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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 202, 212, and 225

RIN 0750-AF74

Defense Federal Acquisition Regulation Supplement; Waiver of Specialty Metals Restriction for Acquisition of Commercially Available Off-the-Shelf Items (DFARS Case 2007-D013)

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 waive application of 10 U.S.C. 2533b for acquisitions of commercially available off-the-shelf (COTS) items. 10 U.S.C. 2533b, established by Section 842 of the National Defense Authorization Act for Fiscal Year 2007, places restrictions on the acquisition of specialty metals not melted or produced in the United States.

DATES: Effective Date: November 8, 2007.

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 2007-D013.

SUPPLEMENTARY INFORMATION:

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A. Background

Section 842(a) of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364) establishes a new specialty metals domestic source restriction, which is codified at 10 U.S.C. 2533b. DoD published a proposed rule, at 72 FR 35960 on July 2, 2007, that would allow the Department to exercise a statutory exception to the requirements of 10 U.S.C. 2533b for COTS items, as provided for

under Section 35 of the Office of Federal Procurement Policy Act (OFPP Act), 41 U.S.C. 431. If a law is covered by Section 35, it must be included on a list of laws published in the Federal Acquisition Regulation (FAR) (or agency supplements for agency-specific laws) that are inapplicable to COTS acquisitions unless the Administrator of the Office of Federal Procurement Policy (OFPP) makes a written determination that it would not be in the best interest of the United States to exempt such contracts from the applicability of that provision of law.

DoD consulted with the OFPP Administrator both before publication of the proposed rule and again before proceeding with the publication of this final rule. OFPP concluded that 10 U.S.C. 2533b is a covered law. OFPP did not make a written determination under Section 35 finding it not to be in the best interest of the United States to exempt COTS contracts from the applicability of 10 U.S.C. 2533b.

The comment period on the proposed rule ended on August 1, 2007. DoD received comments from 41 respondents. Of these respondents, 34 support the rule and 7 oppose it. A discussion of the comments is provided below.

1. Timing of Implementation

Comments: A number of respondents requested clarification regarding the effective date of the rule, including its application to existing contracts.

DoD Response: The final rule is effective upon publication. However, FAR 1.108(d) permits contracting officers, at their discretion, to include FAR/DFARS changes in any existing contract with appropriate consideration.

2. Legal Basis

a. General

Comments: Several respondents state that the statute is already inapplicable to COTS items and that this rule is really just a clarification. One respondent states that it is ``self-evident'' that 10 U.S.C. 2533b is a covered law, because it imposes ``quintessential `government-unique' requirements'' and none of the exceptions contained in Section 35 of the OFPP Act (41 U.S.C. 431) are applicable, as discussed in the Federal Register preamble to the proposed rule.

DoD Response: DoD concurs that 10 U.S.C. 2533b is a ``covered law'' but that further action is required before it is inapplicable to COTS procurements. Section 35(b) of the OFPP Act requires the Administrator of OFPP to ``determine'' that a law is covered. Covered laws are inapplicable only after being listed in the FAR (DFARS is part of the FAR system). Section 35(a)(2) states that ``A provision of law that, pursuant to paragraph (3), is properly included on a list referred to in paragraph (1) may not be construed as being applicable to contracts'' for the procurement of COTS items. In addition it states ``nothing in this section shall be construed to render inapplicable to such contracts any provision of law that is not included on such list.''

b. Impact of Reference to Section 34 of the OFPP Act

Comments: Three respondents conclude that, as a subset of commercial items, COTS items must comply with 10 U.S.C. 2533b, because Section (h) of 2533b makes the statute applicable to procurements of commercial items, notwithstanding Section 34 of the OFPP Act (41 U.S.C.

430).

Another respondent reaches the opposite conclusion, stating that Congress created a COTS-specific process under a separate section of the OFPP Act, i.e., Section 35, pursuant to which Congress could direct the application of a law to COTS. According to the respondent, it is a fundamental principle of statutory construction that each provision of a statute be given meaning and effect. The Congressional decision to treat COTS items separately from commercial items, notwithstanding that COTS is a subset of commercial items, must be honored.

DoD Response: DoD concurs with the respondents who conclude that the application of 10 U.S.C. 2533b to commercial items under Section 34 does not make the provision automatically applicable to COTS. Section 35 of the OFPP Act, which expressly addresses the handling of COTS and is the operative provision for this rulemaking, has a separate basis than Section 34 for determining the inapplicability of laws. As a result, some laws that are applicable to procurements of commercial items under Section 34 may be inapplicable to procurements of COTS items under Section 35. With respect to 10 U.S.C. 2533b, Congress could have directed its application to COTS acquisitions by referring to Section 35 in the law and stating that it is applicable to procurements for COTS. However, Congress chose not to make 10 U.S.C. 2533b automatically applicable to COTS, meaning the law must be waived if it is a covered law under Section 35 absent a determination by the OFPP Administrator that it would not be in the best interest of the United States to waive its applicability.

c. OFPP Authority

Comments: Four respondents are concerned that DoD is pre-empting OFPP authority by issuing this rule. One respondent states that DoD's proposed rule distorts and misuses the authority provided to the Administrator of OFPP. Other respondents state that DoD does not have the authority to propose exemptions for COTS items. A respondent states that this authority is vested by law in the Administrator of OFPP. These respondents state that only the Administrator of OFPP can amend the FAR list of inapplicable provisions as necessary.

DoD Response: Rulemaking was undertaken to comply with the provision in Section 35 requiring the identification in regulation of laws that are made inapplicable to COTS contracts. The rulemaking was not intended to circumvent the OFPP Administrator's authority under Section 35. DoD consulted with the Administrator of OFPP before publication of the proposed rule, and consulted a second time with OFPP before proceeding with the publication of this final rule. OFPP reviewed the rulemaking and concluded that 10 U.S.C. 2533b is a covered law. OFPP did not make a written determination under Section 35 that 10 U.S.C. 2533b should be applied to COTS, i.e., that it would not be in the best interest of the United States to exempt COTS contracts from the applicability of 10 U.S.C. 2533b.

d. Applicability of COTS Waiver to Subcontracts

i. Subcontracts not mentioned in Section 35 of the OFPP Act.

Comments: Five respondents state that Section 35 of the OFPP Act does not authorize waiving applicability of statutes to subcontracts for the acquisition of COTS items, because Section 35 does not specifically mention subcontracts. By contrast, Section 34 has separate subsections on prime contracts and subcontracts. One respondent states that ``where Congress addressed subcontracts in Section 34 of the OFPP Act, but failed to address subcontracts in the following section, it

is presumed that the omission of subcontracts from Section 35 was intentional, and accordingly, no exemption for COTS items applies to subcontractors.'' Another respondent cites Rodriquez v. United States: ``Where Congress includes particular language in one section of a statute but omits it in another section in the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.''

DoD Response: DoD does not agree that Section 35 only provides for waiver of laws at the prime contract level; nor does the Department agree that the reference to subcontracts in Section 34 compels a different conclusion. Clearly, Section 34 and 35 are structured disparately. DoD contends that the reason for the specific mention of subcontracts in Section 34 is because the standards for inapplicability of prime contracts are different than the standards for subcontracts. Thus, under Section 34, some laws can only be waived at the subcontract level, not at the prime contract level. However, Section 35 makes no such distinction between the standards for prime contracts and subcontracts; therefore, a separate subsection was unnecessary. The standards are as follows:

Section 34 of the OFPP Act

Prime Contracts:

[cir] When Congress passed the Federal Acquisition Streamlining Act of 1994 (FASA), it reviewed existing procurement laws, and identified those laws that would be inapplicable to contracts for the acquisition of commercial items. These laws were amended in FASA to state that they are not applicable to procurements of commercial items. Those laws are listed in the FAR in accordance with 41 U.S.C. 430(a)(1).

[cir] There is no authority to list other laws that were in existence at the time of enactment of FASA.

[cir] 41 U.S.C. 430(a)(2) authorizes the listing of covered laws enacted after the enactment of FASA.

Subcontracts:

[cir] Under 41 U.S.C. 430(b), there is no limitation on listing laws that were in existence on the date of FASA enactment.

Section 35 of the OFPP Act

[cir] Under 41 U.S.C. 431(a), there is no limitation on listing laws that were in existence on the date of enactment. Covered laws, as determined by the Administrator of OFPP, shall be listed as inapplicable to contracts for the acquisition of COTS items, unless the Administrator of OFPP makes a written determination that it would not be in the best interest of the United States to exempt such contracts from the applicability of that provision of law. Section 35 does not need a separate subsection on subcontracts, because the standard is the same--if a law is covered and is made inapplicable to prime contracts, it is also inapplicable to subcontracts. COTS items contained in an item provided to the Government are provided under the prime contract whether they were produced directly by the contractor or by a subcontractor. Thus, a separate list for subcontracts is not necessary.

ii. Definition of COTS.

Comments: Five respondents state that a subcontract item that is to be incorporated into an end product cannot be a COTS item because it is not ``offered to the Government.'' Further, the respondents present the argument that ``modification'' necessarily occurs to parts and materials as they are incorporated into end items, prior to Government acceptance, and are not, therefore, COTS items as that term is defined at 41 U.S.C. 431.

DoD Response: DoD does not agree that the definition of COTS items precludes application to components. A component can be offered to the Government, without modification, as part of an end item purchased by the Government. However, DoD does agree that commercial items purchased at one tier that are then modified prior to incorporation in the end item (e.g., as in the case of raw materials) are not COTS items as defined in the statute. Items purchased by the contractor or subcontractor that would have been COTS items if they had been delivered to the Government without modification are not COTS items if their form is modified for incorporation into the end item. Specialty metals purchased for incorporation into higher-tier items cannot be considered COTS items if the specialty metal undergoes modification.

In addition, the waiver provided in the final rule does not apply to specialty metals purchased as end items for delivery to the Government. DoD has included the following additional changes in the final rule:

[cir] The inapplicability to COTS items at 212.570 has been limited to paragraph (a)(1) of the statute (the six major programs and components) and, therefore, does not include paragraph (a)(2) (specialty metal acquired directly by the Government or prime contractor for delivery to the Government as an end item).

[cir] The exception at 225.7002-2(q) excludes acquisition of specialty metal acquired directly by the Government or prime contractor for delivery to the Government as an end item.

3. Justification for the Waiver and Suggested Alternatives

a. Cost, Quality, and Availability

Comments:

i. General.

Two respondents view the justification used to support the waiver as flawed, stating that ``expense'' argument is specious, having nothing to do with the expense of domestic specialty metal, based on the fact that there is no significant difference in price between compliant U.S. metals and noncompliant foreign metals.

Another respondent states that there is also no valid lead time problem relating to availability of specialty metals, which are available as and when needed, with average lead time of less than 12 weeks during the first quarter of 2007. This respondent also states that, since Defense requirements for titanium account for less than 25 percent of the volume of domestic production, there is more than adequate domestic production to meet defense needs; and that U.S.-melted metals are generally superior from a quality standpoint.

Another respondent states that two large aerospace companies have signed long-term agreements with domestic specialty metal producers to procure titanium metal for their respective supply chains at predetermined prices which guarantee access to domestic titanium at reasonable prices, alleviating any problem with availability of specialty metals.

ii. Major programs. One respondent states that, on major programs such as the Marine Maritime Aircraft and the Air Force Tanker Replacement Program, prime contractors have complied, or have pledged to comply, with domestic source requirements. It has not been demonstrated that compliance with specialty metals have increased or will increase the price to DoD in these highly competitive procurements.

iii. Cost. Twenty-seven respondents, more than for any other issue

raised, expressed concern that the law increases costs, contributes to longer lead times, and creates quality and availability problems, and that it is either impossible, time consuming, or too burdensome to comply with this statute in the COTS marketplace.

Most respondents state that 100 percent compliance is not cost-effective (if even possible), particularly for items containing trace amounts of specialty metal. One respondent states that accommodating Government restrictions

requires incurring greater costs to comply with them.

Another respondent states that a compliance program alone would be more expensive than the value of DoD sales, where DoD sales represent 2,000 vehicles out of 4 million sold annually in the United States.

Some respondents state that DoD usage of COTS hardware was very small, perhaps 10 percent in the case of fasteners, in one example, and that separate tracking and lower volumes predicated by unique requirements such as is required by 10 U.S.C. 2533b, greatly increases production costs.

[cir] One respondent states 10 U.S.C. 2533b increases the cost for services associated with segregating compliant from noncompliant COTS items, because it takes time to find the documentation on the origin of the metal.

[cir] Other respondents state that a prime aerospace contractor builds approximately 450 commercial airplanes each year compared to 15 for DoD. Therefore, production costs for the separate lot of fasteners for military use can be as much as 500 percent more than that for commercial fasteners, because the lower military volumes of compliant items do not allow for optimum lot size during the manufacturing process.

[cir] A respondent also offers a comparison based on Air Force testimony before the Senate Armed Services Committee that a 13-cent commercial/dual use nut that meets military conformance standards will cost 40 times more, or $5.20, and take 48 weeks if it must be compliant with the specialty metals restriction.

[cir] Another respondent states that it chooses to distribute only compliant fasteners, rather than keep two inventories, because of the cost involved and, as a result, material costs have risen between 30 and 40 percent.

iv. Quality.

One respondent expresses concern with the quality of domestic metals. The respondent states that it currently has an order in place with a manufacturer in which the metal has failed twice. Some material has been found to be inconsistent. In the respondent's experience, foreign material has always proven to be of consistently excellent quality.

v. Lead time.

One respondent states the lead time can be one to two years for parts manufactured from sub-standard American milled material and claims that it is becoming delinquent on multiple orders because of delays in material due to the inferior quality of the domestic stock of 8740 alloy steel they receive. If the respondent could use foreign steel for DoD requirements, which does not have these inclusions, the quality issues would decrease and the lead time would improve.

Lead times for standard aerospace fasteners can be as long as 50 weeks, according to several respondents, in addition to the raw

material lead times being experienced during the current commercial aerospace market boom. If fasteners are ordered today, and the raw material is on the shelf already, the respondents claim the fasteners will be delivered in late 2008 or spring 2009, based on not having to track the specialty metal content.

Another respondent points out that, in the near term, failure to adopt the COTS rule will seriously impact current deliveries and jeopardize critical acquisitions. COTS items today are almost certainly non-compliant, or the prime contractor will be unable to document compliance. Issuing the necessary domestic non-availability determinations would be excessively time-consuming and burdensome.

vi. Availability.

One respondent is very concerned about the ability of DoD to acquire the materials it needs from leading manufacturers, if DoD attempts to impose undue burdens on COTs manufacturers.

Several respondents state that COTS producers make purchasing decisions based on cost, quality, timely delivery, availability, and maintaining state-of-the-art products, not on the country in which the specialty metal contained in the components were melted. The complexity of the global supply chain makes compliance difficult and costly.

One respondent comments that fastener manufacturers would prefer to purchase domestic specialty metals when possible, regardless of whether they are producing fasteners for military or commercial purposes, but to remain competitive, they must be able to make the best business decisions based on the commercial marketplace.

Two respondents state that many COTs manufacturers are unwilling to change their business model to track specialty metals country of origin to accommodate DoD. For example--

[cir] One respondent states that it consistently declines and, absent the proposed waiver, will continue to decline to sell to DoD.

[cir] Another respondent states that it would likely have to forgo selling to DoD, because the cost of compliance would be more expensive than the value of the DoD sales.

[cir] Another respondent questions its ability to continue to supply COTS items to the Government without some type of waiver.

DoD Response: While the cost of the compliant and non-compliant specialty metal contained in COTS items might be relatively the same, the added costs (which may be significant) to ensure that the final COTS part or sub-assembly is compliant must also be taken into consideration. Further, the cost of setting up dual lines (at which point it is no longer really a COTS item), is usually prohibitive.

The titanium industry has recently expanded its capacity, so that lead time for titanium may be less of a problem now. However, the argument that there is no valid lead time problem with respect to the availability of specialty metals, ignores the problem of the lead time to obtain compliant COTS items.

DoD must comply with 10 U.S.C. 2377, which mandates that DoD procure commercial items to the ``maximum extent practicable,'' while DoD Directive 5000.1, The Defense Acquisition System, (E1.1.18.1) states that the procurement or modification of commercially available products, services, and technologies, from domestic or international sources, is the preferred acquisition strategy and is to be considered before any other alternative. Therefore, many COTS items are now used routinely in every one of the ``big six'' classes of products covered in the law. For example, a domestic non-availability determination for lids and leads in circuit card assemblies was required to be able to accept COTS semiconductors, transistors, diodes, etc., embedded in COTS

equipment used in DoD systems. Other COTS items of a similar nature are commercial hardware (such as slides, hinges, knobs, dials, pointers, etc.) and springs made of specialty metals. As a result, DoD frequently finds itself in situations where it is impossible to accept common COTS items embedded within equipment. The end item cannot be accepted until DoD processes a domestic non-availability determination, or requires a replacement for the COTS item, either of which options create lead time problems.

As stated in the previous paragraph on lead time and in the preamble to the proposed rule, COTS items are produced and manufactured within a global economy, causing industry to make hundreds of decisions in order to remain competitive, none of which take the specialty metal's melt country of origin into account. For example, a military truck contains an electronically

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controlled COTS transmission. The transmission is not modified for military use. The supplier does not know whether the specialty metal is compliant. DoD has two alternatives:

[cir] Shut down the line to obtain compliant transmissions, possibly from a qualifying country, which will require design changes to integrate and additional testing and modification to the truck and subsequent delays in delivery; or

[cir] Process and approve a domestic non-availability determination, which will take market research and documentation. In order for DoD to support such a determination, a contractor must work with its suppliers at every tier to identify non-compliant parts from among potentially hundreds of thousands of parts, determine that it cannot find a compliant source (either because lead times are longer than the contract permits or because sufficient quantity is not available) and research whether and by when it can become compliant. The Department must then conduct a validation review and develop a report to document the determination. These efforts may entail thousands of hours of work, at considerable cost to the taxpayer and a significant addition in lead-time to the acquisition cycle. For additional discussion related to the challenges associated with processing a domestic non-availability determination, see paragraph d. below.

The law does not require U.S. manufacturers or distributors to change their processes or systems to meet DoD-unique restrictions. Unless this COTS waiver is implemented, DoD will not have access to many U.S. COTS items that contain noncompliant specialty metals. The status quo is unacceptable if DoD is to meet its commitments to our warfighters.

b. Traceability of Origin of the Metal

Comments: Several respondents comment that the assertion in the preamble to the proposed rule, that tracking of compliant COTS items is too hard, is false. Two of these respondents state that aerospace manufacturers require manufacturers of titanium and other specialty metal parts to deliver ``heat'' information with every part put into an aircraft, which identifies the source of the metal, when and where it was melted, and what alloys were used. One respondent states that ISO Standard 16426:2002 requires fasteners with full traceability back through all previous manufacturing operations to a given heat or cast number of the raw material of manufacture. Another respondent states that this traceability is the key to determining cause of failure in

post-accident safety investigations. Another respondent states that the magnet industry is a low-volume industry, and tracking is not a burden.

Ten other respondents comment that the effort to track the source of the specialty metal in COTS items, in order to ensure 100 percent compliance with the law, is cost prohibitive and burdensome.

[cir] One respondent notes that DoD is the only purchaser of COTS items that requires tracking of the country of origin for specialty metals, and states that the processes required and the expenses associated with tracking and documenting for each component of an end product or item are significant.

[cir] Other respondents state that it is not possible or cost-effective, and it is burdensome, to determine and monitor the country of origin for specialty metals at every level of the supply chain, particularly when the COTS item contains only trace quantities of specialty metals.

[cir] One respondent states that tracing the specialty metal content of its thousands of parts from hundreds of suppliers through the supply chain, and through product model year changes, supplier changes, and parts improvements would be very costly and labor intensive. Another respondent also states that tracking requires creation of an expensive and inefficient recordkeeping system, by prime contractors, as well as subcontractors at all tiers, resulting in huge increases in cost and delays in delivery of products.

[cir] Several respondents state that manufacturers sell large quantities of fasteners to distributors not knowing, in many cases, whether the fasteners will be used in a commercial or military aircraft. These fasteners meet all quality and safety specifications, but tracking the source of the metal and producing separate lots of fasteners only for DoD orders substantially increases costs with no value added. One respondent states that fastener manufacturers and distributors will be forced to reconsider whether or not to continue doing business with the Government if separate tracking and manufacturing is required.

[cir] Another respondent states that the United States is not the top producer of any of these specialty metals. The United States has no active nickel mines. The United States imports far more titanium sponge than it can produce. This respondent notes that while tracking is required for the use of specialty metals for manufacturers selling to DoD, there are no corresponding restrictions in the purchase of such raw materials by specialty metals companies for melting and selling the metal to U.S. manufacturers. In other words, specialty metals can be purchased in unlimited quantities as ore from Russia, melted in the United States, and resold to U.S. manufacturers, and be compliant with the specialty metals restriction, but U.S. manufacturers cannot use or sell items to DoD that are made from specialty metals directly from Russia and be compliant.

DoD Response: 10 U.S.C. 2377 mandates that the DoD procure commercial items to the ``maximum extent practicable.'' DoD Directive 5000.1 (E1.1.18.1) states that the procurement or modification of commercially available products, services, and technologies, from domestic or international sources, is the preferred acquisition strategy and is to be considered before any other alternative. DoD procures commercial items to reduce costs, speed acquisition, reduce development risk, gain access to the most leading-edge commercial technology, increase its ability to secure increased production, and leverage the competition inherent in the global commercial market.

10 U.S.C. 2533b adds a unique tracking requirement to every

supplier of the ``big six'' major systems, which flows down to each supplier within that supply chain. This same tracking requirement to the country source of origin for specialty metal does not exist in the commercial, global marketplace. To comply with this law, every prime and sub-contractor must establish duplicate processes and inventories to accommodate DoD's requirement or must trace the country source of specialty metal for every item it produces or distributes. Even trace amounts must be tracked unless the item is a commercially available electronic component containing under 10 percent specialty metal. Even if the manufacturers of a particular part state that they can track the source of the specialty metal, the problem becomes overwhelming at the prime level for complex items. Industry overwhelmingly concludes that this results in increased costs and is burdensome.

According to industry sources, tracking the metal at the mill level is not burdensome or difficult, and tracking this metal throughout the supply chain for military-unique items can be accomplished with less impact to industry. However, for COTS items, tracking the source of specialty metal above the mill level items, through the manufacturers and distributors of COTS

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end items or components of major systems requires instituting unique, costly, and burdensome systems and processes at each level of the supply chain, requiring continual updating and tracking at each supplier level as parts are updated or suppliers change. These costs and efforts do not add value to the end item or make COTS items safer.

c. Market Clout of DoD to Enforce Compliance

Comments: Respondents offered differing views on DoD's ability to ensure compliance. One respondent states that, even though DoD asserts that it does not have the market power to enforce compliance, the DoD market is a large and important market for the majority of the companies who supply the military services. Another respondent states that DoD does indeed ``drive the market'' for many classes of domestic magnets.

Ten other respondents view COTS sales to DoD as small in relation to sales in the global market. For example:

[cir] One respondent states that DoD is such a small customer in many of these markets that suppliers simply cannot economically comply with the regulations.

[cir] Another respondent cites the Annual Industrial Capabilities Report to Congress, ``whereas U.S. defense spending accounts for roughly half the world's defense spending, U.S. defense spending accounts for only about one percent of the world IT market.''

[cir] More specifically, one respondent states that only a small percentage of its sales are made to the U.S. Government but that the burden of specialty metal origin tracking leads to manufacturers sometimes foregoing such small revenue propositions of military sales in order to avoid the enormous burden of entirely changing their existing systems and processes. Therefore, this respondent consistently declines, and absent the proposed waiver, will continue to decline to sell COTS items containing specialty metals to DoD, denying DoD the benefit of considering its product solutions.

[cir] Another respondent states that it sells 4 million vehicles in the United States, and sales to DoD are less than 2,000 vehicles annually. This respondent states that the compliance program would be more expensive than the value of the DoD sales, and it would likely

have to forgo selling to DoD if this waiver is not implemented.

DoD Response: By definition, COTS items are sold in substantial quantities in the commercial marketplace. Based on the facts presented by the respondents, DoD requirements represent a small part of the global sales of COTS items and DoD will in fact be deprived the opportunity to buy many COTS items if this waiver is not implemented.

d. Use of Domestic Non-availability Determinations (DNADs)

Comments: One respondent disagrees that the DNAD process poses difficulties, and suggests that DoD's own policy of accepting waiver applications only from prime contractors, rather than directly from the sub-tier supplier, contributes to the unwillingness of prime contractors to comply with the law. The respondent also states that five contractors have availed themselves of this reasonable waiver process, and this should continue to grow. Another respondent disagrees that DNAD processing adds significant lead time to the acquisition cycle, because there is no valid lead time problem with respect to the availability of specialty metals, which are available as and when needed.

However, multiple respondents view the process of obtaining relief through DNADs to be difficult, time consuming, not feasible for some companies, and costly. One respondent adds that DoD will have to issue DNADs for every Federal Supply Class, NAICs code, or similar classification that may cover COTS items containing specialty metals if there is no COTS exemption. Several respondents also note that fastener manufacturers are dependent on prime contractors for initiating and requesting market research, and note that DNADs can be rescinded.

DoD Response: DoD only has contractual relationships with the prime contractor, and does not have privity of contract with sub-tier suppliers. By dealing directly with subcontractors, DoD would take the risk of relieving the contractors of responsibility for performing the contract. For example, if a sub-tier supplier asked for a DNAD for fasteners directly from DoD, rather than the prime contractor, for an aircraft contract, and DoD agreed, but the waived fastener then failed in flight, the prime contractor could disavow responsibility for the failure, citing the DNAD as the document that transferred responsibility for that part. DoD must continue to hold the prime contractor responsible for performance and conformance of the end item, as well as for solving its own supply chain compliance issues.

DNADs may be approved only if it is established that specialty metals in covered items cannot be obtained in sufficient quantity, satisfactory quality, and in the required form, as and when needed. The justification for such a determination requires market research down to the level of the part at which the availability occurs. The fastener DNAD, approved in April 2007, was requested in October 2006. The circuit card assembly DNAD, approved in January 2007, was initially requested in June 2006. This does not include the additional time that the prime and sub-tier suppliers needed to prepare each of these DNAD requests. DNADs require the cooperation of every supplier between the prime contractor and the level at which the availability problem occurs, and experience shows that it takes at least 12-18 months to develop the documentation, review the documentation, and obtain DNAD approval.

The argument that there is no valid lead time problem with respect to the availability of specialty metals is incorrect. For example, a DNAD for lids and leads in circuit card assemblies was required to be able to accept COTS semiconductors, transistors, diodes, etc., embedded in COTS equipment used in DoD systems. Other COTS items of a similar

nature for which a DNAD is under consideration include cotter pins, dowel pins, commercial hardware (such as slides, hinges, knobs, dials, pointers, etc.), and springs made of specialty metals.

As stated above, 10 U.S.C. 2377 mandates that DoD procure commercial items to the ``maximum extent practicable,'' while DoD Directive 5000.1 (E1.1.18.1) states that the procurement or modification of commercially available products, services, and technologies, from domestic or international sources, is the preferred acquisition strategy and is to be considered before any other alternative. As a result, DoD frequently finds itself in situations where it is impossible to accept common COTS items embedded within equipment. In these cases, DoD must either issue a DNAD, obtain a replacement, or reject the end item.

DNADs are approved at a very high level in DoD, either by the Secretary of the military department concerned or by the Under Secretary of Defense for Acquisition, Technology and Logistics (USD (AT&L)). DNADs require many levels of review and, at any point in the process, further documentation or analysis can be required or requested prior to approval. DoD takes great care to fully support each DNAD and does not approve a DNAD casually.

Without some additional relief from the specialty metals restriction, or unless one of the narrowly drawn exceptions in the law applies, DoD has

only three alternatives when faced with delivery of a major system embedded with any noncompliant COTS item: DoD can (1) refuse delivery of the end item, (2) require tear down and replacement of the part, or (3) undergo the lengthy process of researching and documenting a DNAD, if justified. Replacement or refusal of delivery is often not practical or prudent, leaving the DNAD process as the only resort, although time-consuming and inefficient. The COTS exception would eliminate the need for processing and documenting additional DNADs for COTS items.

e. Use of One-Time Waiver

Comments: Two respondents note that the one-time waiver authority provided in 2006 is a reasonable approach to providing a non-compliant supplier time to establish appropriate measures for compliance. These respondents disagree that the one-time waiver authority is burdensome for DoD and its suppliers.

DoD Response: The one-time waiver is beneficial to DoD by providing a period under which suppliers can become compliant on parts that can become compliant. In cases where the one-time waiver does not apply, for example, where a COTS item was manufactured, assembled, or produced after the date of enactment of 10 U.S.C. 2533b or where final acceptance will not take place until after September 30, 2010, this authority is not available. In such cases, the only recourse is a DNAD. More importantly, it is not always easy to determine specifically when the COTS item was manufactured, assembled, or produced, because this inventory is not tracked the same way as unique defense parts. The one-time waiver is not usable in those cases. For most COTS items, becoming compliant is not an option for the manufacturer because the increased costs would make the item non-competitive. Manufacturers will often decline to produce a compliant product (except at unreasonably higher prices). In those cases, DoD has no alternative but to begin the DNAD process in order to procure the COTS item or an item containing an unmodified COTS item.

f. De minimis Exception for Commercially Available Electronic Components

Comments: Four respondents state that the proposed rule cannot legitimately use computers and semiconductors as a basis for a COTS exception, because these items are already exempt under the existing de minimis exception for commercially available electronic components. One respondent states that computers would also likely be exempt from compliance under DoD's class deviation of December 6, 2007, interpretation of a ``component'' as not including so-called ``third tier'' items.

Another respondent states that the de minimis exception results in a prohibitive requirement for each supplier to make a determination about the commerciality and specialty metal content for all of the electronic components that are included in DoD weapons systems today. This respondent states that the circuit card assembly DNAD, approved by USD(AT&L), has recognized the prohibitive nature of this requirement but that, unfortunately, the list of items and parts that comprise electronic components is long and all await additional comparable determinations in order to ensure their continued delivery to the warfighter.

DoD Response: The circuit card assembly DNAD was approved by USD(AT&L) because it was apparent that compliant parts were not available, and these parts are used widely on every weapon system, aircraft, etc. The task of calculating percentages of specialty metals in similar electronic parts is burdensome for sub-tier and prime contractors alike. While the de minimis exception is beneficial, particularly for very small amounts of specialty metals in commercial electronic components, it will not eliminate the need for additional DNADs for COTS items.

The contention is incorrect, that computers would not be covered because of the interpretation that ``component'' does not include third-tier and lower parts and assemblies. Even lower-tier parts and assemblies of the six major categories are covered by the restrictions of the statute, unless they are purchased separately from the major item. For example, when buying an aircraft or a missile, all components, parts, and assemblies are covered by the specialty metal restriction.

g. DX Rating

Comments: One respondent states DoD has the capability to issue a ``DX'' rating under the Defense Priorities and Allocations System (DPAS) in order to prioritize DoD orders over other customers, should availability be a problem. Another respondent states that foreign suppliers are not subject to this priority statute, which makes a robust domestic industry all the more critical. Another respondent comments that DoD has not exercised its powers under the Defense Production Act to put its items at the head of the line in situations where alleged shortages exist.

DoD Response: DPAS provides DoD with the ability to ensure that DoD orders receive priority treatment from domestic industry if necessary to meet required delivery dates. Although DoD uses ``DX'' ratings, the standard ``DO'' rating used on DoD contracts, and flowed down through the supply chain, provides priority delivery over unrated (commercial) orders when necessary. (``DX ratings'' are used for a select list of DoD programs, and provide delivery priority over other DoD programs if necessary. The lower DO rating is sufficient to provide priority over commercial orders.)

However, the DPAS system cannot provide any relief from the problem

that COTS items generally do not contain compliant specialty metals. The DPAS system can require priority delivery of a COTS item. COTS items, by definition, are procured as offered and without modification. COTS items are non-compliant because commercial industry does not restrict itself to using only domestically-smelted metals. The non-compliant metals have already been incorporated into the item by the time it is offered to DoD.

4. Impact

a. Sufficiency of Research to Determine Impact

Comments: One respondent states that there is no factual basis upon which DoD can determine the impact of the proposed exemption on domestic specialty metals producers or on their continued ability to supply specialty metals for the six covered categories of defense articles.

Another respondent states that one of the primary purposes of its organization is economic and policy research. The respondent has researched and deliberated on this issue, and offers its information for the public record, in order to be useful to policymakers. This respondent considers the waiver to be absolutely vital to DoD's continuing access to the commercial marketplace.

Another respondent has represented and advised numerous defense contractors concerning 10 U.S.C. 2533b. The respondent cites DoD and client market research performed in conjunction with Section 2533b corrective action plans, one-time waivers, and domestic non-availability determinations.

Additional respondents have provided detailed analysis of the impact on certain segments of the market.

DoD Response: This rule was reviewed by the Office of the Deputy

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Under Secretary of Defense for Industrial Policy, which is tasked with analyzing the impact of DoD policy on various segments of the industrial base in order to meet the DoD objective of achieving and maintaining reliable and cost-effective industrial capabilities sufficient to meet strategic objectives. DoD believes that this rule will positively impact the health of the defense industrial base by allowing it to more easily and quickly procure COTS items for inclusion in DoD systems. The rule will not have a negative impact on domestic specialty metal producers, because it only addresses COTS items. The amount of product domestic specialty metals producers sell to commercial industry is based on their metal price and quality; it is not influenced by whether DoD can or cannot buy non-compliant COTS items, for the simple reason that producers of COTS items do not take DoD restrictions into account when making sourcing decisions. The rule will have no impact on the amount of domestically-produced specialty metal sold to commercial industry.

b. Scope of the Waiver

Comments: Respondents offered mixed views. Some respondents state that this waiver is too broad and will amount to an across-the-board waiver of the specialty metal requirement. One respondent states that the rule would ``gut the law and be a de facto repeal of a significant portion of the specialty metals law.'' Another respondent objects that the exemption would exempt all COTS items, not just those containing small amounts of specialty metal. Another respondent states that the

rule would potentially waive all domestic specialty metals requirements, even for weapons systems that are uniquely military in nature. Two more respondents state that even the most complicated military equipment is manufactured from COTS items at the lowest level of the supply chain. One of these respondents is concerned that even specialty metals mill products themselves could fall under the definition of COTS items. At the mill level, military and commercial articles of specialty metal are often interchangeable. Some of these respondents recommend that the rule should be limited to a waiver of only those COTS items that contain de minimis or less than some specific percentage of specialty metals.

Other respondents believe the waiver does not provide sufficient relief and request additional rulemaking by DoD in this area as follows:

[cir] Waive specialty metals restrictions where the source of the metal cannot be confirmed and the specialty metal represents a ``de minimis'' piece of the end product to be delivered to DoD.

[cir] Waive specialty metal restrictions based on similar de minimis requirements provided for electronic components.

[cir] Make meaningful changes in this area, including the actions by the newly established Strategic Materials Protection Board.

DoD Response: DoD does not agree that this waiver is too broad. To the extent that DoD can utilize COTS items, it should be able to do so without being hampered by this DoD-unique requirement. Despite attempts to increasingly rely on the commercial marketplace, the items that DoD buys in the six major categories must necessarily diverge from items sold in the commercial marketplace, in order to meet military-unique requirements. DoD aircraft, ships, weapons systems, etc., still contain many components that are not COTS, that have to be manufactured specifically to fulfill military requirements. The respondents that oppose the rule are overlooking that the COTS items must be offered to the Government without modification.

However, the final rule contains changes that make the waiver applicable only to end products and components in the six major categories, not specialty metal acquired directly by the Government, or by a contractor for delivery to the Government as the end product.

To limit the rule to only COTS items with less than a specified percentage of specialty metals would require an unacceptable level of research into the composition of the COTS item, to determine for each item the percentage of specialty metal contained therein. This would introduce delays in the process similar to those associated with doing a domestic non-availability determination.

c. Impact on U.S. Industry and National Security

Comments: Several respondents consider the rule to constitute a threat to U.S. industry and, therefore, a threat to national security. The respondents state that 10 U.S.C. 2533b serves an important role in maintaining a strong U.S. industrial base, and DoD, Congress, and industry should partner to find a means of compliance; and that, by this waiver, DoD is jeopardizing the availability of a future domestic supply of defense materials.

[cir] Specialty metals. With specific regard to specialty metals, one respondent states that exempting COTS items will reduce the demand of domestic specialty metals in down market cycles below sustainable levels for the specialty metals industry. Another respondent states that uniquely military articles do not account for sufficient volume to sustain the domestic specialty metals industry during down cycles.

[cir] Titanium. One respondent specifically addresses the titanium

industry. This respondent states that there are only four titanium companies in the world that are capable of supplying titanium in the quantity and quality needed by DoD. Three of those companies are U.S. companies that are vigorously competing with the fourth company located in Russia, which is government owned, and need not even make a profit to survive. This respondent also cites the cyclical nature of the titanium industry. Even though the industry is strong now, it would be foolhardy to assume that U.S titanium producers will not in the future be seriously harmed by opening the U.S. defense market to Russian titanium.

[cir] High-performance magnets. One respondent is concerned about impact on the high-performance magnet industry in particular. This respondent states that the domestic high-performance industry depends on the DoD market, and without it there might not be sufficient commercial volume to sustain it. Although they admit that most high-performance magnets are not COTS items, they are concerned that items containing such high-performance magnets could be designated as COTS items.

On the other hand, eighteen respondents state that this waiver will strengthen the U.S. industrial base. For example--

[cir] This waiver is important to maintaining and broadening the industrial base. Without this waiver, DoD's access to commercial products and developing commercial technologies will be compromised.

[cir] This waiver will ensure that many commercial manufacturers will have the ability to remain as a qualified domestic supplier to DoD.

[cir] This waiver will benefit manufacturers, by augmenting their sales, decreasing compliance costs, stabilizing U.S. manufacturing jobs, and providing companies the satisfaction of knowing they are contributing to the defense of our nation.

[cir] Exempting COTS items from 10 U.S.C. 2533b will help U.S. fastener manufacturers and distributors, many of whom are small or medium sized

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businesses, remain a viable part of the U.S. defense supplier base.

[cir] 10 U.S.C. 2533b has caused thousands of the respondent's parts to become less valuable or unable to be sold at all. Although the material is bought from a foreign mill, all processing and manufacturing occurs in the United States. On the average, the value of the foreign material is only 15 percent of the total value of each part.

Some respondents provide specific arguments that the proposed waiver will not negatively impact the specialty metals industry to the extent that the respondents opposing the rule claim. Eighty percent of all aerospace fasteners are COTS items, of which only ten percent is supplied to DoD. One respondent states that--

[cir] Total sales worldwide for aerospace fasteners was approximately $2.4 billion in 2006.

[cir] The U.S. aerospace fastener market totaled $1.6 billion in sales.

[cir] DoD's portion was approximately $550 million for defense contracts. Of that $550 million, approximately $330-385 million (60-70 percent) were dual-use fasteners that would qualify as COTS items, and the remaining $165-220 million (30-40 percent) were military unique.

[cir] The alloy steel fasteners industry estimates that $150

million were made of alloy steel (of the $550 million in 2006 defense fastener sales).

[cir] Since sales figures are estimated to be about twice the manufacturing cost, approximately $75 million would be for the manufacturing cost.

[cir] Most industry analysts suggest an 8 percent raw material/ manufacturing cost ratio for alloy steel fasteners, which would equate to $6 million in alloy steel costs. Therefore, even if all alloy steel military aerospace fasteners were considered to be COTS items, and if all of the alloy steel contained in the fasteners shifted from U.S. sources to foreign sources, the maximum impact would be $6 million.

[cir] Likewise, the titanium/nickel-based fasteners industry estimates that $400 million of the fasteners were made of titanium/ nickel base.

[cir] Approximately $200 million would be manufacturing costs.

[cir] Using an average 22.5 percent raw material cost/manufacturing cost ratio, $45 million would be titanium/nickel costs. Therefore, even if all titanium/nickel-based military aerospace fasteners were considered COTS items (which is unlikely), the maximum impact on the specialty metals industry would be approximately $45 million annually, if all the titanium contained in the fasteners shifted from U.S. sources to foreign sources.

Another respondent provides another approach to assessing impact. This waiver is not primarily to allow currently compliant COTS items to begin using non-compliant specialty metals. The respondent states that the core reality is that COTS items are not Section 2533b-compliant now, and almost certainly will not be in the future. Up until the codification of the new 10 U.S.C. 2533b, the Government could withhold payment for components containing noncompliant specialty metals. 10 U.S.C. 2533b no longer permits this. Therefore, this waiver provides a solution that permits DoD to accept needed defense articles that would otherwise be non-compliant.

Those respondents who are concerned with negative impact on the specialty metal or magnet industry see that negative impact as a threat to national security. For example--

[cir] One respondent states that 10 U.S.C. 2533b plays an important role in ensuring our national security.

[cir] Another respondent states that if domestic specialty metals are not used in COTS items, it is far less likely that COTS items critical to defense procurement will be manufactured in the United States. Thus, potential availability issues extend not only to specialty metals themselves, but to every item made from specialty metals in DoD's supply chain.

[cir] A third respondent states that the fact that critical parts that the United States loses its ability to produce were COTS items will be of little comfort as the United States' security becomes vulnerable through its dependency on foreign sources or, even worse, when in a time of crisis, foreign sources become unavailable and the United States cannot produce needed military aircraft, missiles, spacecraft, ships, tanks, weapons, and ammunition.

[cir] Another respondent states that certain items containing high-performance magnets may be considered COTS, but it is a threat to national security to outsource production of these high-performance magnet components to foreign suppliers.

Aside from the arguments that the impact will not be as negative as the specialty metals and high-performance magnets industry predict, most of the supporters of the proposed rule are concerned that failure

to provide this waiver of 10 U.S.C. 2533b will have a negative impact on national security because, if the COTS waiver is not implemented, DoD will be unable to buy needed COTS items. For example--

[cir] One respondent supports the waiver because ``it is essential that we provide our Soldiers, Sailors, Airmen, and Marines the best equipment possible.''

[cir] Another respondent cites the DoD Annual Industrial Capabilities report to Congress in February 2006, stating that DoD relies on commercial information technology because it is the most current and advanced available.

[cir] One respondent strongly believes that waiving the restrictions on COTS will help DoD in acquiring the products that it needs and will perhaps save lives, especially in time of war.

DoD Response: DoD believes this rule promotes national security. It is restricted to addressing the application of 10 U.S.C. 2533b to COTS items; the rule does not in any way alter requirements to purchase compliant non-COTS items. The rule simply allows DoD to purchase those needed COTS items that are already non-compliant.

The amount of product domestic specialty metals producers sell to commercial industry is based on their metal price and quality; it is not influenced by whether DoD can or cannot buy non-compliant COTS items for the simple reason that producers of COTS items do not take DoD restrictions into account when making sourcing decisions. This rule will have no impact on the amount of domestically-produced specialty metal sold to commercial industry, and thus will have no negative impact on the viability of domestic specialty metal producers or national security.

The current restriction against buying non-compliant COTS items harms national security by impeding the promotion of a healthy defense industrial base, frustrating attempts to foster defense trade and industrial cooperation with friends and allies, and directly and negatively impacting DoD's ability to supply the warfighter. To comply with the limitations imposed by 10 U.S.C. 2533b, the defense suppliers are forced to deviate from making sound business decisions in sourcing and production, with corresponding lost opportunities for efficiency and effectiveness. Furthermore, it is not possible to procure needed COTS items in compliant form, and this directly and negatively impacts DoD's ability to support the warfighter.

Domestic specialty metal producers are financially outperforming most other sectors of the defense industry. Further, there is no danger of the United States losing the capabilities of its domestic specialty metals industry. In the unlikely event that, for whatever reason,

action needs to be taken in the future to protect the domestic specialty metals industry for national security reasons, DoD would be able to use its existing authority under 10 U.S.C. 2304(c)(3) and implementing DFARS provisions to restrict procurements of specialty metals to domestic sources.

One respondent is concerned about impact on high-performance magnets. However, as stated by that respondent, most high-performance magnets are not COTS items. Furthermore, the applications that demand high-performance magnets usually have military-specific performance requirements, so they would not typically be COTS either.

d. Precedent

Comments: Most of the respondents that oppose the rule are

concerned with the precedent that this rule will set.

[cir] Several respondents state that DoD's rule inappropriately accommodates the prime contractor's unwillingness to change their existing processes, inventory systems, or facilities.

[cir] Other respondents are concerned about the precedent of this rule as it relates to the Berry Amendment and other products covered by 10 U.S.C. 2533a. One respondent states that it is inappropriate for DoD to consider the COTS exemption for specialty metals without taking into account the broader implications of such a precedent.

One respondent considers that this waiver sets a good precedent, enhancing genuine and meaningful compliance with 10 U.S.C. 2533b. This respondent states that those who argue that DoD should just insist that COTS items become compliant are ignoring reality. If followed, this would seriously undermine overall compliance efforts and invite skepticism that DoD is serious about compliance.

DoD Response: Consistent with Section 35 of the OFPP Act, this rulemaking is designed to facilitate access to the commercial marketplace by waiving application of a Government-unique requirement where the OFPP Administrator has not determined that its application to COTS is in the best interest of the Government. There is no requirement or law that compels a U.S. COTS manufacturer or COTS distributor to change its competitive process or systems to meet DoD-unique restrictions. The law only requires DoD to ensure that the specialty metals in items it buys are compliant. A U.S. COTS manufacturer that decides not to make its COTS products compliant is not breaking the law.

The theoretical possibility of a future waiver of 10 U.S.C. 2533a is an issue outside the scope of this case. No such action has been proposed.

e. Level the Playing Field With Qualifying Countries

Comments: Four respondents state that the proposed COTS exemption, if adopted, would narrow the loophole that provides exemption to end products or components from qualifying countries.

[cir] The same regulations that restrict the American companies provide a loophole to foreign competitors.

[cir] This puts U.S. companies, both large and small, at a significant competitive disadvantage compared to manufacturers from qualifying countries.

[cir] The proposed exemption would lessen the disadvantage currently plaguing companies providing parts and services to DoD.

[cir] Because of this exemption for manufacturers in countries that have certain types of defense-related agreements with the United States, implementation of 10 U.S.C. 2533b, absent promulgation of the proposed rule as a final rule, would actually serve to undermine the goal of creating a strong industrial base. If a U.S. manufacturer cannot comply with the specialty metal requirements, DoD has the option to buy the product from a qualifying country instead.

DoD Response: DoD concurs with the statements of these respondents.

5. Pending Legislation

Comment: One respondent considers it inappropriate and inefficient for DoD to consider this rule while legislative action is pending.

DoD Response: This rule implements a section of the Fiscal Year 2007 Defense Authorization Act, an enacted law. If any new legislation is enacted, DoD will take the necessary steps to implement it.

6. Recommended Changes to the Rule

Several respondents who support the rule suggested revisions.

a. Definition of ``COTS Item''

Comment: One respondent is concerned that the requirement for ``no modification'' is unfair when applied to vastly different items such as a computer or GPS or a fastener. Another respondent requests a more definitive meaning of ``substantial quantities.''

DoD Response: The definition of ``COTS item'' used in the rule is consistent with 41 U.S.C. 431(c). The term ``substantial'' is used as a modifier throughout the FAR, and its interpretation must be on a case-by-case basis.

b. Use of the Term ``Waiver''

Comment: One respondent suggests that DoD should change the title of the case from ``Waiver of Specialty Metals Restrictions * * *'' to ``Inapplicability of Specialty Metals Restrictions * * *''. The rationale for this change is that the sole purpose of this rule is to satisfy the administrative requirement of paragraph (a) of Section 35, to list laws inapplicable to the procurement of COTS items. The respondent states that this rule does not constitute a waiver.

DoD Response: DoD does not agree to change the title of the case. DoD considers ``waiver'' to be an appropriate term because of the discretionary aspects of determining whether a law is covered and whether it is in the best interest not to exempt its application to COTS. DoD notes that the title of a DFARS case is not relevant once the rule is incorporated into the regulations.

c. Introductory Statement at DFARS 212.570

Comment: One respondent recommends that DFARS 212.570 should include the same introductory statement as does FAR 12.503 and DFARS 212.503.

DoD Response: DFARS 212.570 does not include the same introductory statement as FAR 12.503 and DFARS 212.503, because there is currently only one law on the list. If additional laws are added to the list, an introductory statement will be included in DFARS 212.570.

d. Location of Definition of ``COTS Items''

Comment: One respondent is concerned because the only definition of COTS items is at 212.570, referring contracting officers to 41 U.S.C. 431(c) for the definition of COTS items. This does not provide the needed definition to contractors and subcontractors. Nor is there a source provided for definition of ``COTS item'' when the term is used in the proposed exceptions at 225.7002-2.

DoD Response: Since publication of this DFARS final rule precedes publication of the FAR final rule under FAR Case 2000-305, which will incorporate the definition of ``COTS item'' in the FAR, DoD has added the statutory definition of ``COTS item'' at DFARS 202.101, which makes it applicable to clauses as well as text throughout the DFARS.

This rule was not subject to Office of Management and Budget review under

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Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the

meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because manufacturers of COTS items generally have not changed their manufacturing and purchasing practices based on DoD regulations. The burden generally falls on the Government to forego purchase of the item or to process a domestic nonavailability determination requested by the prime contractor. So far, only large contractors have had the resources to request a domestic nonavailability determination. If there is any impact of this rule, it should be beneficial, because small businesses providing COTS items, many of whom are subcontractors, will not have to--

[cir] Rely on the prime contractor to request a domestic nonavailability determination from the Government; or

[cir] Face the decision whether to cease doing business with the Government or set up systems to track and segregate all DoD parts that contain specialty metals.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because this rule contains no 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 202, 212, and 225

Government procurement.

Michele P. Peterson,
Editor, Defense Acquisition Regulations System.

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Therefore, 48 CFR parts 202, 212, and 225 are amended as follows:
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1. The authority citation for 48 CFR parts 202, 212, and 225 continues to read as follows:

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

PART 202--DEFINITIONS OF WORDS AND TERMS

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2. Section 202.101 is amended by adding the definition ``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, 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.
* * * * *

PART 212--ACQUISITION OF COMMERCIAL ITEMS

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3. Section 212.570 is added 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.

PART 225--FOREIGN ACQUISITION

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4. Section 225.7002-2 is amended by adding paragraph (q) to read as follows:

225.7002-2 Exceptions.

* * * * *

(q) Acquisitions of commercially available off-the-shelf items containing specialty metals. This exception does not apply when the specialty metal (e.g., raw stock) is acquired directly by the Government or by a prime contractor for delivery to the Government as the end item.

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