

REPORT TO CONGRESS

COMMERCIALLY AVAILABLE OFF-THE-SHELF ITEMS INCORPORATED INTO NON-COMMERCIAL ITEMS

November 2008

**Deputy Under Secretary of Defense
(Acquisition & Technology)**

Background

Section 804 of the Fiscal Year 2008 National Defense Authorization Act (Public Law 110-181) includes a requirement for the Secretary of Defense to submit to the Committees on Armed Services of the Senate and House of Representatives, not later than December 30, 2008, a report on the use of the Commercial Off-the-Shelf (COTS) authority provided under subsection (h) of section 2533b of title 10 of the United States Code. The report is to include, as a minimum, a description of types of items being procured as COTS items under subsection (h) and incorporated into noncommercial items. Section 804 also requires an update of this report not later than December 30, 2009.

Discussion

Section 804 revised the specialty metals restriction contained in 10 U.S.C. 2533b by adding new and expanded flexibilities, while also adding some new requirements and restrictions. It also included the reporting requirement discussed above. These changes necessitated revisions to existing policy on specialty metals. In order to expedite the implementation of section 804, the Director, Defense Procurement, Acquisition Policy and Strategic Sourcing (DPAP) issued Class Deviation 2008-O0002 on January 29, 2008. The Class Deviation included changes required by section 804 but did not include the reporting requirement for COTS items used in noncommercial items.

The Department planned to issue an interim rule, with public comments due within sixty days. The interim rule would have formalized the changes identified in the class deviation and would have included a reporting requirement. However, there have been so many changes to the specialty metal requirements resulting from both the Fiscal Year 2007 and 2008 National Defense Authorization Acts that prime contractors and their suppliers were required to comply with four sets of statutory and regulatory requirements regarding specialty metals. Any one set of these statutory and regulatory requirements could apply to a defense contract, forcing contractors and subcontractors to address differing compliance rules regarding specialty metals depending upon when the

various contracts were awarded. **Attachment 1** discusses the specialty metals requirements in place at the time the Class Deviation was issued.

Industry expressed enormous concern with issuing an interim rule, stating that it would add greatly to the already confusing environment of specialty metal requirements by imposing another set of regulations. In addition, industry pointed out that as a result of public comments, the resultant final rule could conceivably change these regulations, which would once again impact specialty metals requirements in defense contracts. Industry urged the Department to keep the Class Deviation in place, which, with the exception of the reporting requirement, addressed the provisions of section 804 and instead, issue a proposed rule. Industry believed that such an approach would benefit both the Department and industry.

The four sets of statutory and regulatory requirements regarding specialty metals pose similar confusion for the Department's contracting community. A contracting officer is likely to be monitoring performance under various contracts, each of which may fall under a different set of specialty metals requirements. In order to alleviate any further confusion, the Department agreed with industry's position and a proposed rule was issued on July 19, 2008, with public comments due on September 19, 2008. A decision was made to work with various industry groups/coalitions to obtain the COTS information required for the Fiscal Year 2008 report required by section 804.

The proposed rule included the collection requirement so as to comply with section 804. The reporting requirements proposed by the Department were more extensive than section 804. As a result, public comments questioned the extent of the reporting requirements; and those comments are under consideration. The Department's approach for the Fiscal Year 2009 report will be determined by the adjudication of those comments.

COTS Included in Non Commercial Items

The Department therefore used already-available data for this report. The data are contained in **Table 1 and Table 2** of this report. **Table 1** (page 4) contains information provided by the Specialty Metals Availability Reform Team (SMART) Coalition. In addition, the Defense Contract Management Agency (DCMA) provided a summary of information on COTS items collected in 2007 as part of an industry request for a broad DNAD for COTS hardware. This broad domestic nonavailability determination (DNAD) was never pursued. Instead, the Department issued a proposed rule for a COTS exception, as noted in **Attachment 1**. The information provided by DCMA is provided in **Table 2** (page 5).

Definition of COTS as used in this report

The Department implemented the COTS exception in subsection (h) of 10 U.S.C. 2533b in Class Deviation 2008-O0002 based on the following definition of COTS:

“Commercially available off-the-shelf item” means any item of supply that is-

- (A) A commercial item;*
- (B) Sold in substantial quantities in the commercial marketplace; and*
- (C) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and*
- (D) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App 1702), such as agriculture products and petroleum products.*

Table 1

**Types of Commercial Off-the-Shelf (COTS) Items
Included in Non-commercial Items**

COTS Hardware, such as the items listed within FSG 53:

Fittings [5365](#), [4730](#)

Sleeves [5365](#)

Rings [5365](#), [5325](#)

Seals [5330](#)

Springs [5360](#)

Brackets [5341](#)

Screens/screening [5335](#)

Knobs [5355](#)

Bushings [5365](#)

Shims [5365](#)

COTS fasteners incorporated into higher tier COTS item or purchased from a manufacturer who has certified in accordance with 10 USC 2533b(h)(3)* [5305](#), [5306](#), [5307](#), [5310](#), [5315](#), [5320](#), [5325](#)

Selected COTS items within FSG 59:

Racks [5998](#)

Cables, jacketed wire, wiring harnesses [5995](#), [6145](#)

Panels [5998](#)

Enclosures [5998](#)

Additional COTS items:

Transmissions [1680](#), [2520](#)

Wheels & Brakes [1630](#), [2530](#)

Bearings [3110](#), [3120](#)

* NOTE: other COTS items incorporated into non-commercial items include other fasteners and electronic components. However, COTS fasteners are not exempt unless incorporated into other COTS items, or unless the manufacturer complies with 10 USC 2533b(h)(3) market-basket certification, and such non-exempt COTS fasteners would not represent COTS items that would be included in a “*report on the use of the authority provided under subsection (h) of section 2533b of title 10, United States Code, as amended.*” Similarly, all electronic components (including COTS) are exempt under 10 USC 2533b(g) as amended, but do not necessitate use of 10 USC 2533b(h) authority.

**Defense Contract Management Agency's Investigation
Of Commercially Available Off-The-Shelf Small Hardware
Items, Containing Specialty Metals**

In **FSC 5315**, typical COTS parts being procured consist of: Nails, keys & pins, Machine Keys Pins, Dowel Pins, Split Pins, Spikes, Shoulder Pins, and Cotter Pins.

In **FSC 5330**, typical COTS parts being procured consist of: Packing & gasket materials, Seals and Gaskets.

In **FSC 5335**, typical COTS parts being procured consist of: Metal screening, Metal Cloth, Metal Mesh, and Perforated Plate.

In **FSC 5340**, typical COTS parts being procured consist of: Commercial hardware, Hinges, Door Locks, Access Covers, Bumpers, Casters, Door Hardware, Clevises, Latches, Straps, Strapping, Turnbuckles, Webbed Straps, Slide Arm Guard, Rib Stiffener, Strut, Shock mounts, Shock Absorbers and Yokes.

In **FSC 5355**, typical COTS parts being procured consist of: Knobs & pointers, Dials, and Pointers.

In **FSC 5360**, typical COTS parts being procured consist of: Coil, flat & wire springs, Compression Springs, Torsion Springs, Leaf Springs, Flat Springs, and Extension Springs.

In **FSC 5365**, typical COTS parts being procured consist of: Rings, shims & spacers, Bushings, Shims, Spacers, Externally threaded Rings, Keyed Lock Rings, Serrated Lock Rings, Instrument Retaining Rings, Plate Spacers, Ring Spacers, Sleeve Spacers, Stepped Spacers, Sleeved Bushings Machine Threaded Bushings and Machine Threaded Plugs.

SPECIALTY METAL COMPLIANCE RULES PRIOR TO JANUARY 29, 2008

1. Berry Amendment 10 U.S.C. 2533a, Contracts Awarded Prior to December 6, 2006

Prior to the John Warner National Defense Authorization Act for Fiscal Year 2007 (Publication 109-364), the specialty metals restriction existed in 10 U.S.C. 2533a. On February 17, 2006, DCMA issued an interim instruction addressing the process for conditional acceptance of items containing noncompliant parts. A revision was issued on March 10, 2006. This was followed by additional guidance on June 1, 2006 from the Director, DPAP. This guidance aligned with the DCMA instruction, and explained that contracting officers could use conditional acceptance and withholding of payment as a method for accepting needed equipment, however, compliance plans would be required in such circumstances. On August 18, 2006, the Director, DPAP issued a memorandum which stressed the importance of addressing contractor compliance with the specialty metals restriction in the Berry Amendment (10 U.S.C. 2533a) prior to award of contracts in order to ensure compliance. This memo stated that the contracting officer should inquire and verify that the contractor will deliver compliant items. Last, on September 21, 2006, the Director, DPAP provided additional pre-award guidance.

2. Contracts Awarded Between December 6, 2006 and October 25, 2007

On December 6, 2006, Director, DPAP issued Class Deviation 2006-O0004, Restriction on Procurement of Specialty Metals. This Class Deviation addressed changes made by section 842 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364), entitled "Protection of Strategic Materials Critical to National Security". This new law was effective on November 16, 2006 and included a de minimis exception for commercially available electronic components and a one-time waiver authority under certain circumstances. For any contract awarded after November 16, 2006, the Department can no longer continue the practice of withholding payment while conditionally accepting noncompliant end items or components or covered items.

3. Contracts Awarded Between October 26, 2007 and January 28, 2008

Contracts issued during this period fall under Class Deviation 2007-O0011, Waiver of Specialty Metals Restriction for Acquisition of COTS Items. This Class Deviation superseded the attachment to Class Deviation 2007-O0004, and listed 10 U.S.C. 2533b(a)(1) as a statute that is inapplicable to the acquisition of COTS items, in

accordance with 41 U.S.C. 431. The Class Deviation was followed by Federal Register publication of a final rule on November 8, 2007, under DFARS Case 2007-D013, Waiver of Specialty Metals Restriction for Acquisition of Commercially Available Off-the-Shelf Items. Contracts awarded between October 26, 2007 and January 28, 2008, can continue to rely on Class Deviation 2007-O0011, however, new procurement actions under those contracts must follow the policy on specialty metals in place at the time of award.

4. Contracts Awarded As of January 29, 2008

Contracts awarded as of January 29, 2008 fall under Class Deviation 2008-O0002, Implementation of New Specialty Metals Restrictions. Class Deviation 2008-O0002 supersedes Class Deviations 2006-O0004 and 2007-O0011 and implemented sections 804 and 884 of the FY 2008 NDAA, as well as section 842 of the FY 2007 NDAA not superseded by sections 804 and 884. Class Deviation 2008-O0002 incorporated several new statutory flexibilities, including an expanded electronic component exception, a commercial derivative military articles exception, a COTS exception with restrictions, and a de minimis exception.