U.S.C. 2533a (Clothing, fibers, fabrics, yarn, food, hand/measuring tools)
10 U.S.C. 2533b (Specialty Metals)
- ▶ Defense Procurement & Acquisition Policy Website
 - <http://acq.osd.mil/dpap/>
 - http://www.acq.osd.mil/dpap/cpic/ic/berry_amendment_10_usc_2533a.html
 - http://www.acq.osd.mil/dpap/cpic/ic/restrictions_on_specialty_metals_10_usc_2533b.html
 - http://www.acq.osd.mil/dpap/cpic/ic/restrictions_on_purchases_from_non-us_sources.html



ENVIRONMENT

- ▶ **DOD ACQUISITIONS ARE SUBJECT TO A MYRIAD OF DOMESTIC PREFERENCE PROVISIONS – STATUTORY, REGULATORY AND TREATY-BASED**
- ▶ Buy American Act (BAA)
- ▶ General Agreement on Tariffs and Trade (GATT) – Replaced by the World Trade Organization (WTO) in 1995
 - Trade Agreements Act of 1979 (TAA)
 - World Trade organization Government Procurement Agreement (WTO GPA)
 - Caribbean Basin Trade Initiative (CBTI)
- ▶ **Free Trade Agreements (FTAs)** – North American Free Trade Agreement (NAFTA), FTAs with Australia, Central American countries (El Salvador, Guatemala, Honduras or Nicaragua, Bahrain, Chile, Morocco, and Singapore)
- ▶ **Authorization and Appropriation Acts**
 - 10 USC. 2533a (Berry Amendment)
 - 10 USC 2533b (Specialty Metals restrictions)
 - 10 USC. 2534
 - Others
 - See website on domestic preference legislation



ENVIRONMENT (con't)

- ▶ These statutes, regulations and agreements deal with the following elements differently
 - Origin (Domestic or U.S. made, qualifying, eligible or foreign)
 - Content
 - BAA - component test
 - TAA - substantial transformation
 - Berry Amendment and Special Metals Restriction – domestic (unless exception applies)
 - Covered products
 - BAA – all supplies (unless exception applies)
 - TAA – limited coverage for DoD (dual use and commercial items)
 - Berry Amendment – applicable only to DoD procurement and coverage includes textiles, food, etc.
 - Specialty Metals Restriction – applicable only to DoD procurement and covers six major classes of systems or when prime or DoD is procuring specialty metal (itself)
 - Thresholds
 - BAA – Micro purchase threshold
 - Various trade agreements - vary widely and are revised every two years
 - Berry Amendment and Specialty Metals Restriction – Simplified Acquisition Threshold



ENVIRONMENT (con't)

These arrangements are sometimes inconsistent and confusing and make compliance difficult

► Examples:

1. • Under the BAA, there is a source requirement and the domestic content requirement must be greater than 50 percent.
 - Under the WTO GPA and the various FTAs, there is a source requirement but no content requirement but the product must be a “covered product” (DFARS 225.4-70).
 - Under the Berry Amendment and the Specialty Metals restrictions, you have both a 100% source and a 100% content restriction.
2. The BAA is waived for procurements subject to the TAA, but there is no such exemption for products covered by the Berry Amendment and the Specialty Metals restriction.
3. Domestic products are not the same as U.S. made end products.



BUY AMERICAN ACT (BAA) 41 USC. 10 & E.O. 10582 (as amended) FAR 25.1 & DFARS 225.1



Acquire only domestic end products for public use inside the United States

▶ Domestic end product is defined as:

1. An unmanufactured end product mined or produced in the United States; or
2. An end product manufactured in the United States, if the cost of its components, mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components.

▶ “Domestic” tied to content and product, not country or company

▶ BAA applies only at the end item level. Unlike the Berry Amendment, it does not flow down to subcontractors. The prime contractor is responsible for delivering a product that meets the domestic end product definition

▶ How do we know if a component is domestic? See the underlined portion of the definition above, i.e. mined, produced or manufactured in the United States.



BUY AMERICAN ACT (BAA) 41 USC. 10 & E.O. 10582 (as amended) FAR 25.1 & DFARS 225.1



Exceptions to application:

1. Exceptions under the BAA (FAR)

- a. Public Interest 25.103(a)
- b. Non-Availability 25.103(b)
- c. Unreasonable Cost 25.103(c)
- d. Resale 25.103(d)

2. DoD Exceptions under the BAA (DFARS)

- a. Public Interest 225.103(a)
 - a. For example, Reciprocal Procurement Memoranda of Understanding – a list of the countries is contained is at DFARS 225.872 – identified as qualifying countries.
 - b. Non-availability 225.103(b)
 - c. Unreasonable Cost 225.103(c)

In DoD, a 50% evaluation differential is applied to each offer that is not exempt from the application of the BAA, i.e. qualifying country or eligible country offer.

3. General Exceptions by trade agreements FAR 25.4 and DFARS 225.4



Reciprocal Procurement MOUs and Qualifying Countries



- ▶ Origin:
 - 10 U.S.C. 2457
 - Camp David Accords
 - National Security Considerations
- ▶ As a result of these MOUs, the BAA is waived for qualifying countries under a public interest determination made by the Secretary of Defense.
- ▶ What are the implications of this waiver?
 - Most significant is the fact that components purchased from qualifying countries are counted as domestic components for the purpose of the greater than 50% component cost requirement
 - The Department can procure end items from qualifying countries.



Trade Agreements

- ▶ The issue for trade agreements is origin and brings into focus “substantial transformation”.
 - Under the trade agreements, the test to determine country of origin is “ **substantial transformation** ” (*i.e.*, transforming an article into a new and different article of commerce, with a name, character, or use distinct from the original article). – FAR 25.001(c)(2)
 - We constantly receive questions about the degree of transformation and just what is a new and different article of commerce.
 - It is only in trade agreement related procurements that the term “U.S. made end product” is used.
 - “U.S.-made end product” means an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. FAR 25.001



Trade Agreements (con't)

- ▶ The U.S. is not a designated country and until 2002, DoD treated U.S. made end products were considered foreign items.
 - In 2002, the Under Secretary of Defense (Acquisition, Technology & Logistics) made a determination that for procurements covered by the World Trade Organization Government Procurement Agreement, the Under Secretary of Defense (Acquisition, Technology, and Logistics) that it is inconsistent with the public interest to apply the Buy American Act to end products that are substantially transformed in the United States.
 - Again, we constantly receive questions about what constitutes substantial transformation. Most of the time, the products that are being discussed do not constitute substantial transformation given the information we are provided. Our recommendation is to look at case law and to discuss with Customs Agency.
 - Issues?



Berry Amendment

▶ What is it?

- **A statutory requirement – 10 U.S.C. 2533a**
- Restricts the Department of Defense from using funds appropriated or otherwise available to DoD for procurement of:
 - **“food, clothing and the materials and components thereof, other than sensors, electronics, or other items added to, and not normally associated with, clothing, tents/ tarpaulins/covers, cotton and other natural fiber products, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, canvas products, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles), or any item of individual equipment manufactured from or containing such fibers, yarns, fabrics or materials, and hand or measuring tools,,,”**
 - that are not grown, reprocessed, reused, or produced in the U.S.
- For more detail,. See DFARS 225.7002-1



Anti-Deficiency Act (ADA) Violation



- ▶ Berry implies a prohibition against the purchase of certain items with “....funds appropriated or otherwise available to the Department....”
- ▶ It is a violation of the Berry Amendment if DoD pays for equipment that is non-compliant.
- ▶ It may also be a violation of the Anti-Deficiency Act (31 U.S.C. 1341) which provides for:
 - Fines up to \$5000.00
 - Imprisonment up to 2 years (31 U.S.C. 1350)
 - Adverse personnel actions
- ▶ General Rule —The Berry Amendment:
 - Applies to both End Products and Components



FLOW DOWN REQUIREMENTS TO SUB-TIER SUPPLIERS



► Question - ARE YOU SURE it doesn't apply to what you buy?

- Generally, applies to both end items **AND** components.
- Covered items may be components in less-obvious procurements (ex. fiber material in fuel filters, cotton in medical gauze/bandages, specialty metals used in aircraft parts)
- Violations may lead to:
 - GAO & IG audit
 - Anti-Deficiency Act violations
 - Congressional interest
 - Many headaches!



What's The Difference Between Buy American Act And Berry Amendment or Specialty Metals Restriction?



➤ **Potential for much confusion**

- Berry Amendment only applies to DoD
 - Federal Supply Schedules may not meet requirements
 - So if you use them, you must insert the proper clause
- Does not have a commercial item exception
- Applies *in addition to* Buy American Act
- More restrictive than the Buy American Act
 - No “greater than 50% domestic component cost” allowance in Berry
 - No Qualifying Country exception (***except for specialty metals*** and only chemical warfare protective clothing in Berry)
 - No 50% proposal evaluation cost factor in Berry
 - Vendor may be in compliance with Buy American Act yet be in violation of Berry Amendment
- No contractor “certification” required such as with Buy American Act – requirements may be overlooked



Specialty Metals Restriction 10 U.S.C. 2533b

**Implementation of
Section 842 of the National Defense Authorization Act for
Fiscal Year 2007
and
Sections 804 and 884 of the National Defense Authorization
Act for Fiscal Year 2008**

Department of Defense (DoD) Implementation



Specialty Metals Definition

DFARS 252.225-7008

Restriction on Acquisition of Specialty Metals (July 2009)



- ▶ (i) **Steel**— (A) 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 (B) Containing more than 0.25 percent of any of the following elements: aluminum, chromium, cobalt, molybdenum, nickel, niobium (columbium), titanium, tungsten, or vanadium;
- ▶ (ii) **Metal alloys consisting of—**
 - ▶ (A) **Nickel or iron-nickel alloys** that contain a total of alloying metals other than nickel and iron in excess of 10 percent; or
 - ▶ (B) **Cobalt alloys** that contain a total of alloying metals other than cobalt and iron in excess of 10 percent;
- ▶ (iii) **Titanium and titanium alloys**; or
- ▶ (iv) **Zirconium and zirconium alloys**.
- ▶ (4) **“Steel”** means an iron alloy that includes between .02 and 2 percent carbon and may include other elements.



Background of 10 U.S.C. 2533b



- ▶ In **FY2007 NDAA, Section 842** moved specialty metals from the “Berry Amendment (10 U.S.C. 2533a) to its own statute – 10 U.S.C. 2533b
 - Stated the restriction flows down for **six major categories of products** and **applies to procurement of “end items, or components thereof”, not just to “specialty metals”**
 - Retained the **exception for Reciprocal Defense Procurement MOU** “qualifying” countries (Defense Federal Acquisition Regulation (DFARS) 225.872
 - Provided **two additional exceptions**:
 - **De minimis specialty** metal content in Commercially Available **Electronic Components**
 - **One-time Waiver** under certain circumstances **if** the specialty metals were incorporated into items produced, manufactured, or assembled in the U.S. **before the date of enactment of the Act** and where final acceptance occurs after the date of enactment of the Act.
 - Revised the domestic non-availability exception



Actions Taken by DoD in 2006 and 2007



Class Deviation 2006-O0004 of 6 Dec 06 – implemented 10 U.S.C. 2533b

Determinations of Domestic Non-Availability (DNADs)

4 Jan 07	Circuit Card Assemblies
10 Apr 07	Fasteners
7 Jun 07	Needle Roller Bearings
24 Oct 07	Caterpillar Diesel Engine parts

One-Time-Waivers (OTWs)

21 Jun 07	General Electric
9 Jul 07	Raytheon
10 Aug 07	Northrop Grumman
23 Aug 07	BAE
6 Nov 07	Boeing

COTS Exception

- 26 Oct 07 DPAP signed Class Deviation 2007-O0011
- 8 Nov 07 Final rule published in Federal Register



FY2008 National Defense Authorization Act



► Points of Sections 804 and 884, cont'd

- **Eliminates the usefulness of the domestic non-availability determination (DNAD) exception by:**
 - Narrows the definition of “required form”
 - Requires publication of a notice and request for information from interested parties in FedBizOpps if DoD intends to issue a broad DNAD
 - Requires DoD to take into consideration all information submitted that would apply to more than one contact, consider proprietary and protected information (national security), and provide public access to the DNAD consistent with national security and confidential business information
- Requires DoD to review and amend all existing rules and domestic non-availability determinations approved by Under Secretary of Defense (Acquisition, Technology and Logistics) (USD(AT&L)) between December 6, 2006 and January 28, 2008.
- Requires two reports to Congress, by December 30th of 2008 and 2009, describing types of items procured as COTS and incorporated into non-commercial items.



Process of DoD Implementation of Sections 804 and 884 of NDAA 2008



- ▶ President signed into law on January 28, 2008
- ▶ DoD Class Deviation signed January 2008
- ▶ Proposed Rule published July 2008 in Federal Register
 - Public comment avoids unintended consequences in implementation
 - Multiple and sometimes conflicting comments from the public
 - Definition of “produce”
 - Exceptions for COTS products
 - Required lengthy period to adjudicate changes to proposed rule
- ▶ DFARS Final Rule published July 29, 2009 and incorporated into new procurement actions after that date



DFARS Final Rule

Concerns Raised in Comment Period



Definition of “Produce”



- ▶ Produce - *The application of forces or processes to a specialty metal to create the desired physical properties through quenching and tempering of steel plate, gas atomization or sputtering of titanium, or final consolidation of non-melt derived titanium powder or titanium alloy powder.*
- ▶ Some in industry felt this was too broad; felt quenching and tempering was an insignificant process compared to “melting”
- ▶ DoD disagreed:
 - Melting is only one stage (1/3) in a multi-step process
 - Heat treatment controls microstructure (mechanical and physical properties), very important to military requirements
 - Department of Defense performed an industrial capabilities assessment in 2007 to support rapid production of the MRAP vehicles and other important defense programs relying on protective armor.
 - Thin gauge MIL- A grade steel armor was the limiting factor in domestic production.
 - North American mills collectively capable of producing up to 12,000 tons per month of thin gauge armor steel plate. All four stated quenching and tempering operations (not steel melting capacity or ingot/slab availability) were the limiting factor.
 - Three of the mills rely on ingot/slab melted outside the US (one of the mills is in Canada)
 - If these mills were excluded from participation, the sustained rate for MRAP would have been limited to 550 vehicles per month instead of the actual sustained rate of 1,100.



Definition of “COTS”



- ▶ Means *any item of supply that is – (A) a commercial item; (B) sold in substantial quantities in the commercial marketplace; and (C) Offered to the Government, under this contract or a subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace.*
- ▶ DoD definition contains exceptions for *specialty metal mill products, forgings and castings, high performance magnets or fasteners unless these are contained in COTS end items, subsystems, or assemblies.*
- ▶ Specialty metals industry expressed concerns that the definition was too broad and should not allow modifications at the next higher tier in the supply chain, specifically asking that blanks not be considered COTS.
- ▶ We added language to explain that blanks are not COTS, but are castings.



DoD Implementation of Sections 804 and 884, NDAA 2008 - Fasteners



► Fasteners

- Fasteners that are commercial items contained in COTS items are considered compliant.
- Fasteners that are commercial items, and not incorporated in COTS items, can be considered compliant only if -
- The fastener manufacturer certifies in good faith that it will purchase, during the relevant calendar year, an amount of domestically melted specialty metal, in the required form, for sale to DoD and other customers that is not less than 50% of the total amount of specialty metal it will purchase to produce fasteners for all customers



Fasteners



- ▶ It is the responsibility of DoD to implement the law as written.
- ▶ The law does not allow application of the simplified acquisition threshold exception beyond the prime contract level.
- ▶ Although the statute does not include “or produced” with regard to the specific exception for fasteners or the commercial derivative military article market-basket approaches, DoD interprets the statute to include “or produced.” For some titanium items, melting is not even part of the production process. This interpretation was reflected in section 225.7003–3(b)(3) of the proposed rule.



Fasteners



- ▶ The rule applies the 50 percent fastener market-basket rule based on the precise language in the statute.
- ▶ Provides flexibility for prime contractors and sub-tier suppliers to develop their own certification process.
- ▶ Determine whether to apply the 50 percent by weight, dollars, or volume.
- ▶ The responsibility for ensuring compliance rests with industry, specifically with the prime contractor to monitor compliance throughout its supply chain.
- ▶ The statute specifically requires that the metals be domestically melted. It does not provide an exception for metals from qualifying countries in the market-basket approach provided for commercial fasteners.
- ▶ It is the responsibility of DoD to implement the law as written. The law does not allow application of the simplified acquisition threshold exception beyond the prime contract level.



DoD Implementation of Sections 804 and 884, NDAA 2008



▶ Commercial Derivative Military Articles (CDMA)

- Allows contractors to certify that the contractor or subcontractors have entered into agreements to purchase an amount of domestically melted or produced specialty metal, in the required form, for use during the period of contract performance in the production of the commercial derivative article and related commercial article that is:
 - Not less than the greater of an amount equivalent to:
 - (1) 120% of the amount of specialty metal purchased by the contractor and its subcontractors for use during the period of production of the CDMA (including work under subcontracts); or
 - (2) 50% of the amount of specialty metal purchased by the contractor and its subcontractors for use during the period in the production of the CDMA and the related commercial article

▶ De Minimus – 2%

- If the total weight of noncompliant metals that are not exempt under other exceptions (other than the exception for CDMA items) does not exceed 2% of the total weight of all specialty metals in the item, the end item is excepted. (Applies at the prime level)



Definition of “High Performance Magnets”



- ▶ Means a permanent magnet that obtains a majority of its magnetic properties from rare earth metals (such as samarium)
- ▶ Magnet industry was concerned –
 - that the definition was limited to temperature and magnet strength, and should include “toughness and calibration”.
 - that magnets would be exempt as COTS items
- ▶ Department considered industry’s comments.
 - Industry states that virtually all alnico and samarium cobalt magnets are made to unique customer specifications, and are not COTS. Therefore, direct purchase of permanent magnets will almost certainly involve non-COTS magnets, which are not exempt.
 - Permanent magnets delivered in COTS items or COTS sub-systems are by statute not covered under the specialty metals restriction, therefore, the definition of high performance magnets has no impact on Alnico magnets for defense applications.
 - Performance is measured using magnetic properties and temperature capability. Mechanical strength and toughness generally are not employed as measures of merit for permanent magnets. Calibration sensitivity is an indication of precision, not high performance.



DoD Implementation of Sections 804 and 884, NDAA 2008



▶ National Security Waiver

- USD(AT&L) may approve a written determination to accept noncompliant materials if he determines that acceptance is necessary to the national security of the United States and must:
 - Specify quantity of the end items covered;
 - Specify time period the waiver applies
 - Forwarded the determination to the congressional defense committees
 - Require the contractor or subcontractor responsible to develop and implement an effective plan for future compliance
 - Determine if the noncompliance was knowing or willful- and, if yes, consider suspension or debarment until issues are addressed
- Because national security waivers will only be granted when the acquisition is necessary to the national security interest of the U.S., the requirement for a plan will be applied as a condition subsequent, and not prior, to the granting of a waiver.



One time Waiver Authority, from FY2007 NDAA



▶ One-time waiver authority still applies and can be exercised for:

Specialty metals that were incorporated into items produced, manufactured, or assembled in the U.S. BEFORE the date of enactment of the new law, under specific conditions:

- Contracting officer (CO) determines:
 1. Not practical or economical to remove or replace the non-compliant specialty metals;
 2. Contractor and subcontractor involved have an effective plan to ensure future compliance;
 3. Non-compliance is not knowing or willful; and
 4. The USD(AT&L) or SAE concerned approves CO's determination
- FedBizOps notification required within 15 days after contracting officer determination
- **This waiver covers delivery of items where final acceptance occurs AFTER the date of enactment of the Act and BEFORE Sep 30, 2010**
- Law recognizes that many suppliers have been inadvertently non-compliant particularly concerning commercial items
- Contractors must have adequate procedures in place to ensure future compliance.



Specialty Metals Block Change: Moving to a Single Set of Restrictions



- ▶ Multiple Specialty Metal Sourcing Restrictions are difficult to understand and enforce.
- ▶ Within the past three years, there have been two changes in law, one DFARS final rule, and three implementing Class Deviations.
 - The Date of the Prime Contract determines which set of DFARS clauses apply.
 - A prime contractor or sub-tier supplier may be operating under four different sets of restrictions at the same time, depending on when the contract was awarded.
 - These different restrictions produce conflicting standards, possibly applying conflicting standards to identical items produced by the contractor.
- ▶ Congress recognized difficulties in contractor compliance and agency enforcement by providing a One-Time Waiver in FY 2007 National Defense Authorization Act.



Specialty Metals Block Change: Moving to a Single Set of Restrictions



- ▶ Contracting officers have discretion to modify existing contracts to a new clause
 - Consideration to the Government is required
 - Must be in the Government's best interest to do so.

- ▶ Compliance is easier when the rules are clear and consistent.

- ▶ DCMA has experienced significant administrative cost growth associated with specialty metals compliance over the past years.

- ▶ It is in the Government's best interest to consolidate compliance under one set of rules and enforce one set of restrictions across the enterprise.
 - Ease DCMA's administrative burdens
 - Ease industry's administrative burden
 - Enhance contractor compliance
 - Leads to significant cost avoidance



Specialty Metals Block Change: Moving to a Single Set of Restrictions



- ▶ DCMA plans to issue a block change modification to incorporate the DFARS final rule into existing contracts, if requested by individual prime contractors.
- ▶ Business Case addressing consideration:
 - Avoidance of administrative costs by both Government and Industry coupled with greater effectiveness in implementing new law



Specialty Metals References:



- ▶ DFARS can be found at www.acq.osd.mil/dpap/dars/dfars/index.htm



Comparison of the Berry Amendment, Buy American, and Specialty Metals Act



Name	Ref Law	Applies to	Flow Down	Covered Items	Thresholds	Domestic Content	Comml Exception ?	COTS Exception	Qualifying Country Exception	Where Contract Performed	Contractor Certification	Other Exceptions
Berry	10USC 2533a	DoD		Specified in Amendment	> Simplified Acquisition Threshold	100%	No		Applies to Chemical Warfare Protective Clothing (all qualifying countries) and para-ramid fibers (Netherlands only)	Anywhere	No	
BAA	41 USC 10a - 10d	Govt wide		Supply Purchases	> Simplified Micro purchase Threshold	50%	Yes - for IT		Applies to all items	In U.S. Only	Yes	
Specialty Metals	USC 2533b	DoD		<p>Specified in law</p> <p>1) the following types of end items, or components thereof, containing a specialty metal not melted or produced in the US: aircraft, missile and space systems, ships, tank and automotive items, weapon systems, or ammunition</p> <p>2) a specialty metal that is not melted or produced in the US and that is to be purchased directly by DoD or a prime contractor of DoD</p>	> Simplified Acquisition Threshold	98% (de minimis exception) plus there is a one-time waiver if impractical to remove, not willful, & contractor has a compliance plan.	No, Applies to commercial items	Yes NDAA, Sec 804 for COTS, fasteners, forgings & castings, de minimis, electronic components	Yes	Anywhere, but exceptions for 1) purchases outside US in support of combat or contingency operations; or 2) unusual or compelling need.	No, except for commercial derivative military items	<p>1) Availability exception - insufficient quantity of quality as determined by SECDEF or Service Secs.</p> <p>2) For resale in commissaries, exchanges, & NAF facilities.</p>



Back Up





Frequently Asked Questions



- ▶ **Question:** Who is responsible for determining the applicability of the specialty metals restriction to specific procurement actions?

- ▶ **Answer:**

- ▶ The application of the specialty metals restriction is determined for any procurement on a case-by-case basis by the contracting officer who prepares the solicitation's terms and conditions and awards the contract.

- ▶ The contractor and its suppliers are responsible for compliance with the specialty metals restrictions incorporated into the contract.



Frequently Asked Questions



- ▶ **Question:** Are contracting officers still permitted to continue to use withholdings of payment and conditional acceptance of noncompliant items on DoD contracts?
- ▶ **Answer:** For contracts entered into on or after November 16, 2006, we cannot continue the practice of withholding payment while conditionally accepting noncompliant items. The one-time waiver (section 842(b) of the NDAA for FY2007) may be applicable in these cases if all of the requirements of that waiver are determined to be met, and the SAE or USD(AT&L) approves.



DFARS Final Rule Implementing Sections 804 and 884 of NDAA 2008



Definition of “Produce”

- ▶ **“Produce” means the application of forces or processes to a specialty metal to create the desired physical properties through quenching or tempering of steel plate, gas atomization or sputtering of titanium, or final consolidation of non-melt derived titanium powder or titanium alloy powder.**



Q1. What is the history of this domestic preference restriction?





Q1. What is the history of this domestic preference restriction?



The specialty metals restriction was originally added to the “Berry Amendment” in 1972, and was included annually in DoD Authorization Acts. It was codified in [10 U.S.C. 2533a](#) in 2002 by section 832 of Public Law 107-107.

On October 17, 2006, the President signed the National Defense Authorization Act for Fiscal Year 2007. Under this Act, Section 842 moved the specialty metals restriction from 10 U.S.C. 2533a to 10 U.S.C. 2533b, with revisions. The Department of Defense issued Class Deviation 2006-O0004 dated December 6, 2006.

On October 26, 2007, the Department issued Class Deviation 2007-O0011 stating that 10 U.S.C. 2533b(a)(1) as a statute was inapplicable to the acquisition of commercial off-the-shelf items, in accordance with 41 U.S.C. 431.



FY-2008 NDAA, Sec.804 Changes to 10 U.S.C. 2533b



▶ Section 804 - Exceptions:

- Statutory exception for COTS items, with certain limitations for fasteners, as well as castings and forgings.
- electronic components exception,
- a de minimis exception (does not apply to high performance magnets)
- a commercial derivative military articles exception,
- and a national security waiver.
- No Anti-deficiency Act violation for non-compliant material
- Placed the burden of compliance on the prime and subcontractors.

▶ Tightened some aspects of the law.

- For example, the definition of “required form” contained in the “availability exception” was changed to refer to the specialty metals itself, and not to parts containing specialty metals.



FY-2008 NDAA, Sec.884 Changes to 10 U.S.C.



Section 884

- ▶ Contained stricter rules on how to process Domestic Nonavailability Determinations under the “availability exception.” The Department issued Class Deviation 2008-O0002 on January 29, 2008 incorporating most of the changes in this Act.

- ▶ These laws have been implemented in the Defense Federal Acquisition Regulation Supplement (DFARS) on July 29, 2009 and incorporated in new procurement actions after that date.



Q2. Where can I find information regarding DoD's implementation of the new specialty metals restriction?



- ▶ A2. The Director, Defense Procurement (DPAP), maintains a web site of the most current reference material relating to specialty metals at:
- ▶ http://www.acq.osd.mil/dpap/cpic/ic/restrictions_on_specialty_metals_10_usc_2533b.html
- ▶ The definition of “specialty metals” is provided at DFARS 252.225-7009(a)(11).



Q3. Are there any exceptions to this restriction on specialty metals?



- ▶ A3. Yes, there are a number of exceptions provided for in the law. When a contractor or subcontractor proposes to rely on a particular exception, that fact should be included in the proposal, and the contracting officer has the responsibility to determine if the exception applies. The resulting prime and subcontracts will need to specifically state what exceptions were accepted by the Department prior to award.



Simplified Acquisition Threshold (SAT) Exception



- ▶ The exceptions are summarized below.
- ▶ 1. The specialty metals restriction **does not** apply if the Government prime contract is below the Simplified Acquisition Threshold (SAT). The value of subcontracts is not relevant: only the prime contract value determines this exception.
- ▶ If the prime contract is over the SAT, the prime contractor and every subcontractor must comply with the specialty metals restriction on prime contracts for:
 - ▶ (1) the following types of end items, or components thereof: aircraft, missiles and space systems, ships, tank-automotive, weapon systems, and ammunition, and
 - ▶ (2) the purchase of specialty metal (i.e. raw stock, including bar, billet, slab, wire, plate, and sheet) acquired by the prime contractor for delivery to DoD as an end item, or specialty metal acquired by DoD directly from the entity that melted or produced the specialty metal.



Availability Exception



- ▶ **A Domestic Non-Availability Determination (DNAD)** to the specialty metal restriction may be granted if the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) or the Secretary of the Military Department concerned determines that compliant specialty metal of satisfactory quality, sufficient quantity, and *in the required form*, cannot be procured as and when needed. See the definition of “in the required form” at DFARS 252,225-7009(a)(10).

- ▶ **Who can make Domestic Non-Availability Determinations for specialty metals?**
 - The Under Secretary of Defense (Acquisition, Technology, and Logistics).
 - The Secretary of the Army.
 - The Secretary of the Navy.
 - The Secretary of the Air Force.
 - This authority cannot be redelegated.



Documentation Required for a DNAD



- ▶ An analysis of alternatives that would not require a domestic non-availability determination (a detailed market analysis and corrective action plan); and
- ▶ Written documentation by the requiring activity, with specificity, why such alternatives are unacceptable.
- ▶ Specify the duration and scope of the DNAD
- ▶ If the DNAD will apply to more than one contract (i.e., a class DNAD), approval of the USD(AT&L) is required.
- ▶ At least 30 days before making such a determination, in a manner consistent with national security and confidential business information, the contracting agency must publish a notice on the Federal Business Opportunities website (www.FedBizOpps.gov or any successor site) of the intent to make the domestic nonavailability determination; and solicit information in accordance with DFARS 225.7003-3(b)(5)(ii)(A) and (B).



Combat Operations



- ▶ The specialty metals restriction **does not** apply to acquisitions outside the United States in support of combat operations.



Contingency Operations



- ▶ The specialty metals restriction **does not** apply to acquisitions—
 - In support of contingency operations (see definition of contingency operations in 10 U.S.C. 100); or
 - For which the use of other than competitive procedures has been approved on the basis of unusual and compelling urgency in accordance with [FAR 6.302-2](#)
 - e.g.,
 - 2004 Tsunami operations;
 - 2005 Hurricane Katrina



Resale by Commissaries and Exchanges



- ▶ The specialty metals restriction **does not** apply to acquisitions of items specifically for resale by commissaries, exchanges, and other nonappropriated fund instrumentalities (e.g. the golf shop, the ships' store)



Qualifying Country Exception

- ▶ The specialty metals restriction **does not** apply to items containing specialty metals or specialty metals themselves when the acquisition furthers an agreement with a qualifying country (see DFARS 225.003(9))
 - **The specialty metal was melted or produced in a qualifying country**
 - **Or is contained in an item manufactured in a qualifying country.**



Electronic Components



- ▶ The specialty metals restriction **does not** apply to procurements of electronic components. See the definition of electronic components in DFARS 252.225-7009(a)(5).



Q5. How does the specialty metals restriction differ from the Buy-American Act?



- ▶ A5. The Buy American Act (BAA) ([41 U.S.C 10a](#) through 10d) and the specialty metals restriction (10 U.S.C. 2533b) are two separate laws implemented by two different regulations. They differ with regard to their scope, threshold, exceptions, and waiver authority.
- ▶ Both must be satisfied independently.
- ▶ The specialty metals restriction is applicable to all purchases noted in Answer 1, over the simplified acquisition and applies even if another agency, such as the GSA, is purchasing the item on behalf of the DoD. Unless an exception applies, it requires that all **100% of the specialty metals in end items or components of airplanes, missile and space systems, ships, tank and automotive items, weapon systems, or ammunition be melted or produced in the U.S. or a qualifying country. It requires that any specialty metal (raw bar stock, wire rod, sheet, plate, etc.) bought by DoD or a prime contractor for delivery to DoD be melted or produced only in the U.S.**



BAA



- ▶ With few exceptions, the BAA applies to all supplies or construction materials over the micro-purchase threshold for use in the U.S. The BAA requires application of a differential factor to the evaluated cost or price of supplies that are not domestic end products.
- ▶ A two part test is used to define a domestic end product:
 - ▶ (1) the end product must be manufactured in the U.S. and
 - ▶ (2) the cost of all its domestically manufactured components must exceed 50% of the cost of all its components.
- ▶ The BAA is applicable to the entire Federal Government.
- ▶ Requires that an evaluation factor be placed on proposals offering end items other than domestic end items.
- ▶



BAA Evaluation Factor

- ▶ For civilian agencies, this evaluation factor for supply contracts is 6% if the lowest domestic offeror is from a large business, or 12% if the lowest domestic offeror is from a small business.
- ▶ For the Department of Defense (DoD), the evaluation factor is 50%.
- ▶ The evaluation factor for construction material contracts is 6% for all agencies.
- ▶ For more information on the implementation of the BAA, see [FAR 25.1](#) for supplies and [FAR 25.2](#) for construction material.



BAA and WTO

- ▶ In procurements that are subject to the WTO Government Purchase Agreement and other Free Trade Agreements, the BAA is waived for designated countries and for Free Trade Agreement countries (see [FAR 25.003](#)) and qualifying countries (see DFARS 225.003(9)).
 - Applicability of the BAA is determined by the thresholds specified in the applicable trade agreement and specified products with Federal Supply Classes
 - The corresponding thresholds of the various trade agreements for purchases of supplies, services or construction material are in the Federal Acquisition Regulation (FAR) [25.402](#)

- ▶ For DoD, additional implementation guidance is in the Defense Federal Acquisition Regulation Supplement (DFARS) at subparts [225.1](#) and [225.2](#). The contract clauses that apply are [252.225-7000](#) , [252.225-7001](#) , [252.225-7035](#) and [252.225-7036](#). For construction, use the FAR clause [52.225-9](#). See [DFARS 225.11](#) for a list of all clauses relating to the BAA.



- ▶ **Q6. Who is responsible for determining the applicability of the specialty metals restriction to specific procurement actions?**
- ▶ A6. The application of the specialty metals restriction is determined for any procurement on a case-by-case basis by the contracting officer who prepares the solicitation's terms and conditions and awards the contract. The contractor and its suppliers are responsible for compliance with the specialty metals restrictions incorporated into the contract.



▶ DFARS Demystified: What You Don't Know Can Hurt You

- ▶ Did you know DFARS changed?
225.252-7014 Alt. 1 no longer
is the governing paragraph for compliance. Find out the new
compliance requirements and
how to avoid costly errors, mistakes and penalties.



- ▶ **Even if you don't sell mil-spec parts, your customers might be selling to defense contractors without your knowledge.**
- ▶ **Are you aware that the terms and conditions in your customers' purchase orders can put you at risk for DFARS noncompliance?**
- ▶ **Did you know about the many recent changes in DFARS regulations?**
- ▶ **We've heard that sales personnel (not just business owners) have legal exposure for selling noncompliant parts to defense subcontractors.**
- ▶ **What is the difference between "qualifying countries" and "designated countries?"**



- ▶ Are only manufacturers allowed to self-certify?
- ▶ At what point can you continue to supply DFARS-compliant fasteners?
- ▶ What are COTS items?
- ▶ What is DNAD?
- ▶ How is compliance documented for certification?
- ▶ What is the "market-based approach?"
- ▶ What parts require compliance, and who is responsible for compliance?
- ▶ I don't sell aerospace parts. Am I affected?