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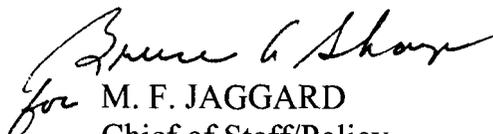
MEMORANDUM FOR DISTRIBUTION

SUBJECT: Class Deviation—Implementation of New Specialty Metals Restriction

Encl: (1) OUSD(AT&L) DPAP memorandum, dated January 29, 2008

The purpose of this memorandum is to forward enclosure (1) for immediate implementation.

For further information on this issue, please contact Katherine Petersen at (703) 614-9641 or e-mail at Katherine.Petersen@navy.mil.


for M. F. JAGGARD
Chief of Staff/Policy
DASN(A&LM)

SUBJECT: Class Deviation—Implementation of New Specialty Metals Restriction

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ACQUISITION,
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JAN 29 2008

DPAP(DARS)

In reply refer to
DARS Tracking Number: 2008-O0002

MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS
COMMAND (ATTN: ACQUISITION EXECUTIVE)
ASSISTANT SECRETARY OF THE ARMY
(ACQUISITION, LOGISTICS, AND TECHNOLOGY)
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(RESEARCH, DEVELOPMENT AND ACQUISITION)
ASSISTANT SECRETARY OF THE AIR FORCE
(ACQUISITION)
DIRECTORS OF THE DEFENSE AGENCIES

SUBJECT: Class Deviation—Implementation of New Specialty Metals Restriction

Director, Defense Procurement and Acquisition Policy issued Class Deviation 2006-O0004, on December 6, 2006, to implement Section 842 of the National Defense Authorization Act of Fiscal Year 2007 (Pub. L. 109-364). Section 842 established the restriction on acquisition of specialty metals under a new section 10 U.S.C. 2533b. On October 26, 2007, Class Deviation 2007-O0011 provided a waiver of the specialty metals restriction for commercially available off-the-shelf (COTS) items, in accordance with section 35 of 41 U.S.C. 431. The newly enacted sections 804 and 884 of the FY 2008 National Defense Authorization Act have changed the specialty metals restriction in 10 U.S.C. 2533b, and are attached for reference. This Class Deviation supersedes previous Class Deviations 2006-O0004 and 2007-O0011.

Section 804 includes several new, expanded flexibilities. The electronic component exception has been broadened to cover all electronic components, no longer limited to commercially available electronic components.

Section 804 includes a statutory exception for COTS items, but excludes high performance magnets and fasteners, unless the magnets or fasteners are incorporated into COTS items. This COTS exception does not apply to contracts or subcontracts for the acquisition of specialty metals, including mill products, such as bar, billet, slab, wire,

plate and sheet, that have not been incorporated in end items, subsystems, assemblies or components. However, specialty metal supply contracts issued by COTS producers are not subcontracts for the purposes of this exception.

A COTS item is defined as a commercial item that is sold in substantial quantities in the commercial marketplace and is offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace.¹ A COTS item is considered to be “offered without modification” as long as it is not modified prior to contractual acceptance by the next higher tier in the supply chain (see paragraph (b) (3) (ii) of the clause at 252.225-7014, Alternate I). Specialty metals contained in a COTS item that was accepted without modification by the next higher tier are excepted and remain excepted even if a piece of the COTS item subsequently is removed (e.g. the end is removed from a COTS screw or an extra hole is drilled in a COTS bracket). For specialty metals that were not contained in a COTS item upon acceptance but are added to the COTS item after acceptance, the added specialty metals are subject to the restrictions (e.g. a special reinforced handle made of specialty metal that is added to a COTS item). If two or more COTS items are combined in such a way that the resultant item is not a COTS item, only the specialty metals involved in joining the COTS items together are subject to the restrictions (e.g. a COTS aircraft is outfitted with a COTS engine, but not the COTS engine normally provided with that aircraft). For COTS items that are normally sold in the commercial marketplace with various options, items that include such options are also COTS items. However, if a COTS item is offered to the Government with an option that is not normally offered in the commercial marketplace, that option is subject to the specialty metals restrictions (e.g., an aircraft is normally sold to the public with an option for several radios. DoD requests a military-unique radio. The aircraft is still a COTS item, but the military-unique radio is not a COTS item, and must comply with the specialty metals restriction unless another exception applies).

We contemplate including Section 804’s COTS reporting requirement in a forthcoming interim rule. It will likely require prime contractors to provide information on the types of COTS components in noncommercial items, and require agencies to report any COTS end item purchased valued at \$5M or above.

Acquisitions of fasteners that are commercial items, and not incorporated into COTS items, can be considered compliant 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 use in production of such fasteners for sale to the Department of Defense and other customers, that is not less than 50% of the total amount of specialty metal that it will purchase to carry out the production of such fasteners for all customers.

¹ It does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products

The exception for qualifying countries remains. However, this exception does not apply when buying specialty metal as an end product.

As for domestic nonavailability determinations (DNADs), “required form” means mill products, such as bar, billet, wire, slab, plate or sheet (see paragraph (m) of section 804). Section 804 requires the Department to review previously approved DNADs and amend them to comply with the new statute within 180 days from enactment, i.e. by July 26, 2008. The broad DNADs for circuit card assemblies, fasteners, needle roller bearings, and diesel engines will expire for use on new contracts on July 26, 2008. Contracts awarded while DNADs were in effect may be modified by bilateral agreement to remove those exceptions. Additionally, section 884 restricts the Department’s ability to approve new broad DNADs. At least 30 days prior to approval of a DNAD that would apply to more than one DoD contract, a notice must be published in FedBizOpps of the intent to approve a DNAD. USD(AT&L) will take into consideration all information submitted and this information will be made publicly available, except for classified information and confidential business information.

The new law also provides a new de minimis exception. DoD may accept delivery of an item containing specialty metals that were not melted or produced in the United States if the total weight of noncompliant metals in the item that are not exempt under other exceptions (other than the exception for military commercial derivative items) does not exceed 2 percent of the total weight of all specialty metals in the item. This de minimis exception does not apply to specialty metal in high performance magnets.

A new exception for commercial derivative military articles allows contractors to certify that the contractor or its 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 military article and the related commercial article that is not less than the greater of: (1) an amount equivalent to 120% of the amount of specialty metal that is required to carry out the production of the commercial derivative military article (including the work under subcontracts); or (2) an amount equivalent to 50% of the amount of specialty metal that is purchased by the contractor and its subcontractors for use during such period in the production of the commercial derivative military article and the related commercial article. For the purpose of this exception, the amount of specialty metal that is required to carry out production of the commercial derivative military article includes specialty metal contained in any item, including COTS items. DoD expects that these certifications will be based on good faith estimates.

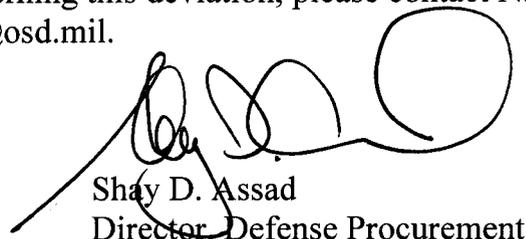
Section 804 includes a new national security waiver. The Under Secretary of Defense for Acquisition, Technology and Logistics may approve a written determination to accept noncompliant materials if he determines that acceptance of such items is necessary to the national security of the United States. The written determination must

specify the quantity of the end items covered by the waiver, specify the time period the waiver applies, and must be forwarded to the congressional defense committees. In any case in which USD(AT&L) makes a determination under this exception, the contractor or subcontractor responsible for the noncompliance must develop and implement an effective plan to ensure future compliance and the USD(AT&L) must determine whether the noncompliance was knowing or willful. If the noncompliance is determined to be knowing or willful, the Secretary will consider suspending or debarring the contractor or subcontractor until the contractor or subcontractor has effectively addressed the issues leading to the noncompliance. Because national security waivers will only be granted when the acquisition in question is necessary to the national security interest of the United States, the requirement for a plan will be applied as a condition subsequent, and not a condition precedent, to the granting of a waiver.

Section 804 uses the term component in such a way that it clearly applies to parts and assemblies incorporated into the end product at any tier. This eliminates the previous interpretation in Class Deviation 2006-O0004 that parts and assemblies below the second tier are not components.

Section 804 removes the implication that accepting non-compliant material may create an Anti-deficiency Act violation. However, contractors continue to be obligated to comply with the restriction.

The attachment to this Class Deviation 2008-O0002 supersedes the attachment to the class deviation 2007-O0011, is effective upon signature, and remains in effect until incorporated in the DFARS or until otherwise rescinded. In line with the authority under FAR 1.108(d)(3), contracting officers may, at their discretion, include the changes implemented by this Class Deviation in any existing contract with appropriate consideration. For questions concerning this deviation, please contact Nancy Dowling, 703-697-9352, or nancy.dowling@osd.mil.



Shay D. Assad
Director, Defense Procurement
and Acquisition Policy

Attachment:
As stated

Cc:
DAU, Ft. Belvoir

Deviation 2008-00002

Restriction on Acquisition of Specialty Metals

1. *Use the following section in lieu of the current regulations on specialty metals in DFARS 225.7002.*

225.700X Restrictions on acquisition of specialty metals.

225.700X-1 Definitions. As used in this section-

(a) "Assembly" "commercial derivative military article," "electronic component," "end item," "required form," and "subsystem" are defined in the clause at 252.225-7014, Preference for Domestic Specialty Metals, Alternate I (DEVIATION 2008-00002).

(b) "Automotive item" means a self-propelled military transport tactical vehicle, primarily intended for use by military personnel or for carrying cargo, such as a High-Mobility Multipurpose Wheeled Vehicle, an armored personnel carrier, or a troop/cargo-carrying truckcar, truck, or van. The term does not include construction equipment (such as bulldozers, excavators, lifts, or loaders) or other self-propelled equipment (such as cranes or aircraft ground support equipment).

(c) "Produced" and "specialty metal" are defined in the clause at 252.225-7014, Preference for Domestic Specialty Metals (DEVIATION 2008-00002) and its Alternate I (DEVIATION 2008-00002).

225.700X-2 Restrictions.

The following restrictions implement 10 U.S.C. 2533b. Except as provided in subsection 225.700X-3-

(a)(1) Do not acquire the following items, or any components of the following items, unless any specialty metals contained in the items or components are melted or produced in the United States:

- (i) Aircraft.
- (ii) Missile or space systems.
- (iii) Ships.

(iv) Tank or automotive items.

(v) Weapon systems.

(vi) Ammunition.

(2) Items that are not incorporated in the above items, are not components. For example, test equipment or ground support equipment are not components of the missile system; and

(b) Do not acquire a specialty metal (e.g., raw stock, including bar, billet, slab, wire, plate, sheet; castings; or forgings) unless the specialty metal is melted or produced in the United States. This restriction applies to the specialty metals acquired by a contractor for delivery to DoD as an end product, in addition to specialty metals acquired directly by DoD.

225.700X-3 Exceptions.

(a) Acquisitions in the following categories are not subject to the restrictions in 225.700X-2:

(1) Acquisitions at or below the simplified acquisition threshold.

(2) Acquisitions outside the United States in support of combat operations.

(3) Acquisitions in support of contingency operations.

(4) Acquisitions 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.

(5) Acquisitions of items specifically for resale in commissaries.

(b) One or more of the following exceptions to the requirements at 225.700X-2 may apply to an end item or component that includes any of the following, under a prime contract or subcontract at any tier:

(1) *Electronic components.* Acquisitions of electronic components, unless the Secretary of Defense, upon the recommendation of the Strategic Materials Protection Board pursuant to 10 U.S.C. 187, determines that the domestic

availability of a particular electronic component is critical to national security.

(2) *COTS items.* (i) Acquisitions of commercially available off-the-shelf items containing specialty metals, except the restrictions do apply to contracts or subcontracts for the acquisition of-

(A) Specialty metals, including mill products, such as bar, billet, slab, wire, plate and sheet, that have not been incorporated into end items, subsystems, assemblies, or components. Specialty metal supply contracts issued by COTS producers are not subcontracts for the purposes of the COTS exception.

(B) COTS fasteners, unless such fasteners are incorporated into COTS end items, subsystems, assemblies, or components.

(C) Forgings or castings of specialty metals, unless such forgings or castings are incorporated into COTS end items, subsystems, or assemblies.

(D) Commercially available high performance magnets, unless such high performance magnets are incorporated into COTS end items or subsystems.

(ii) A COTS item is considered to be "offered without modification" if it is not modified prior to contractual acceptance by the next higher tier in the supply chain. See paragraph (b)(2)(ii) of the clause at 252.225-7014, Alternate I (DEVIATION 2008-00002).

(3) *Fasteners.* Acquisitions of fasteners that are commercial items that are purchased under a contract or subcontract with a manufacturer of such fasteners, if the manufacturer has certified that it will purchase, during the relevant calendar year, an amount of domestically melted specialty metal, in the required form, for use in the production of fasteners for sale to the Department of Defense and other customers, that is not less than 50% of the total amount of the specialty metal that it will purchase to carry out the production of such fasteners for all customers.

(4) *Items from a qualifying country.* Acquisitions of any of the items in 225.700X-2(a), when the acquisition furthers an agreement with a qualifying country (see 225.872-1(a) and (b)).

(5) *Domestic metals nonavailable.* (i) Acquisitions of any of the items in 225.700X-2, to the extent that an official

listed in paragraph (b)(5)(ii) of this subsection determines that specialty metal melted or produced in the United States cannot be acquired as and when needed in-

- (A) A satisfactory quality;
- (B) A sufficient quantity; and
- (C) The required form.

(ii) The following officials are authorized, without power of redelegation, to make the domestic nonavailability determination (DNAD) specified in paragraph (b)(5)(i) of this subsection:

- (A) The Under Secretary of Defense (Acquisition, Technology, and Logistics).
- (B) The Secretary of the Army.
- (C) The Secretary of the Navy.
- (D) The Secretary of the Air Force.

(iii) Defense agencies shall follow the procedures at PGI 225.7002-2(b)(3) when submitting a request for a DNAD.

(iv) Class DNADs. (A) At least 30 days prior to making a domestic nonavailability determination that would apply to more than one DoD contract, USD(AT&L) shall, to the maximum extent practicable, and in a manner consistent with the protection of national security and confidential business information-

- (1) Publish a notice on FedBizOpps (or any successor site) of the intent to make the domestic nonavailability determination; and
- (2) Solicit information relevant to such notice from interested parties, including producers of specialty metal mill products.

(B) USD(AT&L) shall take into consideration all information submitted pursuant to paragraph (b)(5)(iv)(A) of this subsection in making a class domestic nonavailability determination, and may also consider other relevant information that cannot be made part of the public record consistent with the protection of national security information and confidential business information.

(C) USD(AT&L) shall ensure that any such DNAD and the rationale for such determination is made publicly available to the maximum extent consistent with the protection of national security and confidential business information.

(6) *De minimus amount.* DoD may accept delivery of an item containing specialty metals that were not melted or produced in the United States if the total weight of noncompliant metals in the item that are not exempt under one of the exceptions listed in paragraph 225.700X-3(b)(1) through (5) does not exceed 2 percent of the total weight of all specialty metals in the item. This paragraph does not apply to high performance magnets.

(c) *Streamlined compliance for commercial derivative military articles.* The restrictions at 225.700X-2(a)(1) do not apply to an item acquired under a prime contract if-

(1) One of the officials listed at paragraph (b)(5)(ii) of this subsection determines that the item is a commercial derivative military article; and

(2) The contractor has certified that the contractor and its subcontractors have entered into a contractual agreement or agreements to purchase an amount of domestically melted or produced specialty metal as specified in paragraph (c)(2) of the clause at 252.225-7014, Alternate I.

(d) *National security waiver.* (1) DoD may accept the delivery of an end item containing noncompliant materials if the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) determines in writing that acceptance of such end item is necessary to the national security interests of the United States.

(2) A written determination under paragraph (d)(1)-

(i) May not be delegated below the level of USD(AT&L);

(ii) Shall specify the quantity of end items to which the waiver applies and the time period over which the waiver applies; and

(iii) Shall be provided to the congressional defense committees prior to making such a determination (except that in the case of an urgent national security requirement, such certification may be produced to the defense committees up to 7 days after it is made).

(3) In any case in which USD(AT&L) makes a determination under paragraph (d)(1), the USD(AT&L) shall-

(i) Ensure that the contractor or subcontractor responsible for the noncompliance develops and implements an effective plan to ensure future compliance; and

(ii) Determine whether or not the noncompliance was knowing or willful. If USD(AT&L) determines that the noncompliance was knowing and willful, the USD(AT&L), or the appropriate suspension or debarment official, shall consider suspending or debarring the contractor or subcontractor until such time as the contractor or subcontractor has effectively addressed the issues that lead to such noncompliance.

(4) Because national security waivers will only be granted when the acquisition in question is necessary to the national security interests of the United States, the requirement for a plan will be applied as a condition subsequent, and not a condition precedent, to the granting of a waiver.

225.700X-4 One-time waiver.

The Government may accept articles containing specialty metals that are not in compliance with the specialty metals clause of the contract, if-

(a) Final acceptance takes place after October 17, 2006 and before September 30, 2010;

(b) Such specialty metals were incorporated into the items (whether end items, components, or parts) produced, manufactured, or assembled in the United States before October 17, 2006;

(c) The contracting officer determines in writing that-

(1) It would not be practical or economical to remove or replace the specialty metals incorporated in such items or to substitute items containing compliant materials;

(2) The contractor and subcontractor responsible for providing items containing non-compliant specialty metals have in place an effective plan to ensure compliance with the specialty metals clause of the contract for future items produced, manufactured, or assembled in the United States; and

(3) The non-compliance was not knowing or willful;

(d) The determination is approved by-

(1) The Under Secretary of Defense (Acquisition, Technology, and Logistics); or

(2) The service acquisition executive of the military department concerned; and

(e) Not later than 15 days after approval of the determination, the contracting officer posts a notice on FedBizOpps.gov, stating that a waiver for the contract has been granted for the contract under 10 U.S.C. 2533b(b).

225.700X-5 Contract clause.

(a) Unless an exception in 225.700X-3(a) or (d) applies (but see paragraph (b) of this section)-

(1) Use the clause at 252.225-7014, Preference for Domestic Specialty Metals (DEVIATION 2008-00002), in solicitations and contracts that-

(i) Exceed the simplified acquisition threshold; and

(ii) Require the delivery of specialty metals as end products.

(2) Use the clause at 252.225-7014, Alternate I (DEVIATION 2008-00002), in solicitations and contracts that-

(i) Exceed the simplified acquisition threshold; and

(ii) Require delivery of any of the following items, or components of the following items, if such items or components contain specialty metal:

- (A) Aircraft.
- (B) Missile or space systems.
- (C) Ships.
- (D) Tank or automotive items.
- (E) Weapon systems.
- (F) Ammunition.

(b) If an agency cannot reasonably determine at time of acquisition whether some or all of the items will be used in support of combat operations or in support of

contingency operations, then the contracting officer should not rely on the exception at 225.700X-3(b) or (c), but should include the appropriate specialty metals clause in the solicitation and contract, so that the Government has the flexibility to utilize the items as needed.

- (c) If the solicitation and contract require delivery of a variety of contract line items containing specialty metals, but only some of the items are subject to domestic specialty metals restrictions, identify in the Schedule those items that are not subject to the restrictions.

2. Use the following clause in lieu of 252.225-7014 (June 2005) and its Alternate I (April 2003) or any subsequent class deviations to that clause (2006-00004 and 2007-00011).

252.225-7014 Preference for Domestic Specialty Metals.

As prescribed in 225.700X-5(a), use the following clause:

PREFERENCE FOR DOMESTIC SPECIALTY METALS (DEVIATION 2008-00002)

(a) Definitions. As used in this clause-

(1) "Produce" means the application of forces or processes to a specialty metal to create desired physical properties through quenching or tempering of steel plate, or gas atomization or sputtering of titanium."

(2) "Specialty metal" means-

(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.

(b) Any specialty metal delivered under this contract shall be melted or produced in the United States or its outlying areas.

(End of clause)

Alternate I (DEVIATION 2008-00002)

As prescribed in 225.700X-5(b), substitute the following paragraphs (a) and (b) for paragraphs (a) and (b) of the basic clause and add the following paragraphs (c) and (d) to the basic clause:

(a) *Definitions.* As used in this clause—

(1) "Assembly" means an item forming a portion of a system or subsystem that can be provisioned and replaced as an entity and which incorporates multiple, replaceable parts.

(2) "Commercial derivative military article" means 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.

(3) "Commercially available off-the-shelf item"—

(i) 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 a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(ii) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App 1702), such as agricultural products and petroleum products.

(4) "Component" means any item supplied to the Government as part of an end item or of another component.

(5) "Electronic component" means an item that operates by controlling the flow of electrons or other electrically charged particles in circuits, using interconnections of electrical devices such as resistors, inductors, capacitors, diodes, switches, transistors, or integrated circuits.

(6) "End item" means the final production product when assembled or completed, and ready for issue, delivery, or deployment.

(7) "Produce" means the application of forces or processes to a specialty metal to create desired physical properties through quenching or tempering of steel plate, or gas atomization or sputtering of titanium."

(8) "Qualifying country" means any country listed in subsection 225.872-1(a) or (b) of the Defense Federal Acquisition Regulation Supplement (DFARS).

(9) "Required form" means in the form of mill product, such as bar, billet, wire, slab, plate or sheet, and in the grade appropriate for the production of-

(i) A finished end item delivered to the Department of Defense; or

(ii) A finished component assembled into an end item delivered to the Department of Defense.

(10) "Specialty metal" means-

(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.

(11) "Subsystem" means a functional grouping of items that combine to perform a major function within an end item, such as electrical power, attitude control, and propulsion.

(b) Except as provided in paragraph (c) of this clause, any specialty metals incorporated in items delivered under this contract shall be melted or produced in the United States, its outlying areas, or a qualifying country, except for-

(1) Electronic components;

(2)(i) Commercially available off-the-shelf (COTS) items; other than-

(A) COTS fasteners, unless such fasteners are incorporated into COTS end items, subsystems, assemblies, or components.

(B) Forgings or castings of specialty metals, unless such forgings or castings are incorporated into COTS end items, subsystems, or assemblies.

(C) Commercially available high performance magnets, unless such high performance magnets are incorporated into COTS end items or subsystems;

(ii) A COTS item is considered to be "offered without modification" as long as it is not modified prior to

contractual acceptance by the next higher tier in the supply chain.

(A) Specialty metals contained in a COTS item that was accepted without modification by the next higher tier are excepted and remain excepted even if a piece of the COTS item subsequently is removed (e.g., the end is removed from a COTS screw or an extra hole is drilled in a COTS bracket).

(B) For specialty metals that were not contained in a COTS item upon acceptance, but are added to the COTS item after acceptance, the added specialty metals are subject to the restrictions (e.g., a special reinforced handle made of specialty metal that is added to a COTS item).

(C) If two or more COTS items are combined in such a way that the resultant item is not a COTS item, only the specialty metals involved in joining the COTS items together are subject to the restrictions (e.g., a COTS aircraft is outfitted with a COTS engine, but not the COTS engine normally provided with that aircraft.)

(D) For COTS items that are normally sold in the commercial marketplace with various options, items that include such options are also COTS items. However, if a COTS item is offered to the Government with an option that is not normally offered in the commercial marketplace, that option is subject to the specialty metals restrictions. (e.g., An aircraft is normally sold to the public with an option for several different radios. DoD requests a military-unique radio. The aircraft is still a COTS item, but the military-unique radio is not a COTS item, and must comply with the specialty metals restrictions, unless another exception applies.

(3) Fasteners that are commercial items that are purchased under a contract or subcontract with a manufacturer of such fasteners, if the manufacturer has certified that it will purchase, during the relevant calendar year, an amount of domestically melted specialty metal, in the required form, for use in the production of fasteners for sale to the Department of Defense and other customers, that is not less than 50% of the total amount of the specialty metal that it will purchase to carry out the production of such fasteners for all customers.

(4) Items manufactured in a qualifying country;

(5) Items for which the Government has determined in accordance with 225.700X-3 of Class Deviation 2008-00002 that specialty metal melted or produced in the United States cannot be acquired as and when needed in-

- (i) A satisfactory quality;
- (ii) A sufficient quantity; and
- (iii) The required form.

(6) Specialty metals, other than specialty metals in high performance magnets, that do not meet any of the exceptions in paragraphs (b)(1) through (5) of this clause, if the total weight of such noncompliant metals does not exceed 2 percent of the total weight of specialty metals in the item, as estimated in good faith by the Contractor.

(c)(1) *Streamlined compliance for commercial derivative military articles.* As an alternative to the compliance required in paragraph (b) of this clause, the Contractor may purchase an amount of domestically melted specialty metals in the required form, for use during the period of contract performance in the production of the commercial derivative military article and the related commercial article, in the amount determined in accordance with paragraph (c)(2) of this clause, if-

- (i) This is an acquisition of commercial derivative military articles; and
- (ii) The Contractor has certified in its offer in accordance with paragraph (c)(2) of this clause.

(2) *Certification for streamlined compliance for commercial derivative military articles (to be submitted with offer when applicable).* The offeror o certifies o does not certify that prior to award it will have entered into a contractual agreement or 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 military article and the related commercial article, that is not less than the Contractor's good faith estimate of the greater of-

- (i) An amount equivalent to 120% of the amount of specialty metal that is required to carry out the production of the commercial derivative military article (including the work performed under each subcontract); or
- (ii) An amount equivalent to 50% of the amount of specialty metal that is purchased by the contractor and its subcontractors for use during such period in the production

of the commercial derivative military article and the related commercial article.

(3) For the purposes of the certification in paragraph (c)(2) of this clause, the amount of specialty metal that is required to carry out the production of the commercial derivative military article includes specialty metal contained in any item, including commercially available off-the-shelf items, incorporated into such commercial derivative military article.

(d) Unless the Contractor has certified in accordance with paragraph (c), the Contractor shall insert the substance of this clause, excluding paragraph (c) but including this paragraph (d), in all subcontracts for articles containing specialty metals.

(End of clause)

1 in accordance with section 187 of title 10, United
2 States Code; or

3 (2) a specialty metal as defined by section
4 2533b of title 10, United States Code.

5 **SEC. 804. CLARIFICATION OF THE PROTECTION OF STRA-**
6 **TEGIC MATERIALS CRITICAL TO NATIONAL**
7 **SECURITY.**

8 (a) PROHIBITION.—Subsection (a) of section 2533b
9 of title 10, United States Code, is amended—

10 (1) by striking “Except as provided in sub-
11 sections (b) through (j), funds appropriated or oth-
12 erwise available to the Department of Defense may
13 not be used for the procurement of—” and inserting
14 “Except as provided in subsections (b) through (m),
15 the acquisition by the Department of Defense of the
16 following items is prohibited.”;

17 (2) in paragraph (1)—

18 (A) by striking “the following” and insert-
19 ing “The following”; and

20 (B) by striking “; or” and inserting a pe-
21 riod; and

22 (3) in paragraph (2), by striking “a speciality”
23 and inserting “A specialty”.

1 (b) APPLICABILITY TO ACQUISITION OF COMMERCIAL
2 ITEMS.—Subsection (h) of such section is amended to
3 read as follows:

4 “(h) APPLICABILITY TO ACQUISITIONS OF COMMER-
5 CIAL ITEMS.—(1) Except as provided in paragraphs (2)
6 and (3), this section applies to acquisitions of commercial
7 items, notwithstanding sections 34 and 35 of the Office
8 of Federal Procurement Policy Act (41 U.S.C. 430 and
9 431).

10 “(2) This section does not apply to contracts or sub-
11 contracts for the acquisition of commercially available off-
12 the-shelf items, as defined in section 35(c) of the Office
13 of Federal Procurement Policy Act (41 U.S.C. 431(c)),
14 other than—

15 “(A) contracts or subcontracts for the acquisi-
16 tion of specialty metals, including mill products,
17 such as bar, billet, slab, wire, plate and sheet, that
18 have not been incorporated into end items, sub-
19 systems, assemblies, or components;

20 “(B) contracts or subcontracts for the acquisi-
21 tion of forgings or castings of specialty metals, un-
22 less such forgings or castings are incorporated into
23 commercially available off-the-shelf end items, sub-
24 systems, or assemblies;

1 “(C) contracts or subcontracts for commercially
2 available high performance magnets unless such high
3 performance magnets are incorporated into commer-
4 cially available off the shelf end items or subsystems;
5 and

6 “(D) contracts or subcontracts for commercially
7 available off-the-shelf fasteners, unless such fas-
8 teners are—

9 “(i) incorporated into commercially avail-
10 able off-the-shelf end items, subsystems, assem-
11 blies, or components; or

12 “(ii) purchased as provided in paragraph
13 (3).

14 “(3) This section does not apply to fasteners that are
15 commercial items that are purchased under a contract or
16 subcontract with a manufacturer of such fasteners, if the
17 manufacturer has certified that it will purchase, during
18 the relevant calendar year, an amount of domestically
19 melted specialty metal, in the required form, for use in
20 the production of such fasteners for sale to the Depart-
21 ment of Defense and other customers, that is not less than
22 50 percent of the total amount of the specialty metal that
23 it will purchase to carry out the production of such fas-
24 teners.”.

1 (c) **ELECTRONIC COMPONENTS.**—Subsection (g) of
2 such section is amended by striking “commercially avail-
3 able” and all that follows through the end of the sub-
4 section and inserting “electronic components, unless the
5 Secretary of Defense, upon the recommendation of the
6 Strategic Materials Protection Board pursuant to section
7 187 of this title, determines that the domestic availability
8 of a particular electronic component is critical to national
9 security.”.

10 (d) **ADDITIONAL EXCEPTIONS.**—Section 2533b of
11 title 10, United States Code, as amended by subsections
12 (a), (b), and (c), is further amended—

13 (1) by redesignating subsections (i) and (j) as
14 subsections (l) and (m), respectively; and

15 (2) by inserting after subsection (h) the fol-
16 lowing new subsections:

17 “(i) **EXCEPTIONS FOR PURCHASES OF SPECIALTY**
18 **METALS BELOW MINIMUM THRESHOLD.**—(1) Notwith-
19 standing subsection (a), the Secretary of Defense or the
20 Secretary of a military department may accept delivery of
21 an item containing specialty metals that were not melted
22 in the United States if the total amount of noncompliant
23 specialty metals in the item does not exceed 2 percent of
24 the total weight of specialty metals in the item.

1 “(2) This subsection does not apply to high perform-
2 ance magnets.

3 “(j) STREAMLINED COMPLIANCE FOR COMMERCIAL
4 DERIVATIVE MILITARY ARTICLES.—(1) Subsection (a)
5 shall not apply to an item acquired under a prime contract
6 if the Secretary of Defense or the Secretary of a military
7 department determines that—

8 “(A) the item is a commercial derivative mili-
9 tary article; and

10 “(B) the contractor certifies that the contractor
11 and its subcontractors have entered into a contrac-
12 tual agreement, or agreements, to purchase an
13 amount of domestically melted specialty metal in the
14 required form, for use during the period of contract
15 performance in the production of the commercial de-
16 rivative military article and the related commercial
17 article, that is not less than the greater of—

18 “(i) an amount equivalent to 120 percent
19 of the amount of specialty metal that is re-
20 quired to carry out the production of the com-
21 mercial derivative military article (including the
22 work performed under each subcontract); or

23 “(ii) an amount equivalent to 50 percent of
24 the amount of specialty metal that is purchased
25 by the contractor and its subcontractors for use

1 during such period in the production of the
2 commercial derivative military article and the
3 related commercial article.

4 “(2) For the purposes of this subsection, the amount
5 of specialty metal that is required to carry out the produc-
6 tion of the commercial derivative military article includes
7 specialty metal contained in any item, including commer-
8 cially available off-the-shelf items, incorporated into such
9 commercial derivative military article.

10 “(k) NATIONAL SECURITY WAIVER.—(1) Notwith-
11 standing subsection (a), the Secretary of Defense may ac-
12 cept the delivery of an end item containing noncompliant
13 materials if the Secretary determines in writing that ac-
14 ceptance of such end item is necessary to the national se-
15 curity interests of the United States.

16 “(2) A written determination under paragraph (1)—
17 “(A) may not be delegated below the level of
18 the Deputy Secretary of Defense or the Under Sec-
19 retary of Defense for Acquisition, Technology, and
20 Logistics;

21 “(B) shall specify the quantity of end items to
22 which the waiver applies and the time period over
23 which the waiver applies; and

24 “(C) shall be provided to the congressional de-
25 fense committees prior to making such a determina-

1 tion (except that in the case of an urgent national
2 security requirement, such certification may be pro-
3 vided to the defense committees up to 7 days after
4 it is made).

5 “(3)(A) In any case in which the Secretary makes
6 a determination under paragraph (1), the Secretary shall
7 determine whether or not the noncompliance was knowing
8 and willful.

9 “(B) If the Secretary determines that the noncompli-
10 ance was not knowing or willful, the Secretary shall ensure
11 that the contractor or subcontractor responsible for the
12 noncompliance develops and implements an effective plan
13 to ensure future compliance.

14 “(C) If the Secretary determines that the noncompli-
15 ance was knowing or willful, the Secretary shall—

16 “(i) require the development and implementa-
17 tion of a plan to ensure future compliance; and

18 “(ii) consider suspending or debarring the con-
19 tractor or subcontractor until such time as the con-
20 tractor or subcontractor has effectively addressed
21 the issues that lead to such noncompliance.”.

22 (e) **ADDITIONAL DEFINITIONS.**—Subsection (m) of
23 section 2533b of title 10, United States Code, as redesign-
24 nated by subsection (c), is further amended by adding at
25 the end the following:

1 “(3) The term ‘acquisition’ has the meaning
2 provided in section 4 of the Office of Federal Pro-
3 curement Policy Act (41 U.S.C. 403).

4 “(4) The term ‘required form’ shall not apply
5 to end items or to their components at any tier. The
6 term ‘required form’ means in the form of mill prod-
7 uct, such as bar, billet, wire, slab, plate or sheet,
8 and in the grade appropriate for the production of—

9 “(A) a finished end item delivered to the
10 Department of Defense; or

11 “(B) a finished component assembled into
12 an end item delivered to the Department of De-
13 fense.

14 “(5) The term ‘commercially available off-the-
15 shelf’, has the meaning provided in section 35(c) of
16 the Office of Federal Procurement Policy Act (41
17 U.S.C. 431(c)).

18 “(6) The term ‘assemblies’ means items form-
19 ing a portion of a system or subsystem that can be
20 provisioned and replaced as an entity and which in-
21 corporates multiple, replaceable parts.

22 “(7) The term ‘commercial derivative military
23 article’ means an item procured by the Department
24 of Defense that is or will be produced using the
25 same production facilities, a common supply chain,

1 and the same or similar production processes that
2 are used for the production of articles predominantly
3 used by the general public or by nongovernmental
4 entities for purposes other than governmental pur-
5 poses.

6 “(8) The term ‘subsystem’ means a functional
7 grouping of items that combine to perform a major
8 function within an end item, such as electrical
9 power, attitude control, and propulsion.

10 “(9) The term ‘end item’ means the final pro-
11 duction product when assembled or completed, and
12 ready for issue, delivery, or deployment.

13 “(10) The term ‘subcontract’ includes a sub-
14 contract at any tier.”.

15 (f) CONFORMING AMENDMENTS.—Section 2533b of
16 title 10, United States Code, is further amended—

17 (1) in subsection (c)—

18 (A) in the heading, by striking “PROCURE-
19 MENTS” and inserting “ACQUISITIONS”; and

20 (B) in paragraphs (1) and (2), by striking
21 “Procurements” and inserting “Acquisitions”;

22 (2) in subsection (d), by striking “procure-
23 ment” each place it appears and inserting “acquisi-
24 tion”; and

1 (3) in subsections (f) and (g), by striking “pro-
2 curements” each place it appears and inserting “ac-
3 quisitions”.

4 (g) IMPLEMENTATION.—Not later than 120 days
5 after the date of the enactment of this Act, the Secretary
6 of Defense shall prescribe regulations on the implementa-
7 tion of this section and the amendments made by this sec-
8 tion, including specific guidance on how thresholds estab-
9 lished in subsections (h)(3), (i) and (j) of section 2533b
10 of title 10, United States Code, as amended by this sec-
11 tion, should be implemented.

12 (h) REVISION OF DOMESTIC NONAVAILABILITY DE-
13 TERMINATIONS AND RULES.—No later than 180 days
14 after the date of the enactment of this Act, any domestic
15 nonavailability determination under section 2533b of title
16 10, United States Code, including a class deviation, or
17 rules made by the Department of Defense between Decem-
18 ber 6, 2006, and the date of the enactment of this Act,
19 shall be reviewed and amended, as necessary, to comply
20 with the amendments made by this section. This require-
21 ment shall not apply to a domestic nonavailability deter-
22 mination that applies to—

23 (1) an individual contract that was entered into
24 before the date of the enactment of this Act; or

1 (2) an individual Department of Defense pro-
2 gram, except to the extent that such domestic non-
3 availability determination applies to contracts en-
4 tered into after the date of the enactment of this
5 Act.

6 (i) **TRANSPARENCY REQUIREMENT FOR COMMER-**
7 **CIALLY AVAILABLE OFF-THE-SHELF ITEM EXCEPTION.**—
8 The Secretary of Defense shall submit to the Committees
9 on Armed Services of the Senate and House of Represent-
10 atives, not later than December 30, 2008, a report on the
11 use of authority provided under subsection (h) of section
12 2533b of title 10, United States Code, as amended by this
13 section. Such report shall include, at a minimum, a de-
14 scription of types of items being procured as commercially
15 available off-the-shelf items under such subsection and in-
16 corporated into noncommercial items. The Secretary shall
17 submit an update of such report to such committees not
18 later than December 30, 2009.

19 **SEC. 805. PROCUREMENT OF COMMERCIAL SERVICES.**

20 (a) **REGULATIONS REQUIRED.**—Not later than 180
21 days after the date of the enactment of this Act , the Sec-
22 retary of Defense shall modify the regulations of the De-
23 partment of Defense for the procurement of commercial
24 services for or on behalf of the Department of Defense.

SEC. 884. REQUIREMENTS RELATING TO WAIVERS OF CERTAIN DOMESTIC SOURCE LIMITATIONS RELATING TO SPECIALTY METALS.

(a) NOTICE REQUIREMENT.—At least 30 days prior to making a domestic nonavailability determination pursuant to section 2533b(b) of title 10, United States Code, that would apply to more than one contract of the Department of Defense, the Secretary of Defense shall, to the maximum extent practicable and in a manner consistent with the protection of national security information and confidential business information— (1) publish a notice on the website maintained by the General Services Administration known as FedBizOpps.gov (or any successor site) of the Secretary’s intent to make the domestic nonavailability determination; and (2) solicit information relevant to such notice from interested parties, including producers of specialty metal mill products. (b) DETERMINATION.—(1) The Secretary shall take into consideration all information submitted pursuant to subsection (a) in making a domestic nonavailability determination pursuant to section 2533b(b) of title 10, United States Code, that would apply to more than one contract of the Department of Defense, and may also consider other relevant information that cannot be made part of the public record consistent with the protection of national security information and confidential business information. (2) The Secretary shall ensure that any such determination and the rationale for such determination is made publicly available to the maximum extent consistent with the protection of national security information and confidential business information.