

# Defense Department Offers Guidance on Updated DFARS Specialty Metals Provision

*Compliance challenges remain for springmakers and wire suppliers*

By Rita Kaufman, Editor

The U.S. Department of Defense recently issued a memorandum and class deviation in response to newly updated provisions of the Berry Amendment – the law that requires certain goods purchased by the DOD to be made in the U.S. or a “qualifying country.” For the spring industry, this memo contains some much-needed clarification of the specialty metals clause.

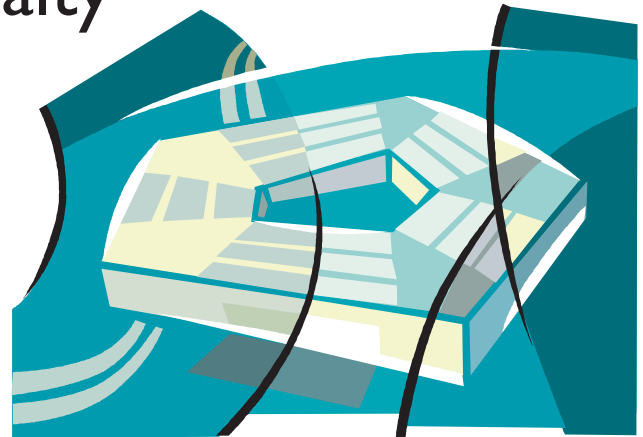
## The Berry Amendment

The Defense Federal Acquisition Regulations Supplement (DFARS) includes the Berry Amendment, which is intended to ensure an adequate domestic industrial base and avoid dependence on foreign suppliers in times of adversity and war.

At issue for springmakers who supply the defense industry is the Berry Amendment specialty metals clause, DFARS 252.225-7014, which restricts where materials used in defense equipment are made.

The amendment was enacted in 1941, and the specialty-metals clause was adopted in 1973. In spring 2001, Congress revisited the Berry Amendment, largely in response to a controversy involving the Army’s procurement of black berets from foreign sources. Later that year, the amendment was made law, and the government began placing real emphasis on enforcement. In fact, the specialty-metals clause became a sticking point in negotiations over the 2007 defense authorization bill after several significant Pentagon contractors disclosed that they did not comply with the law because some of their suppliers have used foreign-produced specialty metal.

Subsequently, the FY2007 Defense Authorization Act moved the specialty-metals clause out of the Berry Amendment and into a new statutory provision, Title 10, U.S.C. Section 2533b. The new law created an exception for certain commercially available electronic components, granted the DOD the authority to waive specialty metal requirements for products manufactured before the date the new



statute was enacted, and established a Strategic Materials Board to recommend items critical for national security.

## The Specialty Metals Provision

DFARS 252.225-7014 gives the following definition of “specialty metals”:

Steel –

- 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

- Containing more than 0.25 percent of any of the following elements: aluminum, chromium, cobalt, columbium, molybdenum, nickel, titanium, tungsten, or vanadium;

- Metal alloys consisting of nickel, iron-nickel, and cobalt base alloys containing a total of other alloying metals (except iron) in excess of 10 percent;

- Titanium and titanium alloys; or

- Zirconium and zirconium base alloys.

It says these specialty metals incorporated in articles purchased by the DOD must be melted or produced in the United States or its outlying areas, or in the following “qualifying countries” (subsection 225.872-1): Australia, Belgium, Canada, Denmark, Egypt, France, Germany, Greece, Israel, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom. (Austria and Finland may also be qualified on a purchase-by-purchase basis.)

It further states that the clause does not apply to specialty metals “incorporated in an article manufactured in a qualifying country.”

## Complying with the Law

The new emphasis on enforcement sent some springmakers and their suppliers scrambling to

determine if their products comply. "There was an unbelievable flood of customers requesting recertification of their material purchases," says Terry Bartel Ph.D., general manager, wire division, Elgiloy Specialty Metals, Elgin, IL. "Some requests were for material that was shipped as long ago as 1986. The resources spent on amending these certifications have been a tremendous cost to us. Unfortunately, not all customers were satisfied because much of this material was not DFARS compliant – a direct result of customers wanting lower prices and not really being concerned that the material came from a DFARS country (or even aware that the requirement existed)."

However, the new statutory provision may offer relief from such material recertification headaches. In a Dec. 6, 2006 memo with the subject "Class Deviation – Restriction on Procurement of Specialty Metals," Defense Procurement and Acquisition Policy Director Shay Assad says, "A new one-time waiver is now established for contracts under which specialty metals were incorporated into items produced, manufactured or assembled in the United States prior to Nov. 16, 2006, and where final acceptance by the government takes place after that date."

Recognizing that many suppliers have been "inadvertently non-compliant" with the specialty metals provision of the Berry Amendment, Assad's memo states, "the new provision allows for a period for suppliers at all levels of the supply chain to become compliant with section 2533b of Title 10."

### Flowing Down the Supply Chain

In contracts involving the six major defense programs, the specialty metals provision applies to all subcontractors.

"When the government purchases an end product for one of the six major defense programs, components, including all parts and assemblies *at all tiers* must be compliant," says Assad.

The six major programs are: aircraft, missile and space systems, ships, tank and automotive items, weapon systems, and ammunition. In the statute, the term "automotive item" refers to self-propelled military transport vehicles. It does not include construction or support equipment, such as bulldozers, lifts, loaders or aircraft ground support equipment.

However, there is a narrow exception that is triggered only if the DOD is buying third-tier or lower parts (not the end item or first- or second-tier component parts) directly from the prime contractor. Contractors *providing directly to the government* third-tier or lower parts of an end

item associated with one of the six major defense programs will no longer need to comply with the specialty metals provision.

To clarify this exception, Assad offers an example: If a spare rocket motor were purchased as a contract line item, that spare rocket motor is a first-tier component of the missile and would still be covered, even if purchased separately from the missile system. If, for example, the rocket motor contains a power supply (second-tier item), and it was purchased as a separate item, it would also be covered by the new specialty metals provision. If, however, a third-tier or lower-level assembly or part, such as the printed circuit board [or a spring] contained within the rocket motor power supply, is purchased separately from the missile system (under a separate contract line item), the restriction does not apply.

It's also important to note:

- The specialty metals provision *does* apply to "raw stock" of specialty metals purchased either directly by the DOD or through a contractor.
- The provision *does not* apply to items, such as springs, that are third-tier or below parts and will not be used in one of the six major defense programs. In that case, the wire does not necessarily have to be melted in the U.S. or a qualifying country.

### Sourcing Compliant Material

For springmakers looking for DFARS-compliant material, the search can be difficult in certain cases, but not impossible, say wire suppliers.

"In my experience, by far the greatest demand for DFARS-compliant spring wires appears to be for the more specialty wires, such as nickel-coated stainless and nickel-coated 17/7 PH," says David Merrills, vice president of Industrial Steel & Wire in Bristol, CT. "I'm not sure if all of these wires are obtainable domestically, but arguably the highest quality wires come from Japan or Korea, both of which are not qualifying countries."

"We haven't had any scenarios where we haven't been able to obtain DFARS-compliant material," says Brian E. Burr, general manager of Sumiden Wire Products Corp., Dickson, TN. "However, we have encountered problems obtaining high-quality DFARS-compliant material."

"Since we deal with the more exotic alloys," says Bartel, "those requiring DFARS-compliant material have seen higher prices because of the higher priced raw material. This is not an absolute truism but does occur more than we would like. The two alloys that come to mind for us are X-750

and MP35N. DFARS-compliant sources are higher priced.”

“It is often easy to find lower priced raw material that is not DFARS compliant from foreign sources due to advantageous currency exchange rates, suspect quality or foreign government subsidies,” explains Burr.

Another item in the new provision that could apply to springmakers is a revised domestic non-availability exception. A Domestic Non-Availability Determination (DNAD) may be granted “if compliant specialty metal cannot be procured as and when needed in the required form,” says Assad. “For example, domestic specialty metal may not be available in the bar stock required to produce fasteners, or the specialty metal may not be available, as and when needed, in the forged or milled form that is required. When considering a DNAD, one of the factors that should be addressed is whether the price of a compliant metal is fair and reasonable, in accordance with FAR 15.402.”

### Electronic Component Exception

A new exception for electronic components was also included in the recent statutory provision. The exception applies to “commercially available electronic components whose specialty metal content is *de minimis* in value compared to the overall value of the lowest level component produced that contains such specialty metal,” says Assad. “The Department will use ‘does not exceed 10 percent’ for the *de minimis* standard for specialty metals contained in electronic components.” An item can be an “electronic component” regardless of the tier of the end product in which it is installed.

To clarify the electronic component exception, Assad offers the following example:

A contractor is providing an aircraft as the end product, but purchases radio communication equipment for the aircraft from a subcontractor. The subcontractor is the producer of the radio communication equipment, buying electronic parts to assemble. The value of the radio communication equipment’s specialty metal content must be less than 10 percent of the value of the radio communication equipment. The individual electronic parts assembled into the radio communication equipment are not the electronic components against which the *de minimis* value of the specialty metal must be calculated, because they are not produced by the subcontractor. It is not necessary to know the exact value of the specialty metal, only to reasonably estimate that it is less than 10 percent of the total value.

### Qualifying Country Exception

As mentioned earlier, specialty metals must be melted in the United States, its outlying areas or in a qualifying country. However, DFARS 252.225.7014 states that the clause does not apply to specialty metals “incorporated in an article manufactured in a qualifying country.” This would seem to create a loophole for manufacturers in qualifying countries. As confirmed by the DOD, the following scenarios are correct interpretations of the specialty metals provision:

1. A spring manufacturer in a qualifying country *can* use wire that was melted in *any* country and sell the springs (at any tier) for use in one of the six major defense programs. (The wire would be incorporated in an article manufactured in a qualifying country.)

2. A spring manufacturer in the U.S. must use wire that was melted in the U.S. or a qualifying country in order to sell the springs for use in one of the six major defense programs. Two exceptions would be if the spring was a third-tier or below part that was purchased directly by the government (not as part of an end product), or if the spring would fall under the electronic component exception.

Springmakers and others who would consider taking advantage of this loophole should use caution, however. The DOD, Congress and lobbyists continue to debate the specialty metals provision, so new guidelines could be forthcoming.

### Ongoing Compliance Issues

Going forward, wire suppliers can include the country of melt on their test certificates, so tracking the origin of the material shouldn’t be a problem in the future.

But what happens to existing material in the supply chain that was intended for defense contracts? “It renders some of our stock of wire as obsolete, as well as stocks of finished springs made and stocked by our customers,” says Merrills.

Even if that weren’t an issue, suppliers would still be left with compliance costs.

“The biggest problem we find in conforming to the Berry Amendment is maintaining and segregating compliant and noncompliant materials,” says Burr. “It becomes very costly to maintain two inventories of products.

“The regulation forces us to have an even larger supplier base,” says Bartel, “so we can supply those who require DFARS compliant material and those who do not. Those who do not require DFARS are not willing to pay the higher prices for this material, so we are forced to maintain a dual inventory. Thus we have more material and increased costs to operate our business.”

“As a warehouse and distributor of wire, we do not know whose wire to stock,” says Merrills. “We never know who the specific customer will be at any one time, and certainly we have no idea who their customer will be (i.e. the military).”

### Pros and Cons

Some believe that laws like the specialty metals provision contradict free trade policies. They say the presence and degree of competition is the most effective way to promote efficiency and improve quality.

“As much as I would like to be able to supply all of our customers with DFARS (or even better, domestic) material, I have to believe that we are being forced into a situation where our competitiveness is being eroded by the higher prices for DFARS compliant material.” says Bartel. “I understand the desire to have implemented such a program, but the world is growing smaller every day and, whether I or anyone else likes it, we are truly in a world market.”

On the other hand, some believe that key U.S. sectors need the protections afforded by the Berry Amendment. Proponents argue that it is important in periods of commercial downtime for the specialty metals industry. Without it, some say, the industry could go out of business – a scenario that would,

in turn, deprive the government of strong defense resources.

“It is our belief the Berry Amendment helps the U.S. spring market by erecting significant barriers to importation of low-priced non-DFARS foreign-produced springs,” says Burr. Another reason the law should remain in place, he says, is to “ensure a continuation of domestic-sourced defense materials.”

Regardless of individual philosophies, the spring industry must comply with the law if it wants to do business with the DOD. Limited availability of certain materials, higher prices or longer lead times may sometimes be encountered. However, there is one thing that could relieve such pressures, says Merrills: “This regulation excludes two of this nation’s largest ‘friendly’ trading partners, Japan and South Korea. If these two countries were to be included or classified as ‘qualifying countries,’ then I don’t believe the spring industry would have any real issues with DFARS.”

*Rita S. Kaufman CAE is the editor of Springs magazine and communications director of the Spring Manufacturers Institute. Readers may contact her by phone at (630) 495-8588 or e-mail at [editor@smihq.org](mailto:editor@smihq.org). ❖*