

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: Proposed rule with request for comments.

SUMMARY: DoD is proposing to amend 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 proposed 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: Comments on the proposed rule should be submitted in writing to the address shown below on or before September 19, 2008, to be considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2008-D003, using any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

E-mail: dfars@osd.mil. Include DFARS Case 2008-D003 in the subject line of the message.

Fax: 703-602-7887.

Mail: Defense Acquisition Regulations System, Attn: Ms. Amy Williams, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062.

Hand Delivery/Courier: Defense Acquisition Regulations System, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202-3402.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, 703-602-0328.

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.

This proposed rule implements 10 U.S.C. 2533b and Section 884 of the National Defense Authorization Act for Fiscal Year 2008. The previous specialty metals policy is removed from DFARS 225.7002-1 through 225.7002-3; the new policy is added at 225.7003-1 through 225.7003-5; and the policy previously at 225.7003, addressing waiver of 10 U.S.C. 2534, is relocated to 225.7008 with no substantive change to content. The following is a discussion of the new specialty metals policy:

1. Restriction on Acquisition of Specialty Metals Not Melted or Produced in the United States

a. *Applicability to the six product categories.* Much of 10 U.S.C. 2533b reflects requirements already established in the DFARS. 10 U.S.C. 2533b(a)(1) is consistent with the existing DFARS requirement for flowdown of the specialty metals restriction to all subcontract tiers when acquiring aircraft, missile and space systems, ships, tank and automotive items, weapon systems, or ammunition, for applicability to end items and components thereof. This restriction applies to acquisition of the item containing the specialty metal, not just the specialty metal. This restriction is implemented in the proposed rule at 225.7003-2(a).

b. *Applicability to specialty metals acquired as end items.*

The restriction at 10 U.S.C. 2533b(a)(2) applies to the purchase of specialty metal as an end item, whether purchased directly by DoD or by a DoD prime contractor. This restriction is implemented in the proposed rule at 225.7003-2(b).

2. Exceptions

a. *Continuation of existing exceptions.*

The types of acquisitions that were previously exempted from specialty

metals restrictions, other than those by vessels in foreign waters, are also included in 10 U.S.C. 2533b and are implemented in the proposed rule at 225.7003-3(a). These exceptions are as follows:

- Acquisitions at or below the simplified acquisition threshold.
- Acquisitions outside the United States in support of combat operations.
- Acquisitions in support of contingency operations.
- 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.
- Acquisitions of items specifically for commissary resale.

In addition, the proposed rule clarifies, at 225.7003-3(a)(6), that the specialty metals restriction does not apply to 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. *New or revised exceptions that may be used in tandem.* Exceptions that were added or revised by 10 U.S.C. 2533b and that can be used singly or together are implemented in the proposed rule at 225.7003-3(b).

(1) *Electronic components.* 10 U.S.C. 2533b, as added by Section 842 of Public Law 109-364, provided a new exception for commercially available electronic components whose specialty metal content is minimal in value compared to the overall value of the lowest level component produced that contains such specialty metal. As amended by Section 804 of Public Law 110-181, the electronic component exception in 10 U.S.C. 2533b has been broadened to cover all electronic components, unless the Secretary of Defense, upon the recommendation of the Strategic Materials Protection Board, determines that the domestic availability of a particular electronic component is critical to national security.

(2) *Commercially Available Off-the-Shelf (COTS) items.* 10 U.S.C. 2533b contains new provisions applicable to COTS items. With certain exceptions, the statute does not apply to COTS items. However, the statute requires the reporting of information regarding the acquisition of noncommercial end items incorporating COTS items containing non-domestic specialty metals (fiscal years 2008 and 2009 only). The proposed rule requires contractors to provide this information for fiscal year 2009 in accordance with the clause at 252.225-70X4, Reporting of

Commercially Available Off-the-Shelf Items that Contain Specialty Metals and are Incorporated into Noncommercial End Items. In addition, the proposed rule contains an internal DoD reporting requirement with regard to the acquisition of COTS end items valued at \$5 million or more per item, containing non-domestic specialty metals.

(3) *Fasteners*. 10 U.S.C. 2533b provides a new exception applicable to the acquisition of fasteners. The exception applies to fasteners that are commercial items purchased under a contract or subcontract, if the manufacturer of the fasteners certifies that it will purchase, during the relevant calendar year, an amount of domestically melted specialty metal for use in the production of such fasteners for sale to DoD and other customers, that is not less than 50 percent of the amount of specialty metal it will purchase to carry out the production of such fasteners.

(4) *Agreements with foreign governments*. 10 U.S.C. 2533b provides an exception applicable to acquisitions that further an agreement with a foreign government (i.e., a qualifying country). However, the exception does not apply to specialty metals acquired as an end item, which is a change from the current practice.

(5) *Domestic specialty metals nonavailable*. 10 U.S.C. 2533b revises the criteria for granting exceptions based on the nonavailability of domestic specialty metals. Such exceptions are permitted if domestic specialty metal cannot be acquired in a satisfactory quality, a sufficient quantity, and in the required form. 10 U.S.C. 2533b(m)(4) clarifies that “in the required form” does not apply to end items or their components at any tier; and that the term means “in the form of mill product” and in the grade appropriate for the production of a finished end item or a finished component assembled into an end item.

(i) 10 U.S.C. 2533b also establishes new requirements with regard to the approval of a domestic nonavailability determination (DNAD). At least 30 days prior to approval of a DNAD that would apply to more than one DoD contract, a notice of the intent to approve the DNAD must be published on the Federal Business Opportunities website. DoD must take into consideration all information submitted in response to the notice, and this information must be made publicly available, except for classified information and confidential business information.

(ii) The proposed rule eliminates the nonstatutory requirement for notification to the congressional defense

committees at least 10 days before the award of a contract that relies on a determination of nonavailability for the acquisition of titanium or a product containing titanium. This requirement was at DFARS 225.7002–2(b)(4).

(6) *Minimal amounts of otherwise noncompliant specialty metal*. 10 U.S.C. 2533b provides a new exception applicable to otherwise noncompliant specialty metals that do not exceed 2 percent of the total weight of specialty metals in a delivered item. The proposed rule permits use of this exception in tandem with other exceptions listed in 225.7003–3(b); any foreign specialty metal not covered by any of the other exceptions may still be acceptable if it does not exceed 2 percent of the total weight of all specialty metals in the end item. This de minimis exception does not apply to the specialty metal in high performance magnets. The proposed rule places responsibility with the prime contractor for management of the content of specialty metals in the end item. In order to manage the de minimis exception, the contractor is authorized, but is not required, to flow down the substance of the specialty metals clause to subcontractors.

c. *Commercial derivative military articles*. 10 U.S.C. 2533b provides an alternative compliance method for commercial derivative military articles. This compliance method can be used if the Government determines that an item to be acquired is a commercial derivative military article, and the contractor certifies that the contractor and its subcontractors will enter into a contractual agreement or agreements to purchase a specified amount of domestically melted specialty metal for use, during the period of contract performance, in the production of the commercial derivative military article and the related commercial article.

d. *National security*. 10 U.S.C. 2533b permits DoD to accept the delivery of an end item containing noncompliant specialty metal if the Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD (AT&L)) determines that acceptance of the item is necessary to the national security interests of the United States. In any case in which the USD (AT&L) makes such a determination, the USD (AT&L) is required to ensure that the contractor or subcontractor responsible for the noncompliance develops and implements an effective plan to ensure future compliance.

3. One-Time Waiver

Section 842(b) of the National Defense Authorization Act for Fiscal Year 2007

(not codified) established one-time waiver authority for contracts under which specialty metals were incorporated into items produced, manufactured, or assembled in the United States prior to October 17, 2006, and where final acceptance by the Government takes place after that date, but before September 30, 2010. DoD may grant such a waiver, provided the noncompliance was not knowing or willful. This policy is addressed in the proposed rule at 225.7003–4.

4. Definitions

a. *Specialty metal, alloy, and steel*. 10 U.S.C. 2533b contains a definition of “specialty metal” that is consistent with the one used in the clause at DFARS 252.225–7014, Preference for Domestic Specialty Metals. The proposed rule makes minor changes to this definition to clarify its meaning, as there has been frequent misinterpretation of the definition with regard to nickel, iron-nickel, and cobalt alloys. Nickel alone is not a metal alloy. The meaning of the term “other alloying metals” within the definition depends on whether the alloy is nickel or iron-nickel, or cobalt. If the metal is a nickel alloy, the other alloying metal can be cobalt. If it is a cobalt alloy, the other alloying metal can be nickel.

In addition, this proposed rule clarifies the definitions of the terms “alloy” and “steel,” as used in the definition of specialty metal in the clauses at DFARS 252.225–70X1, Restriction on Acquisition of Specialty Metals, and 252.225–70X2, Restriction on Acquisition of Certain Articles Containing Specialty Metals. DoD believes there is a need for clarification of the terms used within the definition of specialty metal, as numerous questions have arisen with regard to the meaning of these terms.

i. Alloy.

Basic to understanding the definition of specialty metals is an understanding of the term “alloy.” An alloy is a metal that consists of a mixture of a metal and one or more other elements. Often, these other elements will be metals. In other cases, a metal will be alloyed with a non-metal (such as carbon). However, the resultant material must retain its metallic properties (e.g., high electrical conductivity, luster, and malleability). If a metal and a nonmetal form a salt, or if a metal and oxygen form an oxide, those are not alloys.

The proposed rule defines “alloy” as a metal consisting of a mixture of a basic metallic element and one or more metallic, or non-metallic, alloying elements. For alloys named by a single metallic element (e.g., “titanium alloy”),

the term means that the alloy contains 50 percent or more of the named metal (by mass). If two metals are specified in the name (e.g., nickel-iron alloy), those are the two predominant elements in the alloy, and together they constitute 50 percent or more of the alloy (by mass).

DoD considered whether to define a particular alloy based on “more than 50 percent,” or based on “predominance.” If there were multiple elements in an alloy, the “predominant” metal could be as low as 20 percent or less. However, it did not appear appropriate to determine whether an alloy is considered to be an alloy of a particular metal based not on the percentage of that metal, but on how the remaining percentage is divided up among other elements. For example—

- Under the “predominance” approach, an alloy of 35 percent titanium and 65 percent iron would not be considered a titanium alloy; it would be an iron alloy; but

- An alloy of 35 percent titanium, 33 percent iron, and 32 percent nickel would be considered a titanium alloy (although it contains no more titanium than the prior example, and the non-titanium elements exceed the titanium element).

This anomaly is avoided by requiring an alloy to contain at least 50 percent titanium to be considered a titanium alloy. Using this approach, an alloy is named by whatever combination of metals equals at least 50 percent of the alloy (e.g., the last named example would be a titanium-iron alloy).

DoD concluded that there is no generally accepted industry definition to the contrary. The proposed rule does not establish a universal definition, but a definition that is appropriate within this specific regulation.

ii. *Steel.*

The definition of “specialty metal” is dependent on the meaning of the term “steel.” In order to know whether a particular alloy that has more than 1.65 percent manganese meets the definition in 252.225–70X2(a)(12)(i)(A), it is necessary to be able to first determine whether or not it meets the definition of “steel”. The proposed rule defines “steel” as an iron alloy that includes between .02 and 2 percent carbon and may include other elements. The range of percentage of carbon for steel is based on the Metals Handbook of the American Society of Metals.

Therefore, as used in the proposed rule, steel must have at least 50 percent iron to be an iron alloy, and it must also have between .02 and 2 percent carbon. There are low-carbon steels and high-carbon steels. If the percentages of other

metals increase, the material is termed an alloy steel.

b. *Commercially available off-the-shelf (COTS) items.* 10 U.S.C.

2533b(m)(5) specifies that “commercially available off-the-shelf” has the meaning provided at 41 U.S.C. 431(c), i.e., a commercial item sold in substantial quantities in the commercial marketplace and offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace. The proposed rule contains a definition of “COTS item” that reflects the definition at 41 U.S.C. 431(c) and also the provisions of 10 U.S.C. 2533b, which make the specialty metals restriction applicable to items delivered under subcontracts at any tier. As implemented in the proposed rule at 252.225–70X2(c)(2)(ii), COTS items are determined at the point of sale by the next higher tier in the supply chain.

c. *Produce.* 10 U.S.C. 2533b requires that specialty metals be melted or produced in the United States. The proposed rule adds a definition of “produce” at 252.225–70X1(a)(2) and 252.225–70X2(a)(9). Specialty metals may be melted in another country, but certain significant production processes occur in this country. Furthermore, using new production methods, specialty metals may not even be “melted” to achieve the desired physical properties.

d. *High performance magnet.*

The proposed rule defines “high performance magnet” to mean a permanent magnet that obtains a majority of its magnetic properties from rare earth metals (such as samarium). DoD considers that magnets containing rare earth elements (such as samarium) should be the only magnets included in the definition of “high performance magnet,” because they are so technologically superior in magnetic performance to other types of magnets and make miniaturization possible in many electronic applications. This definition of high performance magnets includes magnets made from samarium cobalt, neodymium iron-boron, and ferrites, but of these high performance magnets, only samarium cobalt magnets contain specialty metals. Therefore, this proposed rule, which addresses restrictions on the acquisition of specialty metals, only impacts the acquisition of samarium cobalt high performance magnets. Although alnico magnets contain specialty metals, they are not high performance magnets. Therefore, if an alnico magnet is a COTS item, the specialty metals in it are not covered by the restriction. This definition of high performance magnet

is in the proposed rule at 252.225–70X2(a)(8).

e. *Automotive item.* The definition of “automotive item” in the proposed rule clarifies that the term means military transport vehicles. The use of “tank” in conjunction with the term “automotive items” at 10 U.S.C. 2533(a)(1) implies that this product category is intended to cover tactical, combat-type vehicles, not commercially available off-the-shelf cars, trucks, or vans. This definition is in the proposed rule at 225.7003–1(b).

f. *Component.* 10 U.S.C. 2533b(m)(2) specifies that “component” has the meaning provided at 41 U.S.C. 403, i.e., any item supplied to the Federal Government as part of an end item or of another component. This definition is in the proposed rule at 252.225–70X2(a)(5).

g. *Assembly, end item, and subsystem.* 10 U.S.C. 2533b provides new definitions of these terms, which have been incorporated in the proposed rule at 252.225–70X2(a)(2), (a)(7), and (a)(14) respectively. The definition of “end item” has been tailored for contract use.

5. *Clauses and Clause Prescriptions*

a. The proposed rule removes the contract clause at DFARS 252.225–7014, Preference for Domestic Specialty Metals, and adds three new contract clauses and a new solicitation provision as follows:

- 252.225–70X1, Restriction on Acquisition of Specialty Metals, applies to the acquisition of specialty metal as an end item.

- 252.225–70X2, Restriction on Acquisition of Certain Articles Containing Specialty Metals, applies to the acquisition of specialty metal as a component of an item in one of six major product categories.

- 252.225–70X3, Commercial Derivative Military Article—Specialty Metals Compliance Certificate, applies to solicitations for which it is anticipated that offers of commercial derivative military articles may be received.

- 252.225–70X4, Reporting of Commercially Available Off-the-Shelf Items that Contain Specialty Metals and are Incorporated into Noncommercial End Items, applies to solicitations and contracts that contain the clause 252.225–70X2, are for the acquisition of noncommercial end products, and are awarded in fiscal year 2009.

b. 10 U.S.C. 2533b requires application of the specialty metals restrictions to commercial items. Therefore, requirements for use of 252.225–70X1 and 252.225–70X2 have been added to the clause at 252.212–7001, Contract Terms and Conditions

Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items. In addition, 252.225–70X3 has been added to the list of provisions applicable to the acquisition of commercial items at 212.301.

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 an initial regulatory flexibility analysis consistent with 5 U.S.C. 603. A copy of the analysis may be obtained from the point of contact specified herein. The analysis is summarized as follows:

The proposed rule affects producers of specialty metals, and manufacturers of components containing specialty metals that will be incorporated into end items to be acquired by DoD. Producers of specialty metals are generally 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 had more than 500 employees. There are numerous manufacturers of products containing specialty metals, either as prime contractors or subcontractors. DoD does not have the data to determine the total number of these manufacturers, or the number that are small businesses, because the Federal Procurement Data System only collects data on prime contractors and end items, not subcontractors and components of end items.

DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2008–D003.

C. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies, because the proposed rule contains information collection requirements. DoD invites comments on the following aspects of the proposed rule: (a) Whether the collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the information collection; (c) ways to enhance the quality, utility, and clarity of the information to be

collected; and (d) ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. The following is a summary of the information collection requirement.

Title: Defense Federal Acquisition Regulation Supplement (DFARS); Restriction on Acquisition of Specialty Metals.

Type of Request: New collection.

Number of Respondents: 3,885.

Responses per Respondent:

Approximately 4.

Annual Responses: 15,390.

Average Burden per Response:

Approximately 100 hours.

Annual Burden Hours: 1,544,000.

Needs and Uses: DoD needs the information required by 252.225–70X4 (fiscal year 2009 contract awards only) to prepare the report to Congress required by 10 U.S.C. 2533b(i). The report must include, at a minimum, a description of the types of items containing specialty metals that are being acquired as commercially available off-the-shelf components of noncommercial items and, therefore, are exempted from domestic source requirements.

DoD needs the information required by 252.225–70X3 to satisfy the requirement of 10 U.S.C. 2533b(j), for an offeror to certify that it will take certain actions with regard to specialty metals if the offeror chooses to use the alternative compliance approach when providing commercial derivative military articles to the Government.

Affected Public: Businesses or other for-profit institutions.

Respondent's Obligation: Required to obtain or retain benefits.

Frequency: On occasion.

Written comments and recommendations on the proposed information collection should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503, with a copy to the Defense Acquisition Regulations System, Attn: Ms. Amy Williams, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062. Comments can be received from 30 to 60 days after the date of this notice, but comments to OMB will be most useful if received by OMB within 30 days after the date of this notice.

To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Acquisition Regulations System, Attn: Ms. Amy

Williams, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062.

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

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

Therefore, DoD proposes to amend 48 CFR parts 202, 212, 225, and 252 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

2. Section 202.101 is amended by revising the definition of “Commercially available off-the-shelf item” to read as follows:

202.101 Definitions.

Commercially available off-the-shelf item—

(1) Means any item of supply that is—

(i) A commercial item (as defined in FAR 2.101);

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

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

(2) 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.

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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 252.225–70X3, 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 252.225-70X2, 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.

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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).

225.7002-2 [Amended]

8. Section 225.7002-2 is amended as follows:

- a. In paragraph (b), in the first sentence, by removing “or (b)”;
- b. By removing paragraph (b)(4);
- c. By redesignating paragraph (b)(5) as paragraph (b)(4);
- d. In newly designated paragraph (b)(4), by removing “PGI 225.7002-2(b)(5)” and adding in its place “PGI 225.7002-2(b)(4)”;
- 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).

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, component, electronic component, end item, high performance magnet, required form, and subsystem* are defined in the clause at 252.225-70X2, 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 252.225-70X1, Restriction on Acquisition of Specialty Metals, and 252.225-70X2, Restriction on Acquisition of Certain Articles Containing Specialty Metals. See PGI 225.7003-1(c) for examples of 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 paragraphs (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; and

(D) COTS fasteners, unless—

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

(2) The manufacturer of such fasteners certifies 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.

(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, Acquisition Policy, and Strategic Sourcing, in accordance with the procedures at PGI 225.7003-3(b)(2).

(iii) At the end of fiscal years 2008 and 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 252.225-70X4).

(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 in a qualifying country (see 225.872-1(a) and (b)).

(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.

(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) 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 the specialty metals in high performance magnets.

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

(1) The restrictions at 225.7003-2(a) do not apply to an item acquired under a prime contract if—

(i) The offeror has certified that the offeror and its subcontractor(s) will

enter into a contractual agreement or agreements to purchase a specified amount of domestically melted or produced specialty metal in accordance with the provision at 252.225-70X3; and

(ii) 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 an exception in 225.7003-3(a) or (d) applies (but see paragraph (c) of this subsection)—

(1) Use the clause at 252.225-70X1, 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 252.225-70X2, 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 252.225-70X3, Commercial Derivative Military Article—Specialty Metals Compliance Certificate, in solicitations—

(1) That contain the clause at 252.225-70X2; 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 252.225-70X4, 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 252.225-70X2;

(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 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 25—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

16. Section 252.212–7001 is amended as follows:

- a. By revising the clause date to read “(XXX 2008)”;
- b. By removing paragraph (b)(6);
- c. By redesignating paragraphs (b)(7) through (21) as paragraphs (b)(8) through (22) respectively;
- d. By redesignating paragraph (b)(5) as paragraph (b)(7);
- e. By adding new paragraphs (b)(5) and (b)(6);
- f. By removing paragraph (c)(1); and
- g. By redesignating paragraphs (c)(2) through (4) as paragraphs (c)(1) through (3), respectively. The added text reads as follows:

252.212–7001 Contract terms and conditions required to implement statutes or Executive orders applicable to Defense acquisitions of commercial items.

* * * * *

(b) * * *

(5) __ 252.225–70X1, Restriction on Acquisition of Specialty Metals (XXX 2008) (10 U.S.C. 2533b).

(6) __ 252.225–70X2, Restriction on Acquisition of Certain Articles Containing Specialty Metals (XXX 2008) (10 U.S.C. 2533b).

* * * * *

252.225–7014 [Removed and Reserved]

17. Section 252.225–7014 is removed and reserved.

252.225–7015 [Amended]

18. 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)”.

19. Sections 252.225–70X1 through 252.225–70X4 are added to read as follows:

252.225–70X1 Restriction on acquisition of specialty metals.

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

RESTRICTION ON ACQUISITION OF SPECIALTY METALS (XXX 2008)

(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 0.02 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)

252.225–70X2 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 (XXX 2008)

(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;

(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.

(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 subsection 225.872–1(a) or (b) 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 0.02 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 manufacturer of the fasteners certifies that it will purchase, during the relevant calendar year, an amount of domestically melted specialty metal, in the required form, for use in the production of 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.

(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 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) 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 amount of such noncompliant metals does not exceed 2 percent of the total weight of the noncompliant specialty metals in the end item, as estimated in good faith by the Contractor, does not exceed 2 percent of the total weight of all specialty metal in the end item. This exception does not apply to the specialty metals in high performance magnets.

(d) *Compliance for commercial derivative military articles*. As an alternative to the

compliance required in paragraph (b) of this clause, the Contractor may purchase an amount of domestically melted 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—

(1) 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

(2) 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 252.225–70X3), 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—

(i) 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

(ii) 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.

(3) For the purpose of this exception, the amount of specialty metal that is required to carry out production of the commercial derivative military article includes specialty metal contained in any item, including COTS items.

(e) To facilitate management of the minimal content exception in paragraph (c)(6) of this clause, the Contractor may, but is not required to, insert the substance of this clause, including this paragraph (e), but excluding paragraph (d), in subcontracts for items containing specialty metals. (End of clause)

252.225–70X3 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 (XXX 2008)

(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 252.225–70X2).

(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 252.225-70X2). 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 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-

(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)

252.225-70X4 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 COMMERCIALY AVAILABLE OFF-THE-SHELF ITEMS THAT CONTAIN SPECIALTY METALS AND ARE INCORPORATED INTO NONCOMMERCIAL END ITEMS (XXX 2008)

(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 252.225-70X2).

(b) If the exception in paragraph (c)(2) of the clause at DFARS 252.225-70X2, Restriction on Acquisition of Certain Articles Containing Specialty Metals, is used for a commercially available off-the-shelf (COTS) 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, Acquisition Policy, and Strategic Sourcing Specialty Metals Restriction Web site at http://www.acq.osd.mil/dpap/cpic/ic/restrictions_on_specialty_metals_10_usc_2533b.html to report information by contract as follows:

Contract awarded	Report by
Oct. 1, 2008—Dec. 30, 2008	Jan. 31, 2009.
Jan. 1, 2009—Mar. 31, 2009	Feb. 28, 2009.
Apr. 1, 2009—Jun. 30, 2009	Jul. 31, 2009.
Jul. 1, 2009—Sep. 30, 2009	Oct. 31, 2009.

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

- (i) Company Name.
- (ii) Contract number and, if applicable, order number.
- (iii) Product category of acquisition (i.e., Aircraft, Missiles and Space Systems, Ships, Tank-Automotive, Weapon Systems, or Ammunition).
- (iv) 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.
- (v) The total dollars of the non-commercial items.
- (vi) The total dollars of the COTS items to which the exception applies.

(End of clause)

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA 2006-25017]

RIN 2127-AG41

Federal Motor Vehicle Safety Standards; Rearview Mirrors

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Withdrawal of rulemaking.

SUMMARY: In response to a petition for rulemaking, in 2005 the National Highway Traffic Safety Administration (NHTSA) proposed to amend Federal Motor Vehicle Safety Standard No. 111, "Rearview Mirrors" to require straight trucks with a gross vehicle weight rating (GVWR) of between 4,536 kilograms (10,000 pounds) and 11,793 kilograms (26,000 pounds) to be equipped with a system capable of providing drivers with a view of objects directly behind the vehicle. More refined data generated since the 2005 NPRM shows that the sub-population of mid-sized trucks

accounts for only four of the estimated 183 fatalities per year due to back-over accidents. In addition, the recently signed Cameron Gulbranson Kids Transportation Safety Act of 2007¹ (K.T. Safety Act of 2007) requires NHTSA to revise the Federal standard for rearward visibility, specifically to reduce backing crashes involving children and disabled people. Considering these developments, the agency believes it more appropriate to address backing safety of straight trucks as part of the comprehensive effort to address backing safety generally, and that solutions should be formulated after the completion and review of ongoing research and data gathering on backing safety. We are therefore withdrawing this rulemaking at this time.

FOR FURTHER INFORMATION CONTACT: For non-legal issues, you may contact Mr. Clarke Harper, Office of Crash Avoidance Standards (NVS-120), NHTSA, 1200 New Jersey Avenue, SE., Washington, DC 20590 (Telephone: 202-366-1740) (Fax: 202-366-5930).

For legal issues, you may contact Mr. Ari Scott, (NCC-112), Office of the Chief Counsel, NHTSA, 1200 New Jersey Avenue, SE., Washington, DC 20590 (Telephone: 202-366-2992) (FAX: 202-366-3820).

SUPPLEMENTARY INFORMATION:

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I. Background

In March 1995, Mr. Dee Norton, an individual, submitted a petition for rulemaking seeking to amend Federal Motor Vehicle Safety Standard (FMVSS) No. 111, "Rearview Mirrors," to require convex, cross-view mirrors on the rear of the cargo box of stepvans and walk-in style delivery and service trucks. The requested rule was intended to prevent future tragedies similar to one that befell Mr. Norton's grandson, who was killed when he was struck and backed over by a delivery truck in an apartment complex parking lot.

The agency granted Mr. Norton's petition. However, because Mr. Norton's solution was only one of many at that time, and the agency had no performance specification for cross-view mirrors, NHTSA published a request for comments in the **Federal Register** on June 17, 1996. The agency sought specific information on cross-view

¹ Public Law 110-189, February 28, 2008.