

## The Berry Amendment's Specialty Metals Restrictions Do Not Apply To Commercial Off-The-Shelf Items

**Summary:** On October 26, 2007, the Department of Defense ("DOD") issued new guidance relating to the Berry Amendment's prohibition of the acquisition of specialty metals melted or produced outside the United States. The guidance, in the form of a class deviation to the Department of Defense Federal Acquisition Regulation Supplement ("DFARS"), provides that the Berry Amendment's restrictions do not apply to the acquisition of commercial off-the-shelf ("COTS") items. A COTS item is a commercial item "sold in substantial quantities in the commercial marketplace" that is "offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace." 41 U.S.C. § 431(c). The exception of COTS items from the restrictions of the Berry Amendment is an important and necessary policy change that will ease the burden on defense contractors and the supplier community.

**The Berry Amendment:** The Berry Amendment, codified at 10 U.S.C. § 2533a and 2533b, restricts DOD's ability to acquire certain non-domestic goods, including food, clothing, cotton and specialty metals not grown, reprocessed, reused, melted, or produced in the United States. Because of the unique issues surrounding the procurement of "specialty metals," last year's National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364) ("FY07 NDAA") created a new section 2533b under Title 10 to address the restrictions related to them. The term "specialty metals" includes certain steel alloys (most significantly, stainless steel), nickel, iron-nickel, or cobalt base alloys, titanium or titanium alloys, and zirconium or zirconium base alloys. Section 2533b restricts the procurement of specialty metals "purchased directly by the Department of Defense or a prime contractor," such as raw stock. For the acquisition of six categories of end items ("the big six"), it restricts the purchase of "end items, or components thereof, containing a specialty metal, or components thereto." The "big six" are: (1) aircraft, (2) missile and space systems, (3) ships, (4) tank and automotive items, (5) weapon systems, and (6) ammunition.

The FY07 NDAA also provided an exception for commercial electronic components whose specialty metal content is de minimis. The specialty metal restriction under the new section 2533b, however, expressly applies to the acquisition of other commercial items. See 10 U.S.C. § 2552b(h). Commercial items are essentially items other than real property that have been sold, leased, or licensed or offered for sale, lease, or license to the general public. See 41 U.S.C. § 403(12)(A). While the FY07 NDAA expressly stated that it applied to the procurement of commercial items, and thus, commercial items were not excepted, it failed to address whether it applied to COTS items. Although COTS items are a subset of commercial items sold in substantial quantities in the commercial marketplace, the Office of Federal Procurement Policy ("OFPP") Act provides that if a statute does not expressly state that it is applicable to COTS items, COTS items are excluded from coverage. 41 U.S.C. § 431(b)(2). Thus, even though Congress expressly applied the restrictions of the Berry Amendment to commercial items, that express application was not sufficient to apply Berry Amendment restrictions to COTS items.

Following the enactment of the FY07 NDAA, DOD issued preliminary guidance on the new section 2533b domestic source restriction for specialty metals. Among other things, the guidance explained that the specialty metal restrictions only apply to "big six" end items or to first and second-tier assemblies, but not third-tier assemblies or below. The guidance also clarified the de minimis exception for specialty metals in electronic components and the process for obtaining a one-time waiver allowed by the statute. We analyzed last year's preliminary guidance in *New DOD Guidance on the Berry Amendment: Still Berry After All These Years*, The Procurement Lawyer, Vol. 2, No. 42 (Winter 2007).

**Class Deviation 2007-00011:** In July 2007, DOD proposed to amend the DFARS to include an express exception for COTS items from the Berry Amendment's specialty metals restriction. See 72 FR 35960, DFARS Case 2007-D013. DOD explained in pertinent part that:

Exercise of this statutory COTS waiver is critical to DOD's access to the commercial marketplace. Manufacturers make component purchasing decisions based on factors such as cost, quality, availability, and maintaining the state of the art—not the country in which specialty metals in the components were melted. In addition, many commercial items commonly acquired in large quantities by DOD, such as

computers, commercial-off-the shelf engines, and semi-conductors, may contain a small percentage of components made of specialty metals, subjecting the manufacturers to costly and burdensome, if not impossible, tracking requirements. Many manufacturers of COTS items are unwilling to change their existing processes, inventory systems, or facilities and incur the significant expense associated with tracking the sourcing of specialty metals in the components of a COTS item in order to generate sales to DOD, which typically represent a very small percentage of overall revenue for COTS items.

*Id.* In this regard, DOD recognized how the expansive burden imposed by the specialty metals source restriction creates a disincentive for manufacturers to sell to DOD. DOD thus expressed concern that continuing the application of the specialty metals source restriction on COTS would reduce DOD's access to the commercial marketplace.

On October 26, 2007, the Director of Defense Procurement and Acquisition Policy issued Class Deviation 2007-O0011 ("deviation") to DFARS 252.225-7014, which is DOD's implementing regulation for the specialty metals restriction, incorporating the COTS waiver. The deviation formally waived the specialty metal restrictions for COTS items. Specifically, the deviation added a subsection (c)(2) to Alternate I of the basic clause, which states that the clause does not apply to specialty metals "contained in commercially available off-the-shelf items, acquired as end items or components." In the accompanying memorandum, the Director explained that a component can be a COTS item if it is offered as part of an end item, without modification. The Director also explained that the installation of a component into an end item does not qualify as a "modification," unless the component is modified prior to incorporation into the end item.

Additionally, the memorandum clarified the definition of a "component" as being a first-tier part or assembly that is incorporated directly into one of the "big six" end items or incorporated directly into a first-tier part/assembly. The Director explained that the tiers apply to assemblies of "major systems" in one of the "big six" end items, and do not change from one contract to another. For example, a second-tier component in one contract will not be considered a first-tier component in another contract simply because it is purchased separately as an end item. This is important because an assembly incorporated into that second-tier component (i.e., a third-tier part/assembly) is not considered a "component" and thus the specialty metal restriction does not apply to it.

Finally, pursuant to 41 U.S.C. § 431, the Administrator for Federal Procurement Policy is required to list all of the laws that are inapplicable to the acquisition of COTS items in the FAR. In that regard, the deviation created a new DFARS 212.570, Applicability of Certain Laws to Contracts and Subcontracts for the Acquisition of Commercially Available Off-the-Shelf Items, and listed 10 U.S.C. § 2533b(a)(1) as the first law not applicable to the acquisition of COTS items.

**Practitioner Tips:** The COTS deviation is a step in the right direction from industry's perspective. By removing the source restriction, contractors (and DOD) should benefit from the reduced burden of compliance and the resulting increased competition.

1. For contractors providing one of the "big six" end items, or components thereto, you no longer have to worry about the specialty metal content of COTS items. This should encourage the use of COTS items.
2. Keep in mind, however, that the specialty metals source restriction is still in effect for all other commercial items. The deviation only waives the restrictions for commercial items purchased in large quantities without modification.
3. Additionally, the new COTS waiver is not retroactive. Therefore, existing contracts must be modified to incorporate DFARS 252.225-7014, Alternate I (Deviation 20007-O0011) for the waiver to apply.

***For further information please contact:***

***Rebecca E. Pearson at 202.344.81833 [repearson@venable.com](mailto:repearson@venable.com),  
James Y. Boland at 202.344.8273 [jyboland@venable.com](mailto:jyboland@venable.com),  
or any attorney in Venable's Government Contracts Practice Group.  
[www.Venable.com](http://www.Venable.com) 1.888.VENABLE***

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