

Government Contracts Advisory

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Specialty Metals: New Rules

Just over a year ago, in an attempt to address industry and Department of Defense (DoD) concerns over the specialty metal restrictions of the Berry Amendment, Congress provided the Secretary of Defense with new and expanded authority to waive the statutory limitations. National Defense Authorization Act for Fiscal Year 2007, Public Law 109-364, § 842; 10 U.S.C. § 2533b. Congress and the DoD have now concluded that the waiver process in fact is impracticable because it took too much time and has impeded DoD's acceptance of necessary equipment. To redress last year's changes, Congress has elected to change the law again, this time with the goal of minimizing the use of waivers and significantly increasing opportunities for exceptions. National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181, § 804. A DFARS Class Deviation implementing the statutory changes was published January 29, 2008. This new Class Deviation supersedes prior Class Deviations made on December 6, 2006, and October 26, 2007.

What has not changed is the maze of paragraphs, subparagraphs and clauses one must follow in order to take full advantage of the new exceptions, which are summarized below:

Commercial Off the Shelf

Congress codified the October 26, 2007, DoD DFARS Class Deviation exempting commercial off the shelf products (COTS). (There is a different rule for COTS fasteners)¹. The definition of COTS in the January 2008, DFARS Class deviation does not differ from the prior definition. What is new, is an explanation in the memorandum accompanying the January 2008, DFARS Class Deviation, that specialty metal in a COTS item maintains its exempt status, or "compliant" status as the COTS item moves through the manufacturing process, even if the final product is modified to convert to a commercial item or military unique item. For example, if a special reinforced handle made of specialty metal is added to a COTS item, converting the item to a commercial item, only the handle is subject to the restrictions; the specialty metal in the underlying COTS product remains exempt. Another example provided in the memorandum is when COTS items are joined together, only the specialty metal needed to join the two items need comply.

De Minimis

DoD may now accept delivery of an item containing non-compliant specialty metal if the weight of the noncompliant specialty metal is 2% or less than the total weight of specialty metal in the item. To maximize the benefit of this rule, keep in mind that "exempt" specialty metal remains "compliant" specialty metal. Returning to the example above of the reinforced handle added to the COTS item, under the COTS exception, all of the specialty metal in the COTS item is considered "compliant" for purposes of the 2% calculation. Application of the de minimis exception on top of the COTS exception may help keep the weight of the non-compliant metal in the reinforced handle below the 2% threshold. The conception of using 2 or more exceptions is referred to as "tiering".

Electronic Component

Last year Congress enacted an exception for "commercially available electronic components" – but the language was confusing and difficult to implement. The meaning of terms such as "commercially

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available" and the "lowest level electronic component" was not clear. The new rule is quite simple: all electronic components are exempt. The DFARS Class Deviation defines electronic component to mean, "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.

Fasteners

As stated above, fasteners have different rules. A COTS fastener qualifies for the exemption only if it is incorporated into a COTS end item, subsystem, assembly, or component. Different still, a fastener that is a commercial item is exempt if the manufacture of the fastener certifies that it will purchase 50% of its specialty metal from a domestic supplier in a given year. DoD has indicated that it will rely on fastener manufacturers to self certify their compliance.

Commercial Derivative Military Articles

DoD may accept a commercial derivative military article from a contractor if that contractor certifies that it will purchase domestic specialty metal during the production of the commercial article in an amount greater than either (a) 120% of the amount of specialty metal that is required to carry out the production of the commercial derivative military article, or (b) 50% of the amount of specialty metal purchased by contractor and subcontractor needed during production of the commercial derivative article and the related commercial item. The January 2008, DFARS class deviation states that certifications will be based on good faith estimates.

National Security Waiver

Although there is a focus on new exceptions and clarifying older exceptions, there is a new National Security waiver for those instances when a non-compliant item is necessary to the National Security interests of the United States.

The January 2008, DFARS Class Deviation is effective immediately. Contracting officers also have the discretion to modify existing contracts with this Class Deviation with appropriate consideration. As the rules can be complex, we recommend you review carefully the most recent January 2008, DFARS class deviation to ensure proper compliance.

¹The COTS rule does not apply when DoD purchases directly specialty metals, forgings and castings.

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