

U.S. Department of Defense Specialty Metals Source Restrictions

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Introduction

- In DoD Authorization acts for FY 2007 and 2008, Congress passed new laws governing DoD's acquisition of specialty metals
- In implementing the new laws, DoD issued three class deviations, each with a new specialty metals clause
- DoD has recently proposed to amend the DFARS specialty metals provisions and to add a new clause



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Objectives

- Review of (i) governing laws, (ii) specialty metals source restrictions, (iii) exceptions to the source restrictions, (iv) the different contract clauses and their applicability, and (v) the proposed specialty metals DFARS amendment
- Provide practical guidance in certain compliance areas



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Overview

- Specialty Metals 101
 - Governing Laws
 - Fundamental Requirements
- Four Specialty Metals Clauses
 - Applicable Dates
 - Differences
- Proposed DFARS Amendment
- Exceptions
- Practice Pointers



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Specialty Metals 101

- Old Law - Berry Amendment, 10 U.S.C. § 2533a
 - Dates from 1940/1941 and covers many items
 - Specialty metals added in 1972
- Interim Law – 10 U.S.C. § 2533b
 - Effective November 16, 2006 and covers only specialty metals
- New Law – Amendments to 10 U.S.C. § 2533b
 - Effective January 28, 2008



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Specialty Metals 101

- Specialty metals are –
 - Steels that contain other elements in addition to iron and carbon (e.g., most stainless steels are specialty metals)
 - Certain metal alloys of nickel, iron-nickel, and cobalt
 - Titanium and titanium alloys
 - Zirconium and zirconium alloys



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Specialty Metals 101

- The specialty metals source restrictions under all three laws are basically the same
- Specialty metals (i) purchased directly or indirectly by DoD or (ii) incorporated in articles delivered under DoD contracts, must be melted in the United States



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Specialty Metals 101

- Class Deviation 2008-00002, 225.700X-2: "Do not acquire" --
 - End items or components of (i) aircraft, (ii) missile and space systems, (iii) ships, (iv) tank and automotive items, (v) weapons, and/or (vi) ammunition, unless any specialty metals contained in the items or components are melted or produced in the U.S.
 - 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 U.S.



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Contract Clauses

- The source restrictions are currently implemented by four sets of contract clauses
 - DFARS 252.225-7014
 - 252.225-7014 (DEVIATION)
 - “2006 Deviation”
 - 252.225-7014 (DEVIATION 2007-00011)
 - “2007 Deviation”
 - 252.225-7014 (DEVIATION 2008-00002)
 - “2008 Deviation”



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Contract Clauses

- Each clause has a basic version and an Alternate I (Alt. I) version
- Alt. I is required if the contract is for end items or components of (i) aircraft, (ii) missile and space systems, (iii) ships, (iv) tank and automotive items, (v) weapons, and/or (vi) ammunition
- If Alt. I is included in the prime contract, Alt. I must be flowed down to all suppliers and subcontractors at every tier



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Contract Clauses

- The date on which the DoD prime contract was awarded determines which clause applies

Award Dates	Correct Clause
Prior to 11/16/06	DFARS 252.225-7014
11/16/06 thru 10/25/07	252.225-7014 (DEVIATION)
10/26/07 thru 1/28/08	252.225-7014 (DEVIATION 2007-00011)
On and after 1/29/08	252.225-7014 (DEVIATION 2008-00002)



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Contract Clauses

- Determining contract award date –

Contract type	Award Date
IDIQ	Date of IDIQ contract, not date of task or delivery order
BOA	Date of task or delivery order, not date of BOA
Option	Date of option award, not option exercise



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Contract Clauses

- In many cases, different exceptions apply depending upon which Alt. I clause is in the prime contract
- In other cases, some exceptions apply regardless of which Alt. I clause is in the prime contract



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Proposed DFARS Amendment

- Implements the Interim Law and New Law
- Adopts most of the 2008 Deviation provisions, but proposes new DFARS clauses
 - 252.225-70X1 (to replace the basic -7014 clause)
 - 252.225-70X2 (to replace the -7014, Alt. I clause)
 - 252.225-70X3 (Commercial Derivative Military Article, Specialty Metals Compliance Certificate)
 - 252.225-70X4 (Reporting of COTS items that contain specialty metal and are incorporated into noncommercial end items)



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DFARS Amendment

- Adds clarifying definitions of alloy and steel
- Adopts the 2008 Deviation definition of “specialty metal” which had clarified confusion regarding nickel, iron-nickel and cobalt alloys
- Adopts the 2008 Deviation definition of “produce” to clarify language in all three Deviation clauses that used the term “produced” in stating the source restriction requirement



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DFARS Amendment

- “Alloy” means –
 - a metal consisting of a mixture of a basic metallic element and one or more metallic, or non-metallic, alloying elements
 - (i) For alloys named by a single metallic element (e.g., titanium alloy), it means that the alloy contains 50 percent or more of the named metal (by mass)
 - (ii) If two metals are specified in the name (e.g., nickel-iron alloy), those metals are the two predominant elements in the alloy, and together they constitute 50 percent or more of the alloy (by mass)



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DFARS Amendment

- “Steel” means –
 - An iron alloy that includes between 0.02 and 2 percent carbon and may contain other elements
- “Specialty metal” includes –
 - Metal alloys consisting of (i) nickel or iron-nickel alloys that contain a total of alloying metals other than nickel and iron in excess of 10% or (ii) cobalt alloys that contain a total of alloying metals other than cobalt and iron in excess of 10%



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DFARS Amendment

- “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



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Exceptions To The Source Restrictions

- Qualifying countries
- DNADs
- One-time waiver
- Electronic components (two versions)
- COTS items (two versions)
- Commercial fasteners



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Exceptions To The Source Restrictions

- Items with minimal non-compliant specialty metals
- Commercial derivative military articles
- National security waiver



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Exceptions To The Source Restrictions

- Acquisitions at or below the simplified acquisition threshold
- Acquisitions outside the U.S. in support of combat operations
- Acquisitions in support of contingency operations
- Acquisitions made noncompetitively due to unusual and compelling urgency
- Acquisition of items for resale in commissaries



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Qualifying Countries

- Specialty metals acquired as end items –
 - Under DFARS 252.225-7014 and the 2006 and 2007 Deviation basic clauses, specialty metals melted in a qualifying country are excepted from the source restrictions
 - Under the 2008 Deviation basic clause and proposed DFARS 252.225-70X1, specialty metals *are not excepted* from the source restrictions, and DoD may not acquire specialty metal as an end product, either directly or through a contractor, unless the specialty metal is melted in the U.S. or its outlying areas.



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Qualifying Countries

- Specialty metals incorporated in items delivered to DoD –
 - Under all four Alt. I clauses, specialty metals *melted in a qualifying country* are excepted if they are incorporated in end items or components
 - Under all four Alt. I clauses, end items and components *manufactured in a qualifying country* are excepted regardless of where the metal was melted
 - Qualifying countries are listed in DFARS 225.872-1
 - The U.S. *is not* a qualifying country



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Domestic Non-Availability Determinations

- DNADs apply to all contracts
- Generally, class DNAD's apply DoD-wide
- Under a DNAD, contracting officers may procure end items and components without regard to where the specialty metals were melted or produced
- Class DNAD's existing prior to enactment of the New Law (CCAs, fasteners, needle bearings) expired on July 26, 2008 for new contracts



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DNADs

- Contracts open or awarded prior to the New Law are covered even though a DNAD has expired
- New DNADs may be made if the facts warrant, but the procedures for making such DNADs were changed by the New Law
 - These procedures are currently implemented by the 2008 Deviation at 225.700X-3(b)(5)(iv)
 - A similar, but expanded procedure is included in proposed DFARS 225.7003(b)(5)(ii)



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One-Time Waiver

- The one-time waiver (OTW) applies to all contracts
- An OTW allows DoD to accept non-compliant items that were produced, manufactured, or assembled in the U.S. before October 17, 2006, where final acceptance occurs after that date



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OTW

- An OTW will be granted only if the contracting officer determines in writing that
 - Removal or replacement of the non-compliant specialty metals in such items or substitution of non-compliant items is impractical or uneconomical
 - The responsible prime and subcontractor have corrective action plans in place
 - The non-compliance was not knowing or willful
- All parts covered by an OTW must be compliant by September 29, 2010



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Electric Components

- All electric components –
 - Under the 2008 Deviation, Alt. I clause, all electronic components are excepted
 - This exception is not applicable under contracts that contain DFARS 252.225-7014, Alt. I, or the 2006 Deviation, Alt. I or 2006 Deviation, Alt. I clauses
 - Proposed DFARS 252.225-70X2, has the same broad exception as the 2008 Deviation, Alt. I clause



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Electronic Components

- Commercially available electronic components with specialty metals of *de minimis* value –
 - This exception is available only under the 2006 Deviation, Alt. I and 2007 Deviation, Alt. I clauses
 - Under both clauses, the specialty metals source restrictions do not apply to specialty metals incorporated in a commercially available electronic component if the value of the specialty metal content does not exceed 10% of the overall value of the lowest level electronic component



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Electronic Components

- “Electronic component” is 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
- Electronic components that meet the definitions of COTS items or commercial item in the FAR are “commercially available”



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Electronic Components

- “De minimis value” means that the value of the specialty metal in the electronic component does not exceed 10% of the overall value of the lowest level electronic component containing specialty metal
- The “value” of the specialty metal content is the cost of the specialty metal in its raw material form
- “Overall value” is either (i) the price for parts purchased from a supplier or (ii) the sale price for parts supplied to a higher tier contractor
- The value of the specialty metal may be estimated



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COTS Items

- No exception for COTS items under DFARS 252.225-7014, Alt. I or 2006 Deviation, Alt. I
- Under 2007 Deviation, Alt. I, all COTS items are excepted
- Under 2008 Deviation, Alt. I, there is an exception for COTS items *other than* –
 - COTS fasteners unless they are incorporated into COTS end items, subsystems, assemblies, or components



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COTS Items

- Forgings or castings of specialty metals, unless they are incorporated into COTS end items or assemblies
- Commercially available high performance magnets unless they are incorporated into COTS end items or subsystems
- Under proposed DFARS 252.225-70X2, there is an exception for COTS items *other than* –
 - Specialty metal mill products, such as bar, billet, slab, etc., that have not been incorporated into COTS end items, subsystems, assemblies, or components



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COTS Items

- Forgings or castings of specialty metals unless they are incorporated into COTS end items, subsystems, or assemblies
- Commercially available high performance magnets that contain specialty metal, unless the magnets are incorporated into COTS end items or subsystems
- COTS fasteners unless –
 - The fasteners are incorporated into COTS end items, subsystems, assemblies, or components



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COTS Items

- The manufacturer of the fasteners certifies 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 such fasteners for sale to DoD 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



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Commercial Fasteners

- This exception applies only under 2008 Deviation, Alt. I and covers –
 - Commercial item fasteners purchased under a contract with a manufacturer of the fasteners, that has certified 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 DoD 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



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Commercial Fasteners

- Proposed DFARS 252.225-70X2 includes the same exception as 2008 Deviation, Alt. I



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Minimal Non-Compliant Specialty Metal

- This exception applies only under the 2008 Deviation, Alt. I clause and covers –
 - Specialty metals, other than specialty metals in high performance magnets, that do not meet any of the exceptions, if the total weight of such non-compliant metals does not exceed 2% of the total weight of specialty metal in the item, as estimated in good faith by the Contractor
- Proposed DFARS 252.225-70X2 contains essentially the same exception



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Commercial Derivative Military Articles

- This exception applies only under the 2008 Deviation, Alt. I clause –
 - A commercial derivative military article is an item procured by DoD 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 government purposes



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Commercial Derivative Military Articles

- Commercial derivative military articles are excepted from the specialty metals source restrictions if the contractor certifies that it and its subcontractors have entered into contracts to purchase an amount of domestically melted specialty metal in the required form, for use during the period of contract performance in the production of a commercial derivative military article and the related commercial article, that is not less than the greater of –



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Commercial Derivative Military Articles

- An amount equivalent to 120% of the amount of specialty metal that is required to produce the commercial derivative military article (including work performed under each subcontract); or
- 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 to produce the commercial derivative military article and the related commercial article



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National Security Waiver

- This exception applies (i) only under the 2008 Deviation, Alt. I clause, and (ii) only to non-compliance discovered after contract award
- DoD may accept delivery of an end item containing non-compliant materials if the Secretary determines in writing that acceptance of such item is necessary to U.S. national security



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National Security Waiver

- If the Secretary determines that the non-compliance was not knowing or willful, the contractor or subcontractor must develop and implement a plan to ensure future compliance
- If the Secretary determines that the non-compliance was knowing or willful, the Secretary will –



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National Security Waiver

- Require the development and implementation of a plan to ensure future compliance; and
- Consider suspending or debaring the contractor or subcontractor



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Exceptions Summary

- Attached is a chart summarizing the exceptions to the foregoing specialty metals source restrictions, the relevant contract clauses, and the period or periods of availability of each exception



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EXCEPTIONS TO DOD SPECIALTY METALS RESTRICTIONS
CONTRACT CLAUSES AND PERIODS OF AVAILABILITY

Contract Clause	252.225-7014 Alt. I				Proposed DFARS 252.225-70X2
	DFARS	Deviation 2006	Deviation 2007	Deviation 2008	
Applicable Clause Period	Pre- 11/16/06	11/16/06- 10/25/07	10/26/07- 1/28/08	1/29/08-	
Exceptions					
Qualifying countries	YES	YES	YES	YES	YES
Class DNADs (expired for new contracts on 7/26/08)	YES	YES	YES	YES	YES
One-time waiver	YES	YES	YES	YES	YES
COTS items with no limits	NO	NO	YES	NO	NO
COTS items with limits	NO	NO	NO	YES	YES
Commercial fasteners	NO	NO	NO	YES	YES
Commercially available electrical components - De minimus	NO	YES	YES	NO	NO
Electronic components - All	NO	NO	NO	YES	YES
Third-tier and below parts and assemblies	NO	YES	YES	NO	NO
Minimal (2%) non-compliant specialty metal (except high performance magnets)	NO	NO	NO	YES	YES
Commercial Derivative Military Articles	NO	NO	NO	YES	YES
National Security Waiver	NO	NO	NO	YES	YES



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Practice Pointer One

- Dealing with an incorrect Alt. I clause –
 - If a solicitation uses an old Alt. I clause, the contract may contain the wrong clause
 - Possible scenarios are shown below

Contract Award	DFARS Clause	2006 Deviation	2007 Deviation	2008 Deviation
Pre-11/16/06	YES	N/A	N/A	N/A
11/16/06-10/25/07	NO	YES	NO	NO
10/26/07-1/28/08	NO	NO	YES	NP
1/29/08-	NO	NO	NO	YES



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Practice Pointer One

- Remember that DoD has fixed the date of contract *award* for determining which clause applies
- If the wrong Alt. I is included in a solicitation, you should attempt to have the correct clause included
- If you are a subcontractor, you should make sure that the Alt. I clause in the subcontract is the correct clause, checking all standard terms and conditions invoked or incorporated by reference in the subcontract



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Practice Pointer One

- The bottom line, however, is that you must comply with whatever clause is actually included in your contract or subcontract, even if that clause is arguably the wrong clause
- The possible good news is that DoD may propose a simple resolution to this currently very complicated and confusing regulatory scheme



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Practice Pointer Two

- Summary of specialty metals rules under the basic (i.e., not Alt. I) clauses –
 - Under DFARS 252.225-7014, any specialty metals incorporated in articles delivered under the contract must have been melted in the United States or its outlying areas
 - However, that restriction does not apply to specialty metals (i) melted in a qualifying country or incorporated into an article manufactured in a qualifying country, or (ii) purchased by a subcontractor at any tier



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Practice Pointer Two

- Under the 2006 Deviation basic clause, any specialty metal delivered under the contract must have been melted in the United States or its outlying areas, or in a qualifying country
- However the accompanying Class Deviation, dated December 6, 2006, provides that any specialty metal (e.g., raw stock) acquired directly by the government or by a prime contractor for delivery to the government must be melted or produced in the United States



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Practice Pointer Two

- Under the 2007 Deviation basic clause, any specialty metal delivered under the contract must have been melted in the United States or its outlying areas, or in a qualifying country
- The accompanying Class Deviation, dated October 26, 2007, provides that, with minor corrections, the Class Deviation 2006-0004 remains in effect, so under this clause, any specialty metal (e.g., raw stock) acquired directly by the government or by a prime contractor for delivery to the government must be melted or produced in the United States



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Practice Pointer Two

- Under the 2008 Deviation basic clause, any special metals delivered under the contract must have been melted or produced in the United States or its outlying areas. The qualifying country exception *is not available* when the government is purchasing specialty metal as an end product.
- The restrictions under proposed DFARS 252.225-70X1 are the same as the 2008 Deviation basic clause.



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Practice Pointer Three

- If a solicitation requires *certification* of full compliance with specialty metals source restrictions –
 - You should decline to certify because federal law prohibits imposing a certification requirement, or interpreting a statute to require a certification, unless the statute expressly requires one; nothing in the New Law requires such a certification
 - But see proposed DFARS 252.225070X3 (CDMA-Specialty Metals Compliance Certificate)



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Practice Pointer Four

- If a supplier asks you to waive applicable Alt. I requirements --
 - You should decline to do so
 - Only the government has authority to waive the Alt. I requirements, and it can do so only under very limited circumstances
 - In any event, if the supplier's products qualify for any of the exceptions, no waiver is needed



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Practice Pointer Five

- If your contract contains only a basic -7014 clause or no -7014 clause, Alt. I may still apply if the deliverable appears to be an end item or component of the six product categories
 - If the contract's DPAS rating is A1 through A6, the appropriate Alt. I clause applies
 - If the DPAS rating is other than A1 through A6, the appropriate basic 7014 clause applies
 - If the contract contains no DPAS rating, you should contact the PCO to obtain more information



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Practice Pointer Six

- Guidance regarding test equipment and ground support equipment
 - Under the Alt. I versions of the 2006, 2007 and 2008 Deviation clauses, as well as proposed DFARS 252.225-70X2, the specialty metals source restrictions do not apply to test equipment and ground support equipment because they are not incorporated in the end product
 - The same rationale applies to pre-November 16, 2006 contracts that contain the Old Law Alt. I



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