20301–3062. Telephone 703–602–8383; facsimile 703–602–7887. Please cite DFARS Case 2008–D035.

SUPPLEMENTARY INFORMATION:

A. Background

The objective of Peer Reviews of solicitations and contracts is to ensure consistent policy implementation, to improve the quality of contracting processes, and to facilitate cross-sharing of best practices and lessons learned throughout DoD. This final rule specifies that the Office of the Director, Defense Procurement and Acquisition Policy, will organize teams of reviewers and will facilitate Peer Reviews for all solicitations valued at $1 billion or more and for all contracts for services valued at $1 billion or more. In addition, the rule requires the military departments, defense agencies, and DoD field activities to establish procedures for pre-award Peer Review of solicitations valued at less than $1 billion, and post-award Peer Review of contracts for services valued at less than $1 billion.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

This rule will not have a significant cost or administrative impact on contractors or offerors, or a significant effect beyond the internal operating procedures of DoD. Therefore, publication for public comment under 41 U.S.C. 418b is not required. However, DoD will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should cite DFARS Case 2008–D035.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 201, 207, 215, and 237

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR Parts 201, 207, 215, and 237 are amended as follows:

■ 1. The authority citation for 48 CFR Parts 201, 207, 215, and 237 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 201—FEDERAL ACQUISITION REGULATIONS SYSTEM

■ 2. Section 201.170 is added to read as follows:

201.170 Peer Reviews.

(a) *Acquisitions valued at $1 billion or more.*

(1) The Office of the Director, Defense Procurement and Acquisition Policy, will organize teams of reviewers and facilitate Peer Reviews for solicitations and contracts valued at $1 billion or more, as follows:

(i) Pre-award Peer Reviews will be conducted for all solicitations valued at $1 billion or more (including options).

(ii) Post-award Peer Reviews will be conducted for all contracts for services valued at $1 billion or more (including options).

(iii) Reviews will be conducted using the procedures at PGI 201.170.

(2) To facilitate planning for Peer Reviews, the military departments, defense agencies, and DoD field activities shall provide a rolling annual forecast of acquisitions with an anticipated value of $1 billion or more (including options) at the end of each quarter (*i.e.,* March 31; June 30; September 30; December 31), to the Deputy Director, Defense Procurement and Acquisition Policy (Contract Policy and International Contracting), 3060 Defense Pentagon, Washington, DC 20301–3060.

(b) *Acquisitions valued at less than $1 billion.* The military departments, defense agencies, and DoD field activities shall establish procedures for—

(1) Pre-award Peer Reviews of solicitations valued at less than $1 billion; and

(2) Post-award Peer Reviews of contracts for services valued at less than $1 billion.

PART 207—ACQUISITION PLANNING

■ 3. Section 207.104 is added to read as follows:

207.104 General procedures.

In developing an acquisition plan, agency officials shall take into account the requirement for scheduling and conducting a Peer Review in accordance with 201.170.

PART 215—CONTRACTING BY NEGOTIATION

■ 4. Section 215.270 is added to read as follows:

215.270 Peer Reviews.

Agency officials shall conduct Peer Reviews in accordance with 201.170.

PART 237—SERVICE CONTRACTING

■ 5. Section 237.102 is amended by adding paragraph (e) to read as follows:

237.102 Policy.

* * * * *

(e) Program officials shall obtain assistance from contracting officials through the Peer Review process at 201.170.

[FR Doc. E9–17953 Filed 7–28–09; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 202, 212, 225, and 252

RIN 0750–AF95

Defense Federal Acquisition Regulation Supplement; Restriction on Acquisition of Specialty Metals (DFARS Case 2008–D003)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to address statutory restrictions on the acquisition of specialty metals not melted or produced in the United States. The rule implements Section 842 of the National Defense Authorization Act for Fiscal Year 2007 and Sections 804 and 884 of the National Defense Authorization Act for Fiscal Year 2008.

DATES: *Effective Date:* July 29, 2009.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone 703–602–0328; facsimile 703–602–7887. Please cite DFARS Case 2008–D003.

SUPPLEMENTARY INFORMATION:

A. Background

Section 842 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364) added new provisions at 10 U.S.C. 2533b, to address requirements for the purchase of specialty metals from domestic sources. Section 804 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181) made amendments to 10 U.S.C. 2533b with regard to its applicability to commercial items,

electronic components, items containing minimal amounts of specialty metals, items necessary in the interest of national security, and items not available domestically in the required form. In addition, Section 884 of the National Defense Authorization Act for Fiscal Year 2008 added a requirement for DoD to publish a notice on the Federal Business Opportunities Web site before making a domestic nonavailability determination that would apply to more than one contract.

DoD published a proposed rule at 73 FR 42300 on July 21, 2008. Sixteen sources submitted comments on the proposed rule. A discussion of the comments is provided below.

1. Definition of Commercially Available Off-the-Shelf (COTS) Item

Comments: Five respondents stated that the definition of COTS item in the proposed rule was too broad, was inconsistent with the intent of Congress, and would allow modifications to occur at the next higher tier in the supply chain. One respondent stated that allowing modifications at the next higher tier in the supply chain would negatively affect the high performance magnet industry and would allow abuse of this exception.

Several respondents were concerned that an item could be substantially modified by downstream contractors prior to delivery to the Government. One respondent recommended that DoD change the definition to state that anything contained in a COTS end item, as well as subcontracts for COTS subassemblies used in non-COTS end items, would be exempt, but non-exempted COTS items, such as mill products, forgings and castings, high performance magnets, and fasteners, that go directly into non-COTS end items or non-COTS assemblies would not be exempt. Another respondent requested that DoD allow only modifications that are incidental to installation, joining, or incorporation into the non-commercial end item. Some of these respondents cited language from the House Armed Services Committee report, which states that the exception for COTS items and components generally applies to items incorporated into non-commercial end items. The Committee report also states that, if a contractor is using COTS items with more substantial modifications, it must use the de minimis or commercial derivative military article exceptions.

One respondent provided a few examples where the rule might lead to an increased use of foreign specialty metals and might allow substantial modification. In one example, a mill product in the form of bar or plate might be machined, rolled, and cut into a blank form by a subcontractor in Russia or China, but would still be considered a COTS item, and then might be used in military unique compressor blades. The blank would undergo substantial modification that altered the dimensions and metallurgy of the metal to meet military specifications before being offered to the Government.

Several respondents wanted DoD to further clarify the difference between COTS and ''commercially available'' for suppliers to which the flowdown requirement applies.

DoD Response: Section 804 of Public Law 110–181 clearly denies use of the COTS item exception for mill products and high performance magnets under any circumstances, and also for fasteners, castings, and forgings unless certain conditions are met. There is no reason for concern about the treatment of ''blanks'' as COTS items, because 10 U.S.C. 2533b(h)(2)(A) specifically requires application of the restriction to contracts or subcontracts for the acquisition of specialty metals * * * that have not been incorporated into end items, subsystems, assemblies, or components. Blanks clearly fall into this category. Therefore, even if the blank is considered to be a COTS item, there would be no waiver of the specialty metals restrictions for the blank. The military-unique blade could not be made from a blank from China unless another exception applies.

Other than those groupings of items specifically restricted, it is reasonable to view COTS items that are provided from the global supply chain to the next higher tier supplier, without any modifications, to be delivered to the Government by those suppliers without modification. If DoD were not to view such items in this way, these COTS suppliers would not be able to provide globally available COTS items to the Government without burdensome investigations to discover whether or not a particular item could be used. This would force COTS suppliers to track not only the sale of the particular COTS item, but also the eventual use of the COTS item to the end of the final assembly. Nowhere in the manufacturing or distribution chain of COTS items does such a rule exist, and it is unreasonable to require COTS suppliers to create one. The advantages to the taxpayer are evident. DoD's maximum use of COTS items results in cheaper, faster, and sufficient availability of such items, at satisfactory quality. Additionally, most DoD production programs have specifically been designed and developed with a growing reliance on non-developmental items to reduce costs to the taxpayer, with great effort not to rely on unique DoD solutions wherever possible. This benefits DoD, and also the taxpayer, by providing a reliable source of items at reasonable prices.

The rule provides a clear definition of COTS items. This definition is flowed down with the clause to subcontractors at all tiers. The definition contains two additional criteria for a COTS item beyond the requirement for the item to be a commercial item.

Comments: Several respondents stated that the COTS definition was too restrictive. One respondent stated that it is wasteful and costly to require sub-tier COTS suppliers to provide COTS items without modification to the next higher tier. The respondent stated that, in some cases, the modifications that occur after the next higher tier must be incorporated in the assembly process earlier, which requires disassembling, testing, and then reassembling of the COTS item under the rule's definition. The respondent stated that DoD should reconsider the need to accept the COTS items separately before allowing modifications, because it is wasteful and costly to require a serial approach.

DoD Response: It is not possible to revise the rule as requested by these respondents and still be in compliance with the statutory definition of a COTS item and the statutory restrictions on the use of the COTS item exception. The law requires that a COTS item be offered to the Government without modification.

2. Definition of Component

Comments: One respondent noted that the language in DoD Class Deviation 2008–O0002 states that items that are not incorporated in the six major end items are not considered to be components. The deviation states that items such as test equipment and ground support equipment are excluded from specialty metals restrictions. The respondent found this language critically important. Although it may be possible to infer these exclusions, the respondent recommended adding this language from the deviation explicitly to the rule, especially since, prior to the creation of 10 U.S.C. 2533b, items such as test equipment and ground support equipment were required to be compliant with the specialty metal restrictions.

DoD Response: According to the principles set forth at DFARS 201.301, the DFARS contains—

(i) Requirements of law;

(ii) DoD-wide policies;

(iii) Delegations of FAR authorities;

(iv) Deviations from FAR requirements; and

(v) Policies/procedures that have a significant effect beyond the internal operating procedures of DoD or a significant cost or administrative impact on contractors or offerors.

Relevant procedures, guidance, and information that do not meet these criteria are issued in the DFARS companion resource, Procedures, Guidance, and Information (PGI).

Definition of the term ''component'' is a requirement of law. ''Component'' is explicitly defined in the rule as ''any item supplied to the Government as part of an end item or of another component.'' Therefore, any items that are not incorporated into any of the items listed in DFARS 225.7003–2(a) are not components of those items. Because test equipment, ground support equipment, and shipping containers are just examples of items that may not be components of the missile system, these items are listed as examples in PGI 225.7003–2(a).

3. Definition of Electronic Component

The proposed rule defined ''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 term does not include structural or mechanical parts of an assembly containing an electronic component.''

Comments: One respondent stated that the rule's definition does a good job of defining the exclusion of the housing materials. Another respondent recommended use of the exact words from the Section 804 report, which stated that the term ''electronic component'' does not include any assembly, such as a radar, that incorporates structural or mechanical parts.

DoD Response: DoD maintains its interpretation of the Congressional report language as stated in the rule. DoD interprets the report language as stating that the whole radar assembly, including the structural or mechanical parts, cannot be considered an electronic component and, therefore, cannot be exempted in its entirety from the specialty metals restrictions. This should not be interpreted to imply that none of the components within the radar assembly can be considered to be electronic components. Components that otherwise meet the definition of ''electronic component'' within the radar assembly, other than structural and mechanical parts, are electronic components.

Comments: One respondent stated that, because magnets control the flow of electrons and charged particles—

○ A high performance magnet could easily be interpreted as an electronic component; or

○ A larger assembly, comprised of many electrical devices as listed in the rule ''interconnected'' with one another, including high performance magnets, could be considered to be an electronic component.

The respondent recommended clarification of the definition to avoid total exclusion of high performance magnets from the specialty metals restrictions, under the exception for electronic components.

DoD Response: DoD concurs with this recommendation. While high performance magnets are almost always used in conjunction with electronic components, DoD concludes that the exception for electronic components should not exempt all high performance magnets from the specialty metals restrictions. Congressional intent on this point is clear, given the special treatment of high performance magnets in the COTS exception at 10 U.S.C. 2533b(h)(2)(c) and the minimum content exception at 10 U.S.C. 2533b(i)(2). Therefore, for purposes of this regulation, the definition of ''electronic component'' has been clarified to specifically exclude high performance magnets.

4. Definition of High Performance Magnet

Comments: Three respondents had concerns on technical grounds with the rule's definition of high performance magnets as permanent magnets that obtain a majority of their properties from rare earth materials.

○ One respondent stated that all alloying elements are important to magnetic properties and, since there is more cobalt than samarium in samarium-cobalt magnets, it is difficult to establish that a majority of the magnetic properties result from a magnet's samarium content.

○ Several respondents stated that magnetic performance is not the only criterion used for defining high performance magnets. They also cited induction and coercivity as measures of magnetic properties and consider thermal properties of magnetic materials to be key measures of a magnet's ultimate performance in an application. One respondent recommended that the rule's definition provide a clear and objective meaning for the definition of high performance magnet—providing specific standards to be met. The respondent disagreed with DoD's Background statement that magnets containing rare earth elements are technologically superior in magnetic performance to other types of magnets, because the technological superiority of one magnet over another is ultimately driven by the requirements of the application where it is used. The respondent also stated that, in addition to maximum energy product, parameters such as temperature stability, temperature range, resistance to demagnetization, corrosion resistance, mechanical toughness, and machinability contribute to the decision as to which type of magnet to use for a military application.

These respondents were also concerned that limiting the definition to rare earth (such as samarium-cobalt) magnets and excluding alnico magnets would increase dependency on Chinese magnets and threaten national security. For example, one respondent expressed concern that, if alnico magnets are not included in the definition, alnico magnets that are COTS items will be exempt from the specialty metals restriction.

Several respondents suggested that DoD use the definition from the Conference Report (H.R. 110–477), which provides that ''high performance magnet'' means permanent magnets containing 10 or more percent by weight of materials such as cobalt, samarium, or nickel.

DoD Response: With regard to whether it is meaningful to define ''high performance magnet'' as a permanent magnet that obtains a majority of its magnetic properties from rare earth metals: Cobalt, iron, and nickel are the three primary ferromagnetic metals and, therefore, are present in most, if not all, permanent magnets. However, it is the very strong magneto-crystalline anisotropy (the property of being directionally dependent) of certain rare earth elements that produces the exceptional magnetic behavior in the materials to which they are added. The partially filled 4f electron subshells in rare earths lead to magnetic properties in a manner similar to the partially filled 3d electron subshells in transition elements such as cobalt, iron, and nickel. However, the magnetic moment of a rare earth material is typically an order of magnitude greater than that in a transition element; and rare earths exhibit a large anisotropy due to dipolar interactions. In summary, rare earths possess very unique electron structures that produce extreme anisotropy in their magnetic properties.

DoD technical experts have concluded that there is no industry standard definition for high performance magnets. However, magnet performance is measured using magnetic properties and temperature capability.

○ Magnetic properties are summarized using maximum energy product. DoD technical experts reviewed various references that place heavy emphasis on the maximum energy product of a magnet as ''the figure of merit'' by which permanent-magnet materials are judged. The greater the maximum energy product of a permanent magnetic material, the more powerful the magnet, and the smaller the volume (and typically the weight) of the magnet required for a given application. The maximum energy products for rare earth magnets are significantly higher than those for ferrite and alnico materials, thus supporting their designation as ''high performance magnets.''

○ Temperature stability is measured using maximum operating and Curie temperatures (the temperature below which there is a spontaneous magnetization in the absence of an externally applied magnetic field). Although alnico magnetic materials rank well on maximum use temperature and Curie temperature, this does not overcome the substantially lower maximum energy product.

The maximum energy product ranking of various magnetic materials and temperature stability measurements are as follows:

Magnetic material	Maximum energy product (kJ/m^3)	Maximum energy product (MGOe)	Max. use temp. (°C)	Curie temp. (°C)
Steel	< 2	low	< 100	
Co-Steels	1–8	< 1	100	
Ferrites	8–32	1–4	300	450
Alnico (AlNiCo)	11–72	1–9	550	860
Samarium-Cobalt ($SmCo_5$)	130–210	16–25	300	750
Samarium-Cobalt (Sm_2Co_{17})	160–260	20–32	550	825
Neodymium-Iron-Boron ($Nd_2Fe_{14}B$)	200–450	25–50	150	315

(Data from MMPA Standard No. 0100–00).

Of today's permanent magnets containing specialty metals, only samarium cobalt magnet materials possess the combination of properties necessary to be considered ''high performance magnets.'' The only other permanent magnets today that obtain a majority of their magnetic properties from rare earths are neodymium-iron-boron magnets. Neodymium-iron-boron magnets are high performance magnets, but normally do not contain specialty metals. Ferrites are not high performance magnets (as was erroneously stated in the preamble to the proposed rule), nor do they contain specialty metals.

Representatives from permanent magnet suppliers asserted in discussions with DoD engineers that alnico magnets possessed superior toughness and calibration sensitivity qualities, and those qualities supported designating alnico magnets as high performance magnets. DoD engineers considered, but ultimately did not accept, that rationale.

○ Mechanical strength and toughness generally are not employed as measures of merit for permanent magnets, because all permanent magnetic materials of interest (ferrites, rare-earths, and alnico) are hard and brittle. Section I, subsection 6.0, of Magnetic Materials Producers Association Standard No. 0100–00, Standard Specifications for Permanent Magnet Materials, states that most permanent magnet materials lack ductility and are inherently brittle. Such materials should not be utilized as structural components in a circuit. Measurement of properties such as hardness and tensile strength are not feasible on commercial materials with these inherent characteristics. Therefore, specifications of these properties are not acceptable.

○ Finally, calibration sensitivity is an indication of precision but not of high performance.

DoD technical experts agree that, in addition to maximum energy product, parameters such as temperature stability, temperature range, resistance to demagnetization, corrosion resistance, mechanical toughness, and machinability contribute to the decision as to which type of magnet to use for a military application. However, just because a particular magnetic material is most appropriate for a particular application does not mean that it is a high performance magnet. Not every application requires the use of a high performance magnet.

Although DoD does not consider alnico magnets to be high performance magnets, regardless of the impact of this decision on the industry, DoD notes that representatives from permanent magnet suppliers further established in discussions with DoD technical experts that virtually all alnico and samarium cobalt magnets are made to unique customer specifications and are not COTS items. Accordingly, direct DoD purchase of such permanent magnets almost certainly would involve non-COTS magnets, which must comply with specialty metals provisions, whether or not the magnets are judged to be high performance magnets. With respect to permanent magnets incorporated into COTS subsystems or end items, such magnets, whether COTS or non-COTS, high performance or not high performance, are by statute not required to utilize specialty metals melted or produced in the United States. Therefore, the definition of high performance magnet makes a difference only with regard to the 2 percent minimum content exception and has no significant impact on the use of alnico magnets for defense applications.

To define ''high performance magnets'' as ''permanent magnets containing 10 percent or more by weight of materials such as cobalt, samarium, or nickel'' would be technically unsound and open-ended. Cobalt and nickel have been primary alloying elements for permanent magnet materials since exploration of these materials began over 100 years ago. By this unbounded definition, almost all magnets would be covered.

Therefore, no change has been made to the definition of high performance magnet.

Comments: One respondent recommended a single, consistent, and narrow definition for high performance magnets. This respondent stated that it should mean only magnets that contain samarium cobalt. The respondent stated that the proposed rule used inconsistent definitions in the clause at 252.225–70X2 (now 252.225–7009) and in section 4.d. of the Background of the proposed rule. According to the respondent, section 4.d. stated that the restriction on acquisition of specialty

metals only impacts the acquisition of samarium cobalt high performance magnets; this is inconsistent with the clause, which provides an expanded definition of a high performance magnet as a permanent magnet that obtains a majority of its magnetic properties from rare earth metals (such as samarium).

DoD Response: There is no inconsistency between the preamble to the proposed rule and the definition in the clause. Section 4.d. of the preamble clearly stated that the proposed rule defined ''high performance magnet'' to mean a permanent magnet that obtains a majority of its magnetic properties from rare earth metals (such as samarium). It then explained that, although the definition of ''high performance magnet'' includes various types of permanent magnets, samarium cobalt magnets are the only high performance magnets composed of specialty metal.

The definition of ''high performance magnet'' is independent of the restriction on specialty metals. Therefore, it would be inappropriate to exclude neodymium-iron-boron magnets from the definition of high performance magnet because they do not consist of a specialty metal and are not impacted by this rule.

5. Definition of Produce

Comments: Eight respondents expressed concern with the definition of ''produce'' in the proposed rule.

○ Numerous respondents opposed the inclusion of any process other than melting, or its equivalent, in the definition of ''produce,'' especially as applied to armor plate. One respondent stated that gas atomization, sputtering, and powder consolidation are production processes; the respondent did not object to their inclusion in the definition of ''produce,'' but the respondent would object to finishing processes, such as rolling, annealing, quenching, or tempering in the United States as sufficient to constitute production of titanium products in the United States (these processes apply only to armor plate in the proposed definition). Likewise, another manufacturer of titanium agreed that gas atomization, sputtering, or consolidation from powder using non-melt technology are the equivalent of production, but the definition should not be further expanded to secondary processes such as rolling and finishing processes.

○ One respondent stated that the definition is contrary to law, indicating that the 1973 Specialty Metals Amendment required that specialty metals be melted in the United States. The respondent cited court cases that recognize a reasonable basis in the law for the DoD requirement that all specialty metals be melted in the United States.

○ Various respondents stated that the words ''melted or produced'' in the statute were not intended to apply to secondary finishing processes such as quenching or tempering, which require a small percentage of the estimated investment for armor steel plate overall.

○ One respondent stated that the definition is inappropriate because the processes of high performance magnets are completely unaddressed in the definition.

○ Various respondents saw this as a dangerous precedent. Several respondents stated that the proposed rule's definition would encourage the use of foreign metals while discouraging investment in domestic industry. One respondent stated that, without a return to the emphasis on melting, this rule will be used to circumvent the intent of the law, importing melted products including high performance magnets, and conducting late-stage low-value finishing processes, such as magnetization, which the respondent considers to be a minor operation requiring little skill.

○ Several respondents cited the additional restriction on armor plate in DFARS 252.225–7030, which requires armor plate to be melted and rolled in the United States. One respondent recommended that the rule define ''produce'' as melted or an equivalent process.

○ While acknowledging DoD's critical need for armor steel plate for Mine Resistant Ambush Protection (MRAP) vehicles, several respondents suggested that DoD use other exceptions in the law, such as the availability or national security exception to procure armor steel plate. Several respondents stated that there is sufficient domestic capacity of armor steel plate melted, rolled and quenched, and tempered in the United States to meet DoD's demand.

One respondent supported the inclusion of quenching and tempering in the definition of ''produce.'' This respondent stated that it converts slabs of alloy steel from Mexico to armored steel plates in the United States by altering the physical characteristics of the alloy steel through quenching and tempering.

DoD Response: The law has never provided a definition of ''produce'' with regard to the requirement to acquire domestic specialty metals. The 1973 DoD Appropriations Act (Pub. L. 92–570) added specialty metals to the annual Berry Amendment restrictions, requiring that restricted items be ''grown, reprocessed, reused, or produced in the United States.'' The Secretary of Defense at that time (Melvin Laird), in a memorandum setting forth DoD planned implementation of this restriction, interpreted this requirement to mean ''melted'' when applied to specialty metals, and the reasonableness of this interpretation was upheld in the courts. This does not mean that this is the only possible interpretation. When Congress created the new 10 U.S.C. 2533b, while following the Laird memo traditions in many respects, it reinstated ''or produced,'' allowing that melting was not the only acceptable process for creation of domestic specialty metal.

According to DoD technical experts, quenching and tempering is not an insignificant process. Melting is only one stage in a multi-step process that is used to produce an item with properties that meet the requirements of an application, i.e., specifications. Melting for most metals accounts for about one third of the final price of a wrought product. Manufacturers have stated that the operations associated with forming and heat treating account for more than one-half of the price of a mill product such as plate. (The prices for mill products used by the military are typically higher than for commercial products due to more stringent military requirements.) Although alloying elements are added during ''melting,'' the primary casting (ingot, slab, bloom, etc.) does not possess the microstructures and/or phases that are required to produce desired properties. Using steel as an example, after primary casting, the metal is shaped and then heat treated to produce the desired properties in the final product. This is true for plate, wire, sheet, etc. Steel's versatility is primarily due to its extraordinary response to heat treatment. Heat treatment is used to control the microstructure and thus the properties of the steel. Different iron-carbon phases form at critical temperatures, and it is the combination and concentration of these phases that produce the desired mechanical properties in the steel. DoD experts believe that heat treatment may be the single most important stage in metals processing for DoD applications. The final properties of the metal are determined by the heat treat schedule. This is true for most if not all metals and their alloys. Heat treatment results in a product with properties that meet the specified requirements. The specifications for a material typically include not just chemistry but also the

mechanical and physical properties as well as the condition of the product, *i.e.,* surface finish, flatness, waviness. Forming and heat treatment processes are very important to producing an item that meets the requirements of an application. It is after heat treatment that the item possesses all of the attributes that are needed for the required application.

The concern that magnetization can be considered production under this rule is unfounded. The definition of ''produce'' has not been left to open-ended interpretation. It has narrowly specified what processes other than melting are included, and does not include magnetization. DoD does not see any impact on the high performance magnet industry from the definition of ''produce,'' because tempering and quenching processes are specifically restricted to the production of steel plate, and gas atomization and sputtering are restricted to the production of titanium.

DoD acknowledges the additional restriction on armor plate in DFARS 252.225–7030, which requires that armor plate be melted and rolled in the United States. Therefore, any acquisition of armor plate by DoD must satisfy both statutory restrictions.

DoD performed an industrial capabilities assessment in 2007 to support rapid production of the MRAP vehicles and other important defense programs relying on protective armor. The assessment found that availability of thin gauge MIL–A grade steel armor was the limiting factor in domestic production. The industrial capabilities assessment identified a total of four North American steel mills collectively capable of producing up to 12,000 tons per month of thin gauge armor steel plate. All four reported that quench and temper operations (not steel melting capacity or ingot/slab availability) were the limiting factor in their ability to produce the thin gauge armor needed to meet U.S. military demand. In contrast to the demonstrated maximum North American MIL–A grade thin gauge armor steel plate production capacity of 12,000 tons per month, the American Iron and Steel Institute (via its Web site) asserts that domestic raw steel melt production per week is usually in excess of 2 million tons (8 million tons per month). To meet peak MRAP and other DoD requirements, the four mills made capital investments and process improvements that enabled a 100 percent increase (to 24,000 tons per month) in thin gauge armor steel plate production capacity. However, two of the mills rely on ingot/slab melted outside the United States. If these mills had been excluded from participation, the sustained MRAP production rate would have been limited to about 600 vehicles per month (instead of the actual sustained rate of 1,100 vehicles per month); and it would have taken twice as long to deploy MRAP vehicles into Iraq and Afghanistan.

DoD also notes that the specialty steel industry does not object to the other expansions DoD provided in the definition of ''produce,'' such as gas atomization, sputtering of titanium, or titanium alloy powder. None of these processes are melting processes. It is inconsistent to accept some non-melt processes, but not others.

DoD considered processing a domestic nonavailability determination under the nonavailability exception or the national security exception, but both avenues represented significant obstacles, and were rejected as unsuitable options. A national security exception requires that the contractor become compliant. The availability exception was determined to be impracticable, time-consuming, and inefficient.

6. Exception for Electronic Components

Comments: One respondent especially applauded DoD efforts to revise the domestic source exceptions for electronic components. Another respondent, while supporting DoD's application of the electronic component exception, was concerned that, in practice, it will be applied by the supply chain more broadly than intended. For example, the respondent has seen the item applied to higher level electronic subsystems, consisting of dozens of sub-components or elements such as alternators, pumps, and motors, which are not primarily ''electronic components'' like circuit cards or arrays of solid state devices.

DoD Response: The definition of electronic component clearly excludes structural or mechanical parts of an assembly containing an electronic component.

7. Exception for COTS Items

Comments: One respondent applauded DoD's efforts to revise the domestic source exceptions for COTS items. Another respondent stated that deconstruction of major equipment, such as green aircraft, should not be allowed under the COTS exception. In that instance, the respondent recommended use of the commercial derivative military article exception.

DoD Response: DoD disagrees that green aircraft must be considered under the commercial derivative military article exception. Funding constraints on major defense programs require DoD to acquire items at best value. DoD uses a best value approach to competition, meaning that DoD sets the performance requirements, but does not dictate specifications. If a prime contractor chooses to start with a COTS end item in order to save development time and the costs associated with that development, that is a benefit of which DoD would like to take advantage. DoD does not think it is reasonable to force COTS suppliers of items to change their procurement systems for DoD if the items they provide to DoD prime contractors are truly COTS items at the point of purchase.

Comments: Another respondent was concerned that the rule made the COTS exception inapplicable to large classes of COTS products unless they are incorporated into a higher level COTS end item, subsystem, assembly, or component. The respondent stated that the House Armed Services Committee endorsed a broader definition by stating that this exception applies to all COTS products incorporated in non-commercial end items.

DoD Response: The law places certain restrictions on application of the COTS item exception to fasteners, high performance magnets, and castings and forgings, versus other COTS items. The rule implements these statutory restrictions.

8. Exception for Fasteners—50 Percent Market-Basket Rule

Comments: One respondent expressed support of the rule with respect to fasteners, stating that the rule would provide fastener manufacturers and distributors with the needed flexibilities to provide compliant fasteners and remain globally competitive.

Several other respondents believed that the rule does not provide enough flexibility and should be streamlined. These respondents stated that—

○ The rule should be liberalized with respect to commercial item fasteners and should allow contractors to provide metals according to the new statute's language regarding ''melted or produced.''

○ It is a source of concern that the fastener exceptions apply to specialty metals melted domestically and do not appear to extend to specialty metals from qualifying countries.

○ The rule requires daunting recordkeeping and is difficult to enforce.

○ The rule is unclear with respect to whether the 50 percent applies to weight, volume, or dollars.

○ The law was flawed with respect to its intention to apply the Buy American

restriction to the component level of major defense projects and remains a primary obstacle to the completion of projects.

○ DoD should add a dollar threshold for applicability of the clause.

DoD Response: Although the statute does not include ''or produced'' with regard to the specific exception for fasteners or the commercial derivative military article market-basket approaches, DoD interprets the statute to include ''or produced.'' For some titanium items, melting is not even part of the production process. This interpretation was reflected in section 225.7003–3(b)(3) of the proposed rule. The words ''or produced'' were erroneously omitted from the corresponding contract clause in the proposed rule, but have been added in the final rule at 252.225–7009(c)(3).

The statute specifically requires that the metals be domestically melted. It does not provide an exception for metals from qualifying countries in the market-basket approach provided for commercial fasteners.

The rule applies the 50 percent fastener market-basket rule based on the precise language in the statute, while providing flexibility for prime contractors and sub-tier suppliers to develop their own certification process and to determine whether to apply the 50 percent by weight, dollars, or volume. The responsibility for ensuring compliance rests with industry, specifically with the prime contractor to monitor compliance throughout its supply chain.

It is the responsibility of DoD to implement the law as written. The law does not allow application of the simplified acquisition threshold exception beyond the prime contract level.

9. Exception for Qualifying Countries

Comments: One respondent stated that the qualifying country exception disfavors U.S. industry by allowing DoD to purchase products containing specialty metals that were melted in qualifying countries, while prohibiting U.S. manufacturers from doing the same.

Another respondent stated that DoD should expand the definition of ''produce'' in DFARS 252.225–70X2(a) (now 252.225–7009(a)) to eliminate the ''qualifying country'' exception and to make explicit that the ''qualifying country loophole'' at DFARS 225.7003–3(b)(4) has been eliminated. The respondent suggested that the expanded scope of 10 U.S.C. 2533b, permitting the purchase of specialty metals or products containing specialty metals that are melted or produced in the United States, may be sufficiently broad to level the playing field between industry in the United States and in qualifying countries.

DoD Response: A U.S. contractor or subcontractor may rely on the qualifying country exception to the extent that the contractor or subcontractor is buying an item containing specialty metals that is manufactured in a qualifying country. This exception to the restrictions of 10 U.S.C. 2533b(a)(1) is provided at 10 U.S.C. 2533b(d), where the acquisition furthers a reciprocal procurement agreement with a foreign government.

An ''uneven playing field'' is created only with regard to use of specialty metals not melted or produced in the United States or a qualifying country. Items manufactured in a qualifying country can include specialty metals melted or produced in non-qualifying countries, whereas U.S. manufacturers cannot include metals melted or produced in a non-qualifying country, unless another exception applies.

Except when using the market-basket approach for fasteners or commercial derivative military article, the only instance where a U.S. prime contractor cannot use the qualifying country exception to purchase specialty metals melted or produced in a qualifying country is when the acquisition is subject to the restriction at 10 U.S.C. 2533b(a)(2) (*i.e.,* the acquisition of the specialty metal, such as raw bar stock, is to be provided to the Government as the end product), in which case DoD also cannot directly acquire such items using the qualifying country exception. This is because the exception for qualifying countries does not apply to the restriction at 10 U.S.C. 2533b(a)(2).

There is nothing in the definition of ''produce'' that applies to the qualifying country exception. However, the words ''or produced'' were erroneously omitted from the qualifying country exception in section 225.7003–3(b)(4) of the proposed rule. This omission has been corrected in the final rule.

10. Domestic Nonavailability Determinations (DNADs)

Comments: Various respondents stated that the final rule should allow reliance on the Fastener DNAD, approved by the Under Secretary of Defense (Acquisition, Technology, and Logistics) on April 10, 2007, in cases where a supplier, at any tier, procured fasteners prior to July 26, 2008, even if the DoD contract is awarded after that date. One respondent stated that many contractors purchased fasteners pursuant to the DNAD in good faith in order to fulfill existing and anticipated contracts and contract modifications. The respondents stated that this approach would allow use of current inventories without the need to segregate and track separately while ensuring no interruption in supply to DoD.

DoD Response: The Fastener DNAD, along with three other broad DNADs approved by the Under Secretary of Defense (Acquisition, Technology, and Logistics) expired for use on new contracts after July 26, 2008, in accordance with DoD Class Deviation 2008–O0002 dated January 29, 2008. The decision to cancel these DNADs was based on the requirement in Section 804(h) of the Fiscal Year 2008 National Defense Authorization Act that, by July 26, 2008, any domestic nonavailability determination made under 10 U.S.C. 2533b must be reviewed and amended as necessary to comply with the changes made by Section 804.

DoD performed market research and found sufficient quantity and satisfactory quality of fasteners of all types available that complied with the new exception.

Additionally, in discussions with industry associations, DoD found consensus that Section 804 provided enough flexibilities, as noted in the comments received to this rule, including the fastener exception based on a commingling approach, the COTS item exception applicable to fasteners delivered in COTS items, the commercial derivative military article exception, and the minimum content exception, to suggest that the previous high concern regarding fasteners was no longer an issue. DoD asked industry to identify any items that were not available, but none were identified. Therefore, a determination was made to allow reliance on the DNADs until the expiration of the time period specified in the statute. DoD sees no evidence to delay the expiration of the fastener DNAD. Any contract awarded prior to July 26, 2008, that relied on the fastener DNAD can continue to rely upon it until the contract is complete.

DoD notes that, based on the new definition of ''required form'' provided in Section 804, it is more difficult to justify nonavailability of an item such as a fastener, since the nonavailability of the specialty metal itself must be justified. Unless a fastener manufacturer or distributor can confirm the nonavailability of a specialty metal, a DNAD can no longer be approved under this exception.

11. Fair and Reasonable Price Criterion

Comments: Two respondents stated that the ''fair and reasonable price''

criterion, included in section 225.7003–3(b)(5) of the proposed rule, was not supported by the statute; has the potential of distorting the market place; and was not the intent of Congress, because Congress eliminated the price criterion from the statute in the Fiscal Year 2007 National Defense Authorization Act.

DoD Response: DoD recognizes that the language in the availability exception at 10 U.S.C. 2533b(b) does not address price reasonableness; however, this does not eliminate the need for DoD to make fiscally prudent decisions. Section 15.402 of the Federal Acquisition Regulation establishes a fundamental requirement for the Government to purchase supplies at fair and reasonable prices. In the event that DoD found itself in a position where the cost of acquiring domestic specialty metal was deemed to be excessive when compared with the alternative, and all reasonable alternatives were researched and found to be unacceptable technically or otherwise, the fair and reasonable price criterion at 225.7003–3(b)(5) reminds contracting officers of their responsibility to be prudent with taxpayer money. This DFARS policy is provided with the understanding that some additional cost may be necessary when acquiring domestic specialty metals versus foreign; however, DoD cannot ignore its fiduciary responsibility entirely.

12. Minimum Content Exception

Comments: One respondent noted appreciation for the recognition of the specialty metals minimum content exception. Another respondent was concerned that determining whether the minimum content exception in the proposed rule at 225.7003–3(b)(6) and 252.225–70X2(c)(6) (now 252.225–7009(c)(6)) applies will be a time-consuming process. The respondent requested detailed guidance on how companies should determine whether they qualify for this exception. Several respondents believed that the proposed rule was unclear with respect to flowdown of the minimum content requirement.

DoD Response: DoD concurs that implementation of the exception will be difficult. Therefore, the rule allows contractors to make a good faith estimate. DoD considers it preferable to provide contractors the flexibility to develop the methodology best suited to their own processes. The proposed rule provided for optional inclusion of the clause at 252.225–70X2 (now 252.225–7009) in subcontracts. The final rule requires contractors to include the substance of the clause in subcontracts for items containing specialty metals, to the extent necessary to ensure compliance of the end products that the contractor will deliver to the Government. Since the prime contractor is ultimately responsible for compliance with the specialty metals restriction, the language in the final rule was constructed to allow the prime contractor flexibility in applying and controlling the minimum content exception. The prime contractor may need to retain control of the application of the 2 percent threshold in the event some sub-tier parts exceed that threshold. Alternatively, the prime contractor may choose to flow down control of this exception to every level in its supply chain so that no supplier can exceed the 2 percent threshold. Regardless of which path the prime contractor chooses, the end product cannot exceed the 2 percent minimum content threshold at the end product level when relying on that exception.

Comments: Several respondents recommended the following changes for consistency with the language at 10 U.S.C. 2533b(i):

○ Revision of the initial phrase of the exception, from ''A minimal amount of otherwise noncompliant specialty metals * * *.'' to ''Items containing a minimal amount of otherwise noncompliant specialty metals * * *''

○ Revision of the statement ''This exception does not apply to the specialty metals in high performance magnets'' to ''This exception does not apply to high performance magnets containing specialty metals.''

In addition, these respondents recommended revision of the parenthetical at 225.7003–6(b)(6), from ''(* * * specialty metals not melted or produced in the United States, that * * *)'' to ''(* * * specialty metals not melted or produced in the United States, an outlying area, or a qualifying country, that * * *)'' for consistency with the wording at 252.225–70X2(c)(6) (now 252.225–7009(c)(6)).

DoD Response: DoD has revised the exceptions at 225.7003–3(b)(6) and 252.225–7009(c)(6) to begin with the phrase ''End items containing a minimal amount of otherwise noncompliant specialty metals * * *.'' The law makes it clear that the exception is for an item to be delivered to DoD. The 2 percent minimum content threshold is based on the total specialty metal in the end item.

In addition, DoD has revised the statement regarding high performance magnets at 225.7003–3(b)(6) and 252.225–7009(c)(6) to read ''This exception does not apply to high performance magnets containing specialty metals.''

DoD did not adopt the recommendation to revise the wording at 225.7003–3(b)(6) to address outlying areas and qualifying countries. The term ''United States,'' as used within DFARS Part 225, includes outlying areas, in accordance with the definition of ''United States'' at FAR 25.003. Further, at 225.7003–3, specialty metals melted or produced in a qualifying country is an exception covered in paragraph (b)(4); whereas in the clause at 252.225–7009, the exception for specialty metals melted or produced in a qualifying country has been built into the restriction in paragraph (b).

13. Commercial Derivative Military Article Market-Basket Approach

Comments: Two respondents found the implementation of the commercial derivative military article exception impractical or unclear. One respondent requested additional guidance in either DFARS or the PGI on how to apply the 50 percent and 120 percent thresholds. Another respondent recommended alternative language for the regulation and the clause, because it was unlikely that a prime contractor and all of its subcontractors would or could enter into the agreements required by this provision due to the complexity and number of subcontractors involved on these major systems. The following is the recommended alternative language:

DFARS 225.7003–3(c)(1)(i): ''The offeror must demonstrate that a sufficient quantity of domestic specialty metals has been or will be purchased by the combination of offeror and subcontracts as provided in offeror's certification''.

DFARS 252.225–70X3(c) (now 252.225–7010)(c)): ''The offeror and its subcontractor(s) will demonstrate that individually or collectively they have entered into agreements to purchase an amount of domestic metals.''

DoD Response: DoD has revised the commercial derivative military article exception based on the respondents' recommendations. However, DoD has retained the requirement for the offeror to certify that the offeror and its subcontractor(s) will enter into a contractual agreement or agreements to purchase a sufficient quantity of domestically melted or produced specialty metal, consistent with 10 U.S.C. 2533b(j)(1)(B). The rule does not include specific procedures for application of this exception, to provide maximum flexibility for prime contractors.

14. National Security Waiver and One-Time Waiver

One respondent stated appreciation for the national security waiver and codification of the one-time waiver.

15. Contingency Operations

10 U.S.C. 2533b(c) contains an exception to the specialty metals restrictions for procurements outside the United States in support of combat or contingency operations. The proposed rule implemented this exception as two separate exceptions for—

○ Acquisitions outside the United States in support of combat operations; and

○ Acquisitions in support of contingency operations.

Comments: One respondent considered this interpretation of the law to be grammatically incorrect and in conflict with the underlying logic of the exception. The respondent stated that—

○ Grammatically, the prepositional phrase ''outside the United States'' contained in the statute follows immediately after the noun ''procurement'' and so modifies the noun with respect to both of the subsequent prepositional phrases.

○ The logic of the exception is to make it easier for DoD to acquire supplies locally when it is operating outside the United States. The same logic would not support an exception for contingency operations conducted in the United States.

DoD Response: While acknowledging that grammatically the law could be read as recommended by the respondent, DoD notes that the exceptions for acquisitions outside the United States in support of combat operations and acquisitions in support of contingency operations are pre-existing exceptions implemented at DFARS 225.7002–2(d) and (f)(1). These exceptions are consistent with the exception at 10 U.S.C. 2533a(d)(1) which, prior to the establishment of 10 U.S.C. 2533b, applied to specialty metals as well as food and hand or measuring tools, and was worded as follows: ''Procurements outside the United States in support of combat operations or procurements of any item listed in subsection (b)(1)(A) [*food*], (b)(2) [*specialty metals*], or (b)(3) [*hand or measuring tools*] in support of contingency operations.'' Although the new exception for specialty metals at 10 U.S.C. 2533b does not repeat the words ''procurements of'', there is no indication of any intent by Congress to change the exception for contingencies to apply only outside the United States. Urgent requirements for contingency operations exist both inside and outside the United States.

16. Prescription for Clause at DFARS 252.225–7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals

Comments: One respondent questioned why the clause prescription limits the exceptions to use of the clause to those specified at 225.7003–3(a) and (d), rather than all exceptions in 225.7003–3(a) through (d).

Another respondent stated that the clause should not be included in contracts for electronic components, since the Defense Priorities and Allocations System (DPAS) rating DO–A7 applies to orders for electronic and communications equipment.

DoD Response: DoD concluded that the exceptions at 225.7003–3(a) and (d) describe situations that would apply to the entire acquisition; therefore, inclusion of the clause would be unnecessary. The exceptions in paragraph 225.7003–3(b) are more likely to apply only to certain items or components of items within an acquisition. Electronic or communications equipment would likely include parts that were not covered by the narrow definition of electronic component at 252.225–7009; therefore, the clause would be applicable to those parts. With regard to exclusion of the clause from all contracts rated DO–A7, there is no statutory basis for such as exception.

The clause at 252.225–7009 is applicable to acquisitions that use the exception at 225.7003–3(c) for commercial derivative military articles, as the procedures for use of this exception are addressed within the clause in paragraph (d).

17. Flowdown of the Clause at 252.225–70X2 (Now 252.225–7009)

Paragraph (e) of the clause at 252.225–70X2 in the proposed rule permitted, but did not require, inclusion of the clause in subcontracts for items containing specialty metals.

Comments: A number of respondents were concerned with the lack of mandatory flowdown of the clause to subcontracts.

○ One respondent stated that the lack of mandatory flowdown would essentially remove the requirements of the specialty metals provisions for high performance magnets, due to the fact that high performance magnets are typically supplies in tier three to tier six.

○ One respondent stated that, while prime contractors generally prefer flexibility in their subcontracts, in this instance, it is preferable to have a mandatory flowdown to help all parties comply and ensure greater consistency.

○ Another respondent stated that subcontractors may refuse to accept the clause since flowdown is not mandatory.

○ One respondent found it unclear as to when the clause is to be included in subcontracts. This respondent stated that if the prime contractor is delivering an item that meets an exception in paragraph (c)(1) of the clause, the clause should not be required in subcontracts with lower tier subcontractors.

○ One respondent recommended that the clause only flow down to subcontracts for components exceeding a certain dollar value.

DoD Response: It is incorrect to assume that the specialty metals requirements will not apply to high performance magnets at lower tiers if the clause does not flow down to subcontracts. It is always the responsibility of the prime contractor to comply with the requirements imposed by the Government in the contract. However, DoD has reworded paragraph (e) of the clause at 252.225–7009 to make it clear that flowdown is required to the extent necessary to comply with contract requirements. In addition, paragraph (e) has been amended to direct the contractor to modify paragraph (c)(6) of the clause as necessary for subcontracts, to facilitate management of the 2 percent minimum content exception addressed in paragraph (c)(6). Only the contractor can determine the application of the 2 percent minimum content exception, because it applies to the end product. Therefore, the contractor will determine what percentage a subcontractor must meet to satisfy contract requirements.

Likewise, if the contractor, or a subcontractor, is providing an item that meets an exception in (c)(1) (*e.g.,* manufactured in a qualifying country), the clause should not be flowed down beyond that point. Lower tier subcontractors would not need to comply if a higher tier subcontractor was going to use their items in a product manufactured in a qualifying country. Therefore, in such circumstances, the contractor or subcontractor does not need to flow down the clause to meet the contractual requirement and should not do so.

Limiting flowdown to components that exceed a certain dollar threshold would not meet the statutory requirement, which specifies application to all components of any of the 6 major product categories.

18. Contractor Reporting Requirement

Comments: Four respondents described the proposed implementation of the statutory reporting requirement at 225.7003–3(b)(2)(iii) and 252.225–70X4 (now 252.225–7029) as unnecessary and burdensome and suggested deletion or simplification. The respondents stated the following:

○ The information is already available to DoD and any unavailable data needed can be obtained through an industry survey.

○ A dollar threshold should be provided to make it more manageable, such as an exemption for items with a unit cost of less than $100.

○ It is unclear whether commercial fasteners acquired under the rules of DoD Class Deviation 2008–O0002 are excluded.

○ The contract-by-contract reporting requirement should be eliminated.

○ The statute does not require reporting of the dollar value of the non-commercial item or the dollar value of the COTS item to which the exception applies.

○ The statute does not require reporting the NAICS code.

○ The rule should clarify that the reporting requirement applies only to prime contractors, because fastener manufacturers and distributors would not know whether the fastener was going to be provided in a COTS item (and therefore would be excepted), or whether it would be provided directly into a noncommercial end item.

One respondent pointed out that the **Federal Register** notice was incorrect in stating that the law required reporting of information regarding the acquisition of noncommercial end items incorporating COTS items containing non-domestic specialty metal. The respondent stated that neither the statute, nor the proposed DFARS text, require the reporting of the type of specialty metal in COTS items incorporated into a non-COTS end item (*i.e.,* no requirement to identify only those COTS items with non-domestic specialty metal).

DoD Response: The intent of the clause at 252.225–7029 is to obtain information on COTS items incorporated into noncommercial end products, only if those COTS items were acquired using the exception authority provided at 10 U.S.C. 2533b(h) (as implemented in paragraph (c)(2) of the clause at DFARS 252.225–7009). It would not be necessary to use this exception if a COTS item is known to contain specialty metals melted or produced in the United States. However, the exception could be used if the source of the specialty metals in a COTS item is known to be non-domestic or is unknown.

The report required by the clause at 252.225–7029 is designed to collect consistent data on the description of the types of items being acquired as COTS items under the exception in paragraph (c)(2) of the clause at DFARS 252.225–7009. To alleviate the burden on prime contractors, who are ultimately responsible for reporting this information to DoD, and to ensure consistency in the data reported, a point and click reporting tool is provided for reporting this data at: *http://www.acwq.osd.mil/dpap/cpic/ic/restrictions_on_specialty_metals_10_usc_2533b.html.*

DoD cannot eliminate the contractor reporting requirement, because DoD has no other way to obtain meaningful information to prepare the report to Congress required by Section 804(i) of Public Law 110–181. An industry survey is not possible in the time allowed for this report.

After reviewing the comments, DoD has amended the reporting requirement as follows:

○ Inclusion of a threshold of $100 per item value. Although the statute does not provide a dollar threshold, inclusion of a threshold eliminating the requirement to report COTS items of $100 or less appears to be a reasonable interpretation of the requirement.

○ Clarification that commercial fasteners acquired under a domestic non-availability determination, or any exception other than COTS, need not be reported.

○ Elimination of the collection of the information on a contract-by-contract basis.

○ Elimination of the requirement for contractors to provide dollar values, recognizing that this requirement was not specified by statute and could be a burden to contractors and subcontractors.

DoD did not eliminate the use of NAICS codes, as their use permits organization of the data and allows DoD to provide a point-and-click Web reporting system that requires the contractor to make limited choices from a menu of finite options.

DoD agrees that the prime contractor is responsible for this reporting requirement. This is clear in that the clause at 252.225–7029 does not include any flowdown requirement. The report applies to any COTS items incorporated in non-commercial items when the COTS exception was relied upon. Implicit in this requirement is the prime contractor's responsibility to work with its supply chain as necessary to determine which items are relying on this exception.

19. Internal DoD Reporting Requirement

Comment: One respondent opposed the requirement for DoD buying activities to report use of the exception for COTS end items valued at $5 million or more per COTS item.

DoD Response: DoD wants to ensure that the COTS item exception is used only where appropriate and, therefore, has adopted this internal reporting requirement to monitor its use.

20. Procedures, Guidance, and Information (PGI)

Comment: One respondent stated that the PGI sections that accompany proposed rules should be published, even though the PGI does not require public comment.

DoD Response: The draft PGI coverage associated with a proposed rule is available in the corresponding change notice published on the DPAP Web site at *http://www.acq.osd.mil/dpap/dars/change_notices.html.*

Note: The amendments to the clause at 252.212–7001, that add 252.247–7003 and revise the dates of 252.225–7021 and 252.225–7036, are shown with the amendments to this rule for administrative purposes only. The addition of 252.247–7003 to 252.212–7001 is part of the interim rule for DFARS Case 2008–D040 published elsewhere in this edition of the **Federal Register**. The revision of the dates of 252.225–7021 and 252.225–7036 is part of the interim rule for DFARS Case 2008–D046 also published elsewhere in this edition of the **Federal Register**. Revision of the date of 252.225–7036, Alternate I, is a result of a DFARS technical amendment published elsewhere in this edition of the **Federal Register**.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD has prepared a final regulatory flexibility analysis consistent with 5 U.S.C. 604. A copy of the analysis may be obtained from the point of contact specified herein. The analysis is summarized as follows:

This final rule amends the Defense Federal Acquisition Regulation Supplement to implement 10 U.S.C. 2533b, as established by Section 842 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364) and Sections 804 and 884 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181). 10 U.S.C. 2533b places restrictions on DoD acquisition of specialty metals not melted or produced in the United States. Two respondents disagreed with

the statement in the Initial Regulatory Flexibility Analysis that producers of specialty metals are generally large businesses. One of the two respondents stated that specialty metals manufacturers are often small businesses that are employee or family owned. The second respondent stated that ''our entire industry employs less than 600 people, yet it remains a competitive and critical member of the DoD supply-chain.'' However, these respondents are magnet producers, not specialty metals producers. According to information available to DoD, most specialty metals producers are large businesses. There is a high capitalization requirement to establish a business that can melt or produce specialty metals. The small business size standard for primary metal manufacturing ranges from 500 to 1,000 employees. All the specialty metals producers reviewed by DoD had more than 1,000 employees. The rule provides special protection for high performance magnets containing domestic specialty metals, as provided in the law.

C. Paperwork Reduction Act

The provision at 252.225–7010, Commercial Derivative Military Article—Specialty Metals Compliance Certificate, and the clause at 252.225–7029, Reporting of Commercially Available Off-the-Shelf Items that Contain Specialty Metals and are Incorporated into Noncommercial End Items, contain new information collection requirements. The Office of Management and Budget has approved the information collection requirements for use through June 30, 2012, under Control Number 0704–0459.

List of Subjects in 48 CFR Parts 202, 212, 225, and 252

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR Parts 202, 212, 225, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR Parts 202, 212, 225, and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 202—DEFINITIONS OF WORDS AND TERMS

202.101 [Amended]

■ 2. Section 202.101 is amended by removing the definition of ''Commercially available off-the-shelf item''.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 3. Section 212.301 is amended by adding paragraph (f)(xiii) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(f) * * *

(xiii) Use the provision at 252.225–7010, Commercial Derivative Military Article—Specialty Metals Compliance Certificate, as prescribed in 225.7003–5(b).

■ 4. Section 212.570 is revised to read as follows:

212.570 Applicability of certain laws to contracts and subcontracts for the acquisition of commercially available off-the-shelf items.

Paragraph (a)(1) of 10 U.S.C. 2533b, Requirement to buy strategic materials critical to national security from American sources, is not applicable to contracts and subcontracts for the acquisition of commercially available off-the-shelf items, except as provided at 225.7003–3(b)(2)(i).

PART 225—FOREIGN ACQUISITION

■ 5. Section 225.7001 is amended by revising paragraph (b) and removing paragraph (d). The revised text reads as follows:

225.7001 Definitions.

* * * * *

(b) *Component* is defined in the clauses at 252.225–7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals; 252.225–7012, Preference for Certain Domestic Commodities; and 252.225–7016, Restriction on Acquisition of Ball and Roller Bearings.

* * * * *

■ 6. Section 225.7002 is added to read as follows:

225.7002 Restrictions on food, clothing, fabrics, and hand or measuring tools.

225.7002–1 [Amended]

■ 7. Section 225.7002–1 is amended by removing paragraph (b) and redesignating paragraph (c) as paragraph (b).

■ 8. Section 225.7002–2 is amended as follows:

■ a. In paragraph (b), in the first sentence, by removing ''or (b)'';

■ b. By adding paragraph (b)(1)(v);

■ c. By revising paragraphs (b)(3) and (b)(4);

■ d. By removing paragraph (b)(5);

■ e. In paragraph (f) introductory text, by removing '', specialty metals,'';

■ f. By removing paragraphs (m) and (n);

■ g. By redesignating paragraphs (o) and (p) as paragraphs (m) and (n) respectively; and

■ h. By removing paragraph (q). The added and revised text reads as follows:

225.7002–2 Exceptions.

* * * * *

(b) * * *

(1) * * *

(v) The Director of the Defense Logistics Agency.

* * * * *

(3) Defense agencies other than the Defense Logistics Agency shall follow the procedures at PGI 225.7002–2(b)(3) when submitting a request for a domestic nonavailability determination.

(4) Follow the procedures at PGI 225.7002–2(b)(4) for reciprocal use of domestic nonavailability determinations.

* * * * *

225.7002–3 [Amended]

■ 9. Section 225.7002–3 is amended by removing paragraph (b) and redesignating paragraph (c) as paragraph (b).

■ 10. Section 225.7003 is revised to read as follows:

225.7003 Restrictions on acquisition of specialty metals.

■ 11. Sections 225.7003–1 through 225.7003–5 are added to read as follows:

225.7003–1 Definitions.

As used in this section—

(a) *Assembly, commercial derivative military article, commercially available off-the-shelf item, component, electronic component, end item, high performance magnet, required form,* and *subsystem* are defined in the clause at 252.225–7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals.

(b) *Automotive item*—

(1) Means a self-propelled military transport tactical vehicle, primarily intended for use by military personnel or for carrying cargo, such as—

(i) A high-mobility multipurpose wheeled vehicle;

(ii) An armored personnel carrier; or

(iii) A troop/cargo-carrying truckcar, truck, or van; and

(2) Does not include—

(i) A commercially available off-the-shelf vehicle; or

(ii) Construction equipment (such as bulldozers, excavators, lifts, or loaders) or other self-propelled equipment (such as cranes or aircraft ground support equipment).

(c) *Produce* and *specialty metal* are defined in the clauses at 252.225–7008,

Restriction on Acquisition of Specialty Metals, and 252.225–7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals.

225.7003–2 Restrictions.

The following restrictions implement 10 U.S.C. 2533b. Except as provided in 225.7003–3—

(a) 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 (also see guidance at PGI 225.7003–2(a)):

(1) Aircraft.

(2) Missile or space systems.

(3) Ships.

(4) Tank or automotive items.

(5) Weapon systems.

(6) Ammunition.

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

225.7003–3 Exceptions.

Procedures for submitting requests to the Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD(AT&L)) for a determination or approval as required in paragraph (b)(5), (c), or (d) of this subsection are at PGI 225.7003–3.

(a) Acquisitions in the following categories are not subject to the restrictions in 225.7003–2:

(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 commissary resale.

(6) Acquisitions of items for test and evaluation under the foreign comparative testing program (10 U.S.C. 2350a(g)). However, this exception does not apply to any acquisitions under follow-on production contracts.

(b) One or more of the following exceptions may apply to an end item or component that includes any of the following, under a prime contract or subcontract at any tier. The restrictions in 225.7003–2 do not apply to the following:

(1) 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)(i) Commercially available off-the-shelf (COTS) items containing specialty metals, except the restrictions do apply to contracts or subcontracts for the acquisition of—

(A) Specialty metal 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 this exception;

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

(C) Commercially available high performance magnets that contain specialty metal, unless such high performance magnets are incorporated into COTS end items or subsystems (see PGI 225.7003–3(b)(6) for a table of applicability of specialty metals restrictions to magnets); and

(D) COTS fasteners, unless—

(1) The fasteners are incorporated into COTS end items, subsystems, or assemblies; or

(2) The fasteners qualify for the commercial item exception in paragraph (b)(3) of this subsection.

(ii) If this exception is used for an acquisition of COTS end items valued at $5 million or more per item, the acquiring department or agency shall submit an annual report to the Director, Defense Procurement and Acquisition Policy, in accordance with the procedures at PGI 225.7003–3(b)(2).

(iii) During fiscal year 2009, contractors are required to report use of this exception to acquire COTS items containing specialty metal that are incorporated into a noncommercial end item (see 252.225–7029).

(3) Fasteners that are commercial items and are acquired 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 or produced 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 percent of the total amount of the specialty metal that the manufacturer will purchase to carry out the production of such fasteners for all customers.

(4) Items listed in 225.7003–2(a), manufactured in a qualifying country or containing specialty metals melted or produced in a qualifying country.

(5) Specialty metal in any of the items listed in 225.7003–2 if the USD(AT&L), or an official authorized in accordance with paragraph (b)(5)(i) of this subsection, determines that specialty metal melted or produced in the United States cannot be acquired as and when needed at a fair and reasonable price in a satisfactory quality, a sufficient quantity, and the required form (*i.e.,* a domestic nonavailability determination). See guidance in PGI 225.7003–3(b)(5).

(i) The Secretary of the military department concerned is authorized, without power of redelegation, to make a domestic nonavailability determination that applies to only one contract.

The supporting documentation for the determination shall include—

(A) An analysis of alternatives that would not require a domestic nonavailability determination; and

(B) Written documentation by the requiring activity, with specificity, why such alternatives are unacceptable.

(ii) A domestic nonavailability determination that applies to more than one contract (*i.e.,* a class domestic nonavailability determination), requires the approval of the USD(AT&L).

(A) At least 30 days before making a domestic nonavailability determination that would apply to more than one contract, the USD(AT&L) will, 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 the Federal Business Opportunities Web site (*http://www.FedBizOpps.gov* 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) The USD(AT&L)—

(1) Will take into consideration all information submitted in response to the notice in making a class domestic nonavailability determination;

(2) May 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; and

(3) Will ensure that any such domestic nonavailability determination and the rationale for the determination are made publicly available to the maximum extent consistent with the protection of national security and confidential business information.

(6) End items containing a minimal amount of otherwise noncompliant specialty metals (*i.e.,* specialty metals not melted or produced in the United States that are not covered by another exception listed in this paragraph (b)), if the total weight of noncompliant specialty metal does not exceed 2 percent of the total weight of all specialty metal in the end item. This exception does not apply to high performance magnets containing specialty metals. See PGI 225.7003–3(b)(6) for a table of applicability of specialty metals restrictions to magnets.

(c) *Compliance for commercial derivative military articles.* The restrictions at 225.7003–2(a) do not apply to an item acquired under a prime contract if—

(1) The offeror has certified, and subsequently demonstrates, that the offeror and its subcontractor(s) will individually or collectively enter into a contractual agreement or agreements to purchase a sufficient quantity of domestically melted or produced specialty metal in accordance with the provision at 252.225–7010; and

(2) The USD(AT&L), or the Secretary of the military department concerned, determines that the item is a commercial derivative military article (defense agencies see procedures at PGI 225.7003–3). The contracting officer shall submit the offeror's certification and a request for a determination to the appropriate official, through agency channels, and shall notify the offeror when a decision has been made.

(d) *National security waiver.* The USD(AT&L) may waive the restrictions at 225.7003–2 if the USD(AT&L) determines in writing that acceptance of the item is necessary to the national security interests of the United States (*see* procedures at PGI 225.7003–3). This authority may not be delegated.

(1) The written determination of the USD(AT&L)—

(i) Shall specify the quantity of end items to which the national security waiver applies;

(ii) Shall specify the time period over which the national security waiver applies; and

(iii) Shall be provided to the congressional defense committees before the determination is executed, except that in the case of an urgent national security requirement, the determination may be provided to the congressional defense committees up to 7 days after it is executed.

(2) After making such a determination, the USD(AT&L) will—

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

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

(3) 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.

225.7003–4 One-time waiver.

DoD 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 before September 30, 2010;

(b) The specialty metals were incorporated into items (whether end items or components) 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 any 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 USD(AT&L); 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 the Federal Business Opportunities Web site at *http://www.FedBizOpps.gov*, stating that a waiver for the contract has been granted under Section 842(b) of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364).

225.7003–5 Solicitation provision and contract clauses.

(a) Unless the acquisition is wholly exempt from the specialty metals restrictions at 225.7003–2 because the acquisition is covered by an exception in 225.7003–3(a) or (d) (but see paragraph (d) of this subsection)—

(1) Use the clause at 252.225–7008, Restriction on Acquisition of Specialty Metals, in solicitations and contracts that—

(i) Exceed the simplified acquisition threshold; and

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

(2) Use the clause at 252.225–7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals, 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) Use the provision at 252.225–7010, Commercial Derivative Military Article—Specialty Metals Compliance Certificate, in solicitations—

(1) That contain the clause at 252.225–7009; and

(2) For which the contracting officer anticipates that one or more offers of commercial derivative military articles may be received.

(c) Use the clause at 252.225–7029, Reporting of Commercially Available Off-the-Shelf Items that Contain Specialty Metals and are Incorporated into Noncommercial End Items, in solicitations and contracts that—

(1) Contain the clause at 252.225–7009;

(2) Are for the acquisition of noncommercial end items; and

(3) Are awarded in fiscal year 2009.

(d) 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, the contracting officer should not rely on the exception at 225.7003–3(a)(2) or (3), but should include the appropriate specialty metals clause or provision in the solicitation and contract.

(e) 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 subject to the restrictions.

225.7004–4 [Amended]

■ 12. Section 225.7004–4 is amended by removing ''225.7003'' and adding in its place ''225.7008''.

225.7005–3 [Amended]

■ 13. Section 225.7005–3 is amended by removing ''225.7003'' and adding in its place ''225.7008''.

225.7006–3 [Amended]

■ 14. Section 225.7006–3 is amended in paragraph (a), and in the second sentence of paragraph (b), by removing ''225.7003'' and adding in its place ''225.7008''.

■ 15. Section 225.7008 is added to read as follows:

225.7008 Waiver of restrictions of 10 U.S.C. 2534.

(a) When specifically authorized by reference elsewhere in this subpart, the restrictions on certain foreign purchases under 10 U.S.C. 2534(a) may be waived as follows:

(1)(i) The Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD(AT&L)), without power of delegation, may waive a restriction for a particular item for a particular foreign country upon determination that—

(A) United States producers of the item would not be jeopardized by competition from a foreign country, and that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country; or

(B) Application of the restriction would impede cooperative programs entered into between DoD and a foreign country, or would impede the reciprocal procurement of defense items under a memorandum of understanding providing for reciprocal procurement of defense items under 225.872, and that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country.

(ii) A notice of the determination to exercise the waiver authority shall be published in the **Federal Register** and submitted to the congressional defense committees at least 15 days before the effective date of the waiver.

(iii) The effective period of the waiver shall not exceed 1 year.

(iv) For contracts entered into prior to the effective date of a waiver, provided adequate consideration is received to modify the contract, the waiver shall be applied as directed or authorized in the waiver to—

(A) Subcontracts entered into on or after the effective date of the waiver; and

(B) Options for the procurement of items that are exercised after the effective date of the waiver, if the option prices are adjusted for any reason other than the application of the waiver.

(2) The head of the contracting activity may waive a restriction on a case-by-case basis upon execution of a determination and findings that any of the following applies:

(i) The restriction would cause unreasonable delays.

(ii) Satisfactory quality items manufactured in the United States or Canada are not available.

(iii) Application of the restriction would result in the existence of only one source for the item in the United States or Canada.

(iv) Application of the restriction is not in the national security interests of the United States.

(v) Application of the restriction would adversely affect a U.S. company.

(3) A restriction is waived when it would cause unreasonable costs. The cost of an item of U.S. or Canadian origin is unreasonable if it exceeds 150 percent of the offered price, inclusive of duty, of items that are not of U.S. or Canadian origin.

(b) In accordance with the provisions of paragraphs (a)(1)(i) through (iii) of this section, the USD(AT&L) has waived the restrictions of 10 U.S.C. 2534(a) for certain items manufactured in the United Kingdom, including air circuit breakers for naval vessels (*see* 225.7006). This waiver applies to—

(1) Procurements under solicitations issued on or after August 4, 1998; and

(2) Subcontracts and options under contracts entered into prior to August 4, 1998, under the conditions described in paragraph (a)(1)(iv) of this section.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 16. Section 252.212–7001 is amended as follows:

■ a. By revising the clause date to read ''(JUL 2009)'';

■ b. By removing paragraph (b)(7);

■ c. By redesignating paragraphs (b)(6), (b)(8) through (20), (b)(21), and (b)(22), as paragraphs (b)(8), (b)(9) through (21), (b)(23), and (b)(24), respectively;

■ d. By adding new paragraphs (b)(6), (b)(7), and (b)(22);

■ e. In newly designated paragraph (b)(11) by removing ''(NOV 2008)'' and adding in its place ''(JUL 2009)'';

■ f. In newly designated paragraph (b)(14)(i) by removing ''(JAN 2009)'' and adding in its place ''(JUL 2009)'';

■ g. In newly designated paragraph (b)(14)(ii) by removing ''(OCT 2006)'' and adding in its place ''(JUL 2009)'';

■ h. By removing paragraph (c)(1);

■ i. By redesignating paragraph (c)(2) as paragraph (c)(1); and

■ j. By adding a new paragraph (c)(2) to read as follows:

252.212–7001 Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items.

* * * * *

(b) * * *

(6) _____ 252.225–7008, Restriction on Acquisition of Specialty Metals (JUL 2009) (10 U.S.C. 2533b).

(7) _____ 252.225–7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals (JUL 2009) (10 U.S.C. 2533b).

* * * * *

(22) _____ 252.247–7003, Pass-Through of Motor Carrier Fuel Surcharge Adjustment to the Cost Bearer (JUL 2009) (Section 884 of Public Law 110–417).

* * * * *

(c) * * *

(2) 252.247–7003, Pass-Through of Motor Carrier Fuel Surcharge Adjustment to the Cost Bearer (JUL 2009) (Section 884 of Public Law 110–417).

* * * * *

■ 17. Sections 252.225–7008, 252.225–7009, and 252.225–7010 are added to read as follows:

252.225–7008 Restriction on Acquisition of Specialty Metals.

As prescribed in 225.7003–5(a)(1), use the following clause:

RESTRICTION ON ACQUISITION OF SPECIALTY METALS (JUL 2009)

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

(1) *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).

(2) *Produce* means the application of forces or processes to a specialty metal to create the

desired physical properties through quenching or tempering of steel plate, gas atomization or sputtering of titanium, or final consolidation of non-melt derived titanium powder or titanium alloy powder.

(3) *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.

(4) *Steel* means an iron alloy that includes between .02 and 2 percent carbon and may include other elements.

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

(End of clause)

252.225–7009 Restriction on Acquisition of Certain Articles Containing Specialty Metals.

As prescribed in 225.7003–5(a)(2), use the following clause:

Restriction on Acquisition of Certain Articles Containing Specialty Metals (Jul 2009)

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

(1) *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).

(2) *Assembly* means an item forming a portion of a system or subsystem that—

(i) Can be provisioned and replaced as an entity; and

(ii) Incorporates multiple, replaceable parts.

(3) *Commercial derivative military article* means an item acquired 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.

(4) *Commercially available off-the-shelf item*—

(i) Means any item of supply that is—

(A) A commercial item (as defined in paragraph (1) of the definition of ''commercial item'' in section 2.101 of the Federal Acquisition Regulation);

(B) Sold in substantial quantities in the commercial marketplace; and

(C) Offered to the Government, under this contract or a subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; 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.

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

(6) *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. The term does not include structural or mechanical parts of an assembly containing an electronic component, and does not include any high performance magnets that may be used in the electronic component.

(7) *End item* means the final production product when assembled or completed and ready for delivery under a line item of this contract.

(8) *High performance magnet* means a permanent magnet that obtains a majority of its magnetic properties from rare earth metals (such as samarium).

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

(10) *Qualifying country* means any country listed in section 225.003(9) of the Defense Federal Acquisition Regulation Supplement (DFARS).

(11) *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 to be delivered to the Government under this contract; or

(ii) A finished component assembled into an end item to be delivered to the Government under this contract.

(12) *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.

(13) *Steel* means an iron alloy that includes between .02 and 2 percent carbon and may include other elements.

(14) *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) *Restriction.* 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.

(c) *Exceptions.* The restriction in paragraph (b) of this clause does not apply to—

(1) Electronic components.

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

(A) Specialty metal mill products, such as bar, billet, slab, wire, plate, or sheet, that have not been incorporated into COTS end items, subsystems, assemblies, or components;

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

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

(D) COTS fasteners, unless—

(1) The fasteners are incorporated into COTS end items, subsystems, assemblies, or components; or

(2) The fasteners qualify for the commercial item exception in paragraph (c)(3) of this clause.

(ii) A COTS item is considered to be ''without modification'' if it is not modified prior to contractual acceptance by the next higher tier in the supply chain.

(A) Specialty metals in a COTS item that was accepted without modification by the next higher tier are excepted from the restriction in paragraph (b) of this clause, 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) Specialty metals that were not contained in a COTS item upon acceptance, but are added to the COTS item after acceptance, are subject to the restriction in paragraph (b) of this clause (*e.g.*, a special reinforced handle made of specialty metal 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 restriction in paragraph (b) of this clause (*e.g.*, a COTS aircraft is outfitted with a COTS engine that is not the COTS engine normally provided with the 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 restriction in paragraph (b) of this clause (*e.g.*—An aircraft is normally sold to the public with an option for installation kits. The Department of Defense requests a military-unique kit. The aircraft is still a COTS item, but the military-unique kit is not a COTS item and must comply with the restriction in paragraph (b) of this clause unless another exception applies).

(3) Fasteners that are commercial items, if the manufacturer of the fasteners certifies it will purchase, during the relevant calendar year, an amount of domestically melted or produced 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 percent 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) Specialty metals for which the Government has determined in accordance with DFARS 225.7003–3 that specialty metal melted or produced in the United States, its outlying areas, or a qualifying country cannot be acquired as and when needed in—

(i) A satisfactory quality;

(ii) A sufficient quantity; and

(iii) The required form.

(6) End items containing a minimal amount of otherwise noncompliant specialty metals (*i.e.*, specialty metals not melted or produced in the United States, an outlying area, or a qualifying country, that are not covered by one of the other exceptions in this paragraph (c)), if the total weight of such noncompliant metals does not exceed 2 percent of the total weight of all specialty metals in the end item, as estimated in good faith by the Contractor. This exception does not apply to high performance magnets containing specialty metals.

(d) *Compliance for commercial derivative military articles.*

(1) As an alternative to the compliance required in paragraph (b) of this clause, the Contractor may purchase an amount of domestically melted or produced 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, if—

(i) The Contracting Officer has notified the Contractor of the items to be delivered under this contract that have been determined by the Government to meet the definition of ''commercial derivative military article''; and

(ii) For each item that has been determined by the Government to meet the definition of ''commercial derivative military article,'' the Contractor has certified, as specified in the provision of the solicitation entitled ''Commercial Derivative Military Article—Specialty Metals Compliance Certificate'' (DFARS 252.225–7010), that the Contractor and its subcontractor(s) will enter 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 each commercial derivative military article and the related commercial article, that is not less than the Contractor's good faith estimate of the greater of—

(A) An amount equivalent to 120 percent 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

(B) An amount equivalent to 50 percent of the amount of specialty metal that will be 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.

(2) For the purposes of this alternative, 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.

(e) *Subcontracts.* The Contractor shall insert the substance of this clause in subcontracts for items containing specialty metals, to the extent necessary to ensure compliance of the end products that the Contractor will deliver to the Government. When inserting the substance of this clause in subcontracts, the Contractor shall—

(1) Modify paragraph (c)(6) of this clause as necessary to facilitate management of the minimal content exception;

(2) Exclude paragraph (d) of this clause; and

(3) Include this paragraph (e).

(End of clause)

252.225–7010 Commercial Derivative Military Article—Specialty Metals Compliance Certificate.

As prescribed in 225.7003–5(b), use the following provision:

Commercial Derivative Military Article—Specialty Metals Compliance Certificate (Jul 2009)

(a) *Definitions. Commercial derivative military article, commercially available off-the-shelf item, produce, required form,* and *specialty metal,* as used in this provision, have the meanings given in the clause of this solicitation entitled ''Restriction on Acquisition of Certain Articles Containing Specialty Metals'' (DFARS 252.225–7009).

(b) The offeror shall list in this paragraph any commercial derivative military articles it intends to deliver under any contract resulting from this solicitation using the alternative compliance for commercial derivative military articles, as specified in paragraph (d) of the clause of this solicitation entitled ''Restriction on Acquisition of Certain Articles Containing Specialty Metals'' (DFARS 252.225–7009). The offeror's designation of an item as a ''commercial derivative military article'' will be subject to Government review and approval.

(c) If the offeror has listed any commercial derivative military articles in paragraph (b) of this provision, the offeror certifies that, if awarded a contract as a result of this solicitation, and if the Government approves the designation of the listed item(s) as commercial derivative military articles, the offeror and its subcontractor(s) will demonstrate that individually or collectively they 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 each commercial derivative military article and the related commercial article, that is not less than the Contractor's good faith estimate of the greater of—

(1) An amount equivalent to 120 percent 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

(2) An amount equivalent to 50 percent of the amount of specialty metal that will be 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.

(d) For the purposes of this provision, 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 articles.

(End of provision)

252.225–7014 [Removed and Reserved]

■ 18. Section 252.225–7014 is removed and reserved.

252.225–7015 [Amended]

■ 19. Section 252.225–7015 is amended in the introductory text by removing ''225.7002–3(c)'' and adding in its place ''225.7002–3(b)''.

■ 20. Section 252.225–7029 is added to read as follows:

252.225–7029 Reporting of Commercially Available Off-the-Shelf Items that Contain Specialty Metals and are Incorporated into Noncommercial End Items.

As prescribed in 225.7003–5(c), use the following clause:

Reporting of Commercially Available Off-the-Shelf Items that Contain Specialty Metals and Are Incorporated Into Noncommercial End Items (Jul 2009)

(a) *Definitions. Commercially available off-the-shelf item,* and *specialty metal,* as used in this clause, have the meanings given in the clause of this solicitation entitled ''Restriction on Acquisition of Certain Articles Containing Specialty Metals'' (DFARS 252.225–7009).

(b) If the exception in paragraph (c)(2) of the clause at DFARS 252.225–7009, Restriction on Acquisition of Certain Articles Containing Specialty Metals, is used for a commercially available off-the-shelf (COTS) item, valued at more than $100 per item, to be incorporated into a noncommercial end

item to be delivered under this contract, the Contractor shall—

(1) Follow the instructions on the Defense Procurement and Acquisition Policy Web site at *http://www.acq.osd.mil/dpap/cpic/ic/restrictions_on_specialty_metals_10_usc_2533b.html* to report information required by the contract as follows:

Contract awarded	Report by
Before July 31, 2009	August 31, 2009.
August 1–31, 2009 ...	September 30, 2009.
September 1–30, 2009.	October 31, 2009.

(2) In accordance with the procedures specified at the Web site, provide the following information:

(i) Company Name.

(ii) Product category of acquisition (*i.e.,* Aircraft, Missiles and Space Systems, Ships, Tank—Automotive, Weapon Systems, or Ammunition).

(iii) The 6-digit North American Industry Classification System (NAICS) code of the COTS item, contained in the non-commercial deliverable item, to which the exception applies.

(c) The Contractor shall not report COTS items that are incorporated into the end product under an exception other than paragraph (c)(2) of the clause at DFARS 252.225–7009, such as electronic components, commercial item fasteners, qualifying country, non-availability, or minimal amounts of specialty metal.

(End of clause)

[FR Doc. E9–17967 Filed 7–28–09; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 202 and 252

Defense Federal Acquisition Regulation Supplement; Technical Amendments

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is making technical amendments to the Defense Federal Acquisition Regulation Supplement (DFARS) to update the list of Air Force contracting activities and paragraph numbering.

DATES: *Effective Date:* July 29, 2009.

FOR FURTHER INFORMATION CONTACT: Ms. Michele Peterson, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone 703–602–0311; facsimile 703–602–7887.

SUPPLEMENTARY INFORMATION: This final rule amends DFARS text as follows:

○ *202.101.* Updates the list of Air Force contracting activities.

○ *252.225–7036.* Updates a paragraph designation in Alternate I for consistency with the corresponding paragraph in the basic clause.

List of Subjects in 48 CFR Parts 202 and 252

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR parts 202 and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 202 and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 202—DEFINITIONS OF WORDS AND TERMS

■ 2. Section 202.101 is amended in the definition of ''Contracting activity'' by revising the list with the heading ''AIR FORCE'' to read as follows:

202.101 Definitions.

* * * * *

Contracting activity * * *

AIR FORCE

Office of the Assistant Secretary of the Air Force (Acquisition)
Office of the Deputy Assistant Secretary (Contracting)
Air Force Materiel Command
Air Force Reserve Command
Air Combat Command
Air Mobility Command
Air Education and Training Command
Pacific Air Forces
United States Air Forces in Europe
Air Force Space Command
Air Force District of Washington
Air Force Operational Test & Evaluation Center
Air Force Special Operations Command
United States Air Force Academy
Aeronautical Systems Center
Air Armament Center
Electronic Systems Center
Space and Missile Systems Center

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.225–7036 [Amended]

■ 3. Section 252.225–7036 is amended as follows:

■ a. By revising the Alternate I date to read ''(JUL 2009)'';

■ b. In Alternate I introductory text by removing ''(a)(4) and (c) for paragraphs (a)(4)'' and adding in its place ''(a)(8) and (c) for paragraphs (a)(8)''; and

■ c. In Alternate I by redesignating paragraph (a)(4) as paragraph (a)(8).

[FR Doc. E9–17948 Filed 7–28–09; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204 and 217

RIN 0750–AG05

Defense Federal Acquisition Regulation Supplement; Clarification of Central Contractor Registration and Procurement Instrument Identification Data Requirements (DFARS Case 2008–D010)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to address requirements for ensuring the accuracy of contractor information in the Central Contractor Registration (CCR) database and in contract documents. Additionally, the rule clarifies requirements for proper assignment of procurement instrument identification numbers.

DATES: *Effective Date:* July 29, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Julian Thrash, Defense Acquisition Regulations System, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone 703–602–0310; facsimile 703–602–7887. Please cite DFARS Case 2008–D010.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule reinforces requirements for use and maintenance of accurate contractor information, to permit proper identification and tracking of contract data through DoD's business processes. The DFARS changes address requirements for—

○ Ensuring that contract documents contain contractor information that is accurate and consistent with the information in the CCR database; and

○ Proper assignment of procurement instrument identification numbers.

DoD published a proposed rule at 73 FR 62239 on October 20, 2008. Three