

## Specialty Metals Frequently Asked Questions

The United States has implemented extensive and complex rules aimed at restricting the use of non-domestic “Specialty Metals” in the defense acquisition process. The stated goal is to protect the U.S. defense industry from becoming overly dependent on foreign sources of supply, especially in times of conflict. These rules are codified in public laws such as the “Berry Amendment” (10 U.S.C. 2533a) and the National Defense Authorizations Acts of FY 2006 and 2007 (10 U.S.C. 2533b and revisions).

Since December 2006, the Department of Defense (DoD) has issued an increasing number of memos attempting to regulate, clarify and otherwise implement the intent of these laws. Most of the legislative and regulatory changes over the last two years have been the result of lobbying struggles in Washington and attempts to explain the application of the law to a very confused domestic defense supply base. The following Q&A is an attempt to assist defense manufacturers in understanding and complying with these laws.

### **Q: What are specialty metals?**

A: Per DFARS 252.225-7014 (a) (2), “Specialty metals” 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, columbium, molybdenum, nickel, titanium, tungsten, or vanadium;

(ii) Metal alloys consisting of nickel, iron-nickel, and cobalt base alloys containing a total of other alloying metals (except iron) in excess of 10 percent;

(iii) Titanium and titanium alloys; or

(iv) Zirconium and zirconium base alloys.”

### **Q: What is the Berry Amendment?**

A: The Berry Amendment is public law 10 U.S.C. 2533a, codified in the 1950s to restrict foods and clothing acquisition by DoD. Specialty Metals restrictions were added in 1973 by the Defense Appropriations Act.

### **Q: Where can I get a copy of DFARS clauses?**

A: <http://farsite.hill.af.mil/VDFDARA.HTM> (Tip: to go to part 252, click on the underlined “52” in the table on the left of the page.)

### **Q: Where can I get a copy of the public laws and DCMA rulings?**

A: Public Laws can be found at the Cornell University web site and DCMA rulings can be found on the DCMA web site (see Helpful Links below).

### **Q: What are the restrictions on using specialty metals on defense contracts?**

A: Generally the restrictions apply to the country of origin where the specialty metal was melted or “smelted”. Only specialty metal melted in the U.S. or a “Qualifying Country” may be used in DoD weapons and space products unless other exemptions apply under law. Note: the exemptions to specialty metals laws have changed frequently and sometimes dramatically during the 2006-2008 fiscal years. It is essential that

contractors and suppliers know which clause, deviation and effectivity date applies to their various defense contracts.

**Q: What effect do these restrictions have on the defense industry?**

A: While the effects are wide ranging, generally the law favors “Qualifying Countries”, forces some suppliers to maintain dual inventories and impacts many prime contractors’ ability to meet schedules and stay competitive.

**Q: Is this a quality issue?**

A: No. This is a contractual compliance/non-compliance issue, not having anything to do with technical non-conformances.

**Q: What penalties are imposed for noncompliance with specialty metals restrictions?**

A: Under the “Berry Amendment” most penalties involved conditional acceptance and withhold payment of the non-compliant parts. Under the newer legislation, there can be no conditional acceptance. Contractors and suppliers must only deliver compliant parts or request a DNAD.

**Q: How do I know if my products are noncompliant?**

A: First check the governing version of the DFARS clause in your contract. Then determine if any DNADs or other exemptions apply to the product in question. The current DFARS clause requires disclosure if noncompliance is discovered. There is no requirement to certify to compliance unless you are a fastener manufacturer and want the new 50% exemption. Since there is no industry standard that requires the country of melt on the mill certifications, manufacturers and distributors must often seek data from suppliers two or more tiers down the chain. Without concrete evidence of noncompliance, there is not much point in reporting a “suspicion”.

**Q: What changed with the FY2007 legislation (10 U.S.C. 2533b)?**

A: See <http://guidebook.dcmamail.com/225/dc07-042.htm>

**Q: What changed with the FY2008 legislation?**

A: See <http://guidebook.dcmamail.com/225/dc08-143.htm>

**Q: What about Commercial-off-the-Shelf item compliance?**

A: The latest DFARS Deviation includes an exception for COTS items and materials. The test for COTS is applied at the point of acceptance from the lower tier supplier. If that item is modified by a higher tier in the manufacturing process, the modification must be compliant - e.g. two parts joined by a specialty metal tab, the tab must be either compliant or COTS.

The language of the specialty metals clause itself is an excellent source of authoritative information and includes a fairly extensive explanation of how to determine whether an item remains COTS when portions of it are removed, new metal is added, multiple COTS items are combined, or COTS are sold with various options.

DFARS 252.225-7014, Alternate I (Deviation 2008-O0002), (a)(3) and (b)(2)(ii):  
**"commercially available off-the-shelf item'** 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."

"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.... 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."

The following examples illustrate this exception:

**Example #1:** A COTS item is painted, coated or powdered after receipt by the next higher tier, but before installation into the next level of assembly. The part number of the COTS item does not change. Does the item retain its COTS character?

Answer: Yes, the item retains its status as COTS provided the process applied is compliant.

For instance, a COTS fastener that gets coated by the fastener manufacturer – the selection of a coating does not cause the fastener to lose its COTS status because coatings are part of various options offered in the commercial marketplace.

**Example #2:** Same as above but the COTS item is anodized and the part number does change.

Answer: Yes, the item retains its status as COTS.

**Example #3:** Stainless steel wire mesh is purchased from a commercial distributor. The next higher tier supplier cuts the mesh material to a useful shape, and attaches the cut material to a bezel, allowing the material can be installed. This is done in house by the supplier as a best value make/buy business case. For purposes of the specialty metal restriction, has the wire mesh lost its COTS properties?

Answer: Yes, the item retains its status as COTS.

**Q. What exception is granted for Electronic Components?**

A. Sec. 842 of the FY2007 NDAA established an exception for commercially available electronic components with a de minimis amount of specialty metals. Sec. 804 of the FY2008 NDAA broadened the exception to include all electronic components. The Class Deviation defines electronic component as 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. The conference report accompanying the legislation states that the term “electronic component” as used in the provision does not include any assembly, such as a radar, that incorporates structural or mechanical parts.

**Q: How should a Procurement Agent respond to a seller’s disclosure of noncompliance?**

A: First check to see if the DFARS clause is actually in both the prime contract and the purchase contract. If it is, determine which version it is (consult with Systems Integrity or Legal) and challenge the supplier to document the non-compliance with a mill cert or other documentation. If the product is indeed noncompliant, challenge the supplier to either use an alternate source or substitute a compliant part from inventory. If none of those solutions will support, coordinate a response with the program Contracts and Legal departments.

**Q: What is a Domestic Non-Availability Determination (DNAD)?**

A: As defined in DFARS 225.7002-2, a DNAD is a determination that “that items grown, reprocessed, reused, or produced in the United States cannot be acquired as and when needed in a satisfactory quality and sufficient quantity at U.S. market prices”.

This determination can only be made by one of the following:

- (i) The Under Secretary of Defense (Acquisition, Technology, and Logistics).
- (ii) The Secretary of the Army.
- (iii) The Secretary of the Navy.
- (iv) The Secretary of the Air Force

Note: the rules for DNADs were altered significantly in the FY 2008 legislation.

**Q: What is a “class DNAD”?**

A: A class DNAD applies to an industry wide specific group or “class” of products (e.g., fasteners or populated circuit cards) as opposed to a program or contract unique DNAD.

**Q: Class DNADs covering several different products are posted on the [DCMA Class DNAD and One-Time Waivers website](#). Can I rely on those Class DNADs for current contract requirements?**

A. Class DNADs continue to be in effect for contracts which were issued prior to July 26<sup>th</sup>, 2008. If you are a sub-tier supplier, you should check with your customer to determine the date of award of the prime contract. If award date was prior to July 26, 2008, you may rely on the DNAD. If the prime contract award date is later than July 26, 2008, you may no longer rely on the Class DNADs and must be compliant with the requirement or fit within one of the exceptions in the rule which was current at the time that contract was awarded.

**Q. The Class DNAD covering most fasteners, expired for new contract awards on 26 July 2008. What are the ways in which to provide compliant fasteners today?**

A. The FY08 legislation and January 29, 2008 class deviation 2008-O0002 provide several ways in which to provide compliant fasteners.

As always, compliant fasteners can be provided using 100% domestic or qualifying country specialty metals. In addition, the new rules provide the following compliance options:

- 1) COTS fasteners installed in COTS items are compliant;
- 2) Commercial or COTS fasteners provided using a new “market-basket” exception are compliant. The market-basket exception allows for COTS or commercial fasteners that are **not** incorporated into COTS items to be considered compliant if the fastener manufacturer has self-certified that it will purchase, during the relevant calendar year, an amount of domestically melted specialty metal that is not less than 50% of the total amount of specialty metal needed to carry out production of fasteners for all customers. Fastener manufacturers who choose to use this “market-basket” approach will need to provide such certifications to their customers upon request. For those fastener manufacturers who elect to self-certify, and for those distributors that have gathered certifications from their suppliers, you may request that your name be added to a list of companies being maintained by the Industrial Fastener Institute (IFI) – see the helpful links at the end of this FAQ.
- 3) Fasteners previously considered compliant under contracts issued prior to July 26, 2008, will still be compliant.
- 4) Non-compliant fasteners produced/manufactured/assembled in the US PRIOR to OCTOBER 17, 2006 may be considered compliant when the end item is delivered to the DOD BEFORE SEPTEMBER 30, 2010 provided these fasteners are sold to the following OEMs (or their suppliers) with approved One Time Waiver compliance plans filed with DOD: Raytheon, NG Electronic Systems, GE Aviation, The Boeing Company, BAE Systems Tactical Vehicle Systems, Sikorsky Aircraft Corp., Rockwell Collins, NavCom Defense Electronic.
- 5) The new de minimus exception for noncompliant specialty metals (other than in high performance magnets) that do not exceed 2% of the weight of specialty metal in the item (as estimated in good faith by the contractor) may also apply.

**Q: What information is required to request a DNAD?**

A: This has changed somewhat with each revision in legislation. Refer to the Berry Amendment FAQ and the NDAA FY2007 & 2008 legislation links above. If in doubt,

consult with your legal counsel and your procurement agent. The basic information is found in DFARS 225.7002-2.

**Q: To whom do I submit a request for a DNAD?**

A: The request should be forwarded to your higher tier contractor to be submitted by the prime contractor to the Government. Only those individuals listed in DFARS 225.7002-2 can grant a DNAD.

**Q: How can small companies get legal help to understand and comply with these complex rules?**

A: Contact their Contractor customer or consult their legal counsel and refer to the useful links contained at the end of this document,

**Q: Which countries are “qualifying countries”?**

A: Refer to DFARS 225.872-1 General

**Q: What is a One-Time Waiver (OTW)?**

A: One-Time Waivers were made available in the FY2007 legislation for noncompliant parts that generally were produced, manufactured or assembled (PMA) prior to October 17, 2006. See the FY2007 info link above.

**Q: How do I know if my customer has an OTW?**

A: Check the DCMA web site at:  
[DCMA Class DNAD and One-Time Waivers website](#)

**Q: How do I determine the prime contract award date to determine which rules apply?**

A: Consult with your higher tier or prime contractor procurement agent.

**Q: Will there be more changes to specialty metals requirements in 2008?**

A: There may be a change to the rule. The current requirements are contained in a DFARS deviation which will ultimately be replaced with a final rule. The process requires publication of a proposed rule or an interim rule, a public comment period, and then publication of the final rule. In this instance the proposed rule was published on July 21, 2008 (DFARS Case 2008-D003 Proposed rule with request for comments).

**Q: Where can I find more detailed information about specialty metals requirements on defense contracts?**

A: Begin with the DFARS and associated PGI provisions. Further information may be available from your customer or legal counsel. Also, see the list of useful links below.

Glossary of Terms

Useful Links

[\*\*OUSD/DPAP Specialty Metals webpage\*\*](#)

[\*\*DCMA Class DNAD and One-Time Waivers website\*\*](#)

[\*\*Defense Logistics Agency Specialty Metals webpage\*\*](#)

[\*\*Industrial Fasteners Institute: Fastener Manufacturer 10 USC 2533b\(h\)\(3\) Certifications\*\*](#)

Cornell University U.S. Code: <http://www4.law.cornell.edu/uscode/>

10-30-08