

Government Contracts Blog

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More Than a Year In the Making! -- DOD Issues Final Rules for Specialty Metals; New Rules Are No Less Complicated

In July 2008, [DOD proposed revisions to the Specialty Metals rules](#), hoping to finally calm the turbulence that has boiled up over the past three years in this area. On July 29, 2009, after more than a year of stolid deliberation, DOD issued final rules implementing the [latest statutory revisions from January 2008](#). See 74 Federal Register 37626.

We have [discussed the specialty metals restrictions](#) at some length in this blog. Frankly, we wish that such extensive discussion was unnecessary and that the whole specialty metals regulatory framework would be better streamlined (or, at the risk of over-wishing, that it would just go away). We have heard from many people in industry that the chaos and impenetrability of the specialty metals regulations serve as an archetypal example of why doing business with the United States is so difficult. Rather than re-hashing matters we have already discussed, this blog posting discusses key features of the new DOD specialty metals rules, highlighting some of the key differences between the final and [proposed rules](#) (there are few).

1. **The Qualifying Country Exception Is Further Clarified, But The Anti-American Bias Remains.** The final rules clarify that the qualifying country exception applies to items containing specialty metals that were melted *or produced* in the qualifying country. Inexplicably, while DOD acknowledged [the anti-American bias inherent in the qualifying country exception](#), DOD declined to correct the “uneven playing field,” apparently conceding that such a regulatory interpretation was an inevitable reality. While we question whether the anti-American bias *must* exist under the new statute, the fact remains that the disparate treatment for U.S. companies appears to continue under the new rules.
2. **Clarifications On The *De Minimis* Exception, Including That The Minimal Content Is Measured At The “End Item” Level.** While most people commenting on the proposed rules acknowledged the utility of the *de minimis* exception, many criticized it as being too complicated and time-intensive. DOD acknowledged this fact, emphasizing that companies (particularly prime contractors) were entitled to make *reasonable* estimates in determining whether the *de minimis* threshold is met. Toward this end, DOD further modified the final rule by emphasizing that the *de minimis* threshold is measured at the

end item level, not necessarily on a component-by-component basis. *See* DFARS 225.7003-3(b)(6) and 252.225-7009(c)(6). This should allow prime contractors to “roll up” the value of minimal non-compliant specialty metals at the end item level.

3. **While An Exception Exists For “Commercial Derivative Military Articles,” Little Additional Clarification Is Provided.** Among the exceptions created in 2008 is that relating to Commercial Derivative Military Articles (“CDMAs”), products that integrate large amounts of domestic specialty metals with lesser amounts of foreign metals on the same manufacturing line. Under the final rules, prime contractors certify compliance with the CDMA requirements, indicating that they “individually or collectively” in “the combination of offeror and subcontract” purchases, will comply with the CDMA minimum purchasing requirements. DOD declined to offer additional concrete guidance on how the CDMA thresholds should be measured, in order “to provide maximum flexibility for prime contractors.” While many companies may appreciate the “trust” evidenced by such a passive pronouncement, we think that industry would prefer more concrete guidance through the DFARS and/or [PGI \(Procedures, Guidance, and Information\)](#) before executing the certification, which will carry both criminal and civil penalties if proved false. Currently, such guidance is rather threadbare.
4. **The COTS Exceptions Remain, Although Only Some COTS Fasteners Are Included. The COTS Exceptions Remain Very Complicated, But The Reporting Requirement Has Been Streamlined.**
 - **Complicated COTS.** The complicated COTS exception under the prior formulation of the rules remains essentially unchanged. While still difficult to apply conceptually, the COTS exception in the final rule appears to be, perhaps, the most merciful formulation that people could have hoped for (especially considering some of the more severe alternatives suggested by some of the people commenting on the proposed rules).
 - **Confusing Fasteners.** However, the COTS fastener exception is not, to borrow a term, “merciful” -- purchasing and tracking specialty metal compliant fasteners remain an enormous burden on DOD and industry alike. The fastener exception (not to mention the multiple exceptions-to-the-fastener-exception) is one of the most complicated and mind-numbing features of the specialty metals rules. Bizarrely, DOD allowed the final rules to retain an overly narrow interpretation of the COTS exception relating to fasteners, which seems to eliminate the exemption unless COTS fasteners are incorporated into a COTS end-item, subassembly, or component. *See* DFARS 225.7003-3(b)(2)(i)(D)(1). This formulation was [openly criticized by Congress](#), but DOD stated that its proposed rules, as written, “implement [the] statutory restrictions.” While we are reluctant to invite the heavy hand of Congress to stir the specialty metals pot, perhaps the statutory restriction requires an express statutory fix, because it seems that DOD is not persuaded by the mere comments of the House Armed Services Committee.
 - **Simplified Reporting.** The 2008 statutory revisions required DOD to collect data relating to COTS products incorporated into non-commercial end items. Not surprisingly, DOD flowed down this data collection requirement to industry through a new reporting clause, located at DFARS 252.225-7029. There are a few key features of the reporting that have

been added in the final rule, which has been significantly streamlined and accelerated -- no doubt as a concession to the shortness of life, and also due to the fact that a DOD report synthesizing the collected data is due to Congress on December 30, 2009. *See* Pub. L. No. 110-181, § 804(i).

Where Do We Stand? What Are The Applicable Rules?

The July 2009 revisions to the specialty metals restrictions are but the latest in a long line of regulatory developments. As [previously discussed on this blog](#), the chart below summarizes the various regulatory requirements that may apply, depending on the contract award date. However, as we are all aware, knowing the contract award date and knowing how the various rules impact actual contract deliverables are two completely different issues. Good luck.

Contract Award Date	DFARS 225.7002-2 (10/26/06)	<u>Class Deviation 2006-O0004</u>	<u>Class Deviation 2007-O0011</u>	DFARS 225.7002-2 (11/08/07)	<u>Class Deviation 2008-O0002</u>	DFARS 225.7003-2 (7/29/09)
Prior to 11/16/2006	X					
Between 11/16/2006 & 10/25/2007		X (Allowing exceptions for 1 st Tier and 2 nd Tier Components)				
Between 10/26/2007 & 11/07/2007		X	X (Allowing exceptions for all COTS products)			
Between 11/08/2007 & 01/28/2008		X	X	X		
Between 01/29/08 and 7/28/09					X (Allowing exceptions for <i>some</i> COTS products)	
Between 7/29/09 and the present						X

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