

# **Frequently Asked Questions Regarding the Specialty Metals Restriction under 10 U.S.C. 2533b**

As of July 29, 2009

CAUTION: THESE FAQS ARE FOR GENERAL INFORMATION AND ARE NOT DEFINITIVE. THE STATUTE AND REGULATIONS SHOULD ALWAYS BE REVIEWED FOR THE DEFINITIVE RULES THAT APPLY TO INDIVIDUAL FACT SITUATIONS.

ADDITIONALLY, THESE FAQS DO NOT TAKE INTO ACCOUNT ANY RESTRICTIONS REQUIRED TO COMPLY WITH EXPORT CONTROL LAWS SUCH AS THE ITAR OR EARS.

## **General Questions:**

### **Q1. What is the history of this domestic preference restriction?**

A1. The specialty metals restriction was originally added to the “Berry Amendment” in 1972, and was included annually in DoD Authorization Acts. It was codified in [10 U.S.C. 2533a](#) in 2002 by section 832 of Public Law 107-107.

On October 17, 2006, the President signed the National Defense Authorization Act for Fiscal Year 2007. Under this Act, [Section 842](#) moved the specialty metals restriction from 10 U.S.C. 2533a to [10 U.S.C. 2533b](#), with revisions. The Department of Defense issued Class Deviation 2006-O0004 dated December 6, 2006.

On October 26, 2007, the Department issued Class Deviation 2007-O0011 stating that 10 U.S.C. 2533b(a)(1) as a statute was inapplicable to the acquisition of commercial off-the-shelf items, in accordance with 41 U.S.C. 431.

On January 28, 2008, the President signed the National Defense Authorization Act for Fiscal Year 2008. Under this Act, [sections 804 and 884](#) addressed further changes to 10 U.S.C. 2533b. Section 804 included a statutory exception for COTS items, with certain limitations for fasteners, as well as castings and forgings. Section 804 expanded the electronic components exception, and provided new exceptions, such as a de minimis exception (does not apply to high performance magnets), a commercial derivative military articles exception, and a national security waiver. Section 804 removed the implication that accepting non-compliant material may create an Anti-deficiency Act violation, while placing the burden of compliance on the prime and subcontractors. This Act also tightened some aspects of the law. For example, the definition of “required form” contained in the “availability exception” was changed to refer to the specialty metals itself, and not to parts containing specialty metals. Section 884 contained stricter rules on how to process Domestic Nonavailability Determinations under the “availability exception.” The Department issued Class Deviation 2008-O0002 on January 29, 2008 incorporating most of the changes in this Act.

These laws have been implemented in the Defense Federal Acquisition Regulation Supplement (DFARS) on July 29, 2009 and are to be incorporated into new procurement actions after this date.

**Q2. Where can I find information regarding DoD's implementation of the new specialty metals restriction?**

A2. The Director, Defense Procurement (DPAP), maintains a web site of the most current reference material relating to specialty metals at:

[http://www.acq.osd.mil/dpap/cpic/ic/restrictions\\_on\\_specialty\\_metals\\_10\\_usc\\_2533b.html](http://www.acq.osd.mil/dpap/cpic/ic/restrictions_on_specialty_metals_10_usc_2533b.html)

The definition of "specialty metals" is provided at [DFARS 252.225-7009\(a\)\(11\)](#).

**Q3. Are there any exceptions to this restriction on specialty metals?**

A3. Yes, there are a number of exceptions provided for in the law. When a contractor or subcontractor proposes to rely on a particular exception, that fact should be included in the proposal, and the contracting officer has the responsibility to determine if the exception applies. The resulting prime and subcontracts will need to specifically state what exceptions were accepted by the Department prior to award.

The exceptions are summarized below.

1. The specialty metals restriction **does not** apply if the Government prime contract is below the Simplified Acquisition Threshold (SAT). The value of subcontracts is not relevant: only the prime contract value determines this exception.

If the prime contract is over the SAT, the prime contractor and every subcontractor must comply with the specialty metals restriction on prime contracts for:

(1) the following types of end items, or components thereof: aircraft, missiles and space systems, ships, tank-automotive, weapon systems, and ammunition, and

(2) the purchase of specialty metal (i.e. raw stock, including bar, billet, slab, wire, plate, and sheet) acquired by the prime contractor *for delivery to DoD as an end item*, or specialty metal acquired by DoD directly from the entity that melted or produced the specialty metal.

2. Availability exception. A domestic non-availability determination (DNAD)) to the specialty metal restriction may be granted if the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) or the Secretary of the Military Department concerned determines that compliant specialty metal of satisfactory quality,

sufficient quantity, and *in the required form*, cannot be procured as and when needed. See the definition of “in the required form” at [DFARS 252.225-7009\(a\)\(10\)](#).

- Documentation required for a DNAD:
  - An analysis of alternatives that would not require a domestic non-availability determination (a detailed market analysis and corrective action plan); and
  - Written documentation by the requiring activity, with specificity, why such alternatives are unacceptable.
  - Specify the duration and scope of the DNAD
- If the DNAD will apply to more than one contract (i.e., a class DNAD), approval of the USD(AT&L) is required.
- At least 30 days before making such a determination, in a manner consistent with national security and confidential business information, the contracting agency must publish a notice on the Federal Business Opportunities website ([www.FedBizOpps.gov](http://www.FedBizOpps.gov) or any successor site) of the intent to make the domestic nonavailability determination; and solicit information in accordance with [DFARS 225.7003-3\(b\)\(5\)\(ii\)\(A\) and \(B\)](#).
  
- Who can make Domestic Non-Availability Determinations for specialty metals?
  - The Under Secretary of Defense (Acquisition, Technology, and Logistics).
  - The Secretary of the Army.
  - The Secretary of the Navy.
  - The Secretary of the Air Force.
  - This authority cannot be redelegated.

3. The specialty metals restriction **does not** apply to acquisitions outside the United States in support of combat operations.

4. The specialty metals restriction **does not** apply to acquisitions—

- In support of contingency operations (see definition of contingency operations in [10 U.S.C. 100](#)); or
- For which the use of other than competitive procedures has been approved on the basis of unusual and compelling urgency in accordance with [FAR 6.302-2](#)

5. The specialty metals restriction **does not** apply to acquisitions of items specifically for resale by commissaries, exchanges, and other nonappropriated fund instrumentalities.

6. The specialty metals restriction **does not** apply to items containing specialty metals or specialty metals themselves when the acquisition furthers an agreement with a qualifying country (see [DFARS 225.003\(9\)](#)) (i.e., the specialty metal was melted or produced in a qualifying country or is contained in an item manufactured in a qualifying country).

7. The specialty metals restriction **does not** apply to procurements of electronic components. See the definition of electronic components in [DFARS 252.225-7009\(a\)\(5\)](#).

8. The Secretary of Defense or the Secretary of the military department may accept non-compliant specialty metals if the specialty metals were incorporated into items produced, manufactured, or assembled in the United States before October 17, 2006, and the contracting officer for the contract determines that the contractor is not in compliance with 10 USC 2533b, and also determines in writing that -

- It would not be practical or economical to remove or replace the specialty metals incorporated in such items or to substitute items containing compliant materials;
- The prime contractor and subcontractor responsible for providing items containing non-compliant materials have in place an effective plan to ensure compliance with 10 U.S.C. 2533b for items produced, manufactured, or assembled in the United States after October 17, 2006; and
- The non-compliance is not knowing or willful, as represented by the contractor and subcontractor; and
- The Under Secretary of Defense for Acquisition, Technology, and Logistics or the service acquisition executive (SAE) of the military department concerned approves the determination.
- A notice must be posted in FedBizOpps.gov by the contracting officer within 15 days after making a determination that a waiver has been

granted and that a contracting officer may exercise this authority only with respect to the delivery of items where final acceptance takes place after October 17, 2006 and before September 30, 2010.

**Q4. How would I know if incorporation of non-compliant specialty metals by the contractor or subcontractor was “not knowing or willful”?**

A4. The contracting officer should ascertain that this topic was not specifically addressed in the proposal or negotiations and request a statement from the prime contractor and the subcontractor responsible for the noncompliance stating it was inadvertent. Failure to flow down requirements does not meet the criteria for “not knowing.” Making a business decision without requesting relief from the statute does not meet the criteria for “not willful.”

**Q5. How does the specialty metals restriction differ from the Buy-American Act?**

A5. The Buy American Act (BAA) ([41 U.S.C 10a through 10d](#)) and the specialty metals restriction ([10 U.S.C. 2533b](#)) are two separate laws implemented by two different regulations. They differ with regard to their scope, threshold, exceptions, and waiver authority.

The specialty metals restriction is applicable to all purchases noted in Answer 1, over the simplified acquisition and applies even if another agency, such as the GSA, is purchasing the item on behalf of the DoD. Unless an exception applies, it requires that all **100% of the specialty metals in end items or components of airplanes, missile and space systems, ships, tank and automotive items, weapon systems, or ammunition be melted or produced in the U.S. or a qualifying country. It requires that any specialty metal (raw bar stock, wire rod, sheet, plate, etc.) bought by DoD or a prime contractor for delivery to DoD as an end item be melted or produced only in the U.S.**

With few exceptions, the BAA applies to all supplies or construction materials over the micro-purchase threshold for use in the U.S. The BAA requires application of a differential factor to the evaluated cost or price of supplies that are not domestic end products.

A two part test is used to define a domestic end product:

- (1) the end product must be manufactured in the U.S. and
- (2) the cost of all its domestically manufactured components must exceed 50% of the cost of all its components.

The BAA is applicable to the entire Federal Government. The BAA does not preclude foreign firms from competing for Federal contracts for supplies or construction materials. However the Act does require that an evaluation factor be placed on proposals offering end items other than domestic end items. For civilian agencies, this evaluation factor for supply contracts is 6% if the lowest domestic offeror is from a large business, or 12% if the lowest domestic offeror is from a small business. For the Department of Defense (DoD), the evaluation factor is 50%. The evaluation factor for construction material contracts is 6% for all agencies. For more information on the implementation of the BAA, see [FAR 25.1](#) for supplies and [FAR 25.2](#) for construction material.

In procurements that are subject to the WTO Government Purchase Agreement and other Free Trade Agreements, the BAA is waived for designated countries and for Free Trade Agreement countries (see [FAR 25.003](#)) and qualifying countries (see DFARS 225.003(9)). Applicability of the BAA is determined by the thresholds specified in the applicable trade agreement. The corresponding thresholds of the various trade agreements for purchases of supplies, services or construction material are in the Federal Acquisition Regulation (FAR) [25.402](#)

For DoD, additional implementation guidance is in the Defense Federal Acquisition Regulation Supplement (DFARS) at subparts [225.1](#) and [225.2](#). The contract clauses that apply are [252.225-7000](#) , [252.225-7001](#), [252.225-7035](#) and [252.225-7036](#). For construction, use the FAR clause [52.225-9](#). See [DFARS 225.11](#) for a list of all clauses relating to the BAA.

**Q6. Who is responsible for determining the applicability of the specialty metals restriction to specific procurement actions?**

A6. The application of the specialty metals restriction is determined for any procurement on a case-by-case basis by the contracting officer who prepares the solicitation's terms and conditions and awards the contract. The contractor and its suppliers are responsible for compliance with the specialty metals restrictions incorporated into the contract.

**Q7. Are contracting officers still permitted to continue to use withholdings of payment and conditional acceptance of noncompliant items on DoD contracts?**

A7. For contracts entered into on or after November 16, 2006, we cannot continue the practice of withholding payment while conditionally accepting noncompliant items. The one-time waiver (section 842(b) of the NDAA for FY2007) may be applicable in these cases if all of the requirements of that waiver are determined to be met, and the SAE or USD(AT&L) approves. Contracts that were entered into prior to November 16<sup>th</sup> are not precluded from continuing the practice, but can also apply the one-time waiver authority if all of the conditions are met.

**Q8. Are Domestic Non-Availability Determinations (DNADs) to the specialty metals restriction commonly granted?**

A8. No, waivers to the specialty metals restriction are not commonly granted, and as of the fiscal year 2008 NDAA, generally are unlikely to be approved. While the statute provides authority to the USD(AT&L) or a Secretary of a Military Department to approve a DNAD if it is determined that the specialty metal melted or produced in the United States cannot be acquired in satisfactory quality and sufficient quantity *and in the required form* as and when needed. In the required form refers to the form of mill products, such as bar, billet, wire, slab, plate or sheet, and in the grade appropriate for the production required.

Additionally, under the Defense Production Act (DPA), the Department of Defense has established a priority rating system for to ensure access to material from US suppliers. Under the Defense Priorities Allocation System (DPAS), a U.S. supplier must treat DPAS rated contracts expeditiously by providing material, either at the prime or subcontract level, ahead of other customers. As a result, the Department expects the use of the Availability exception to be rarely used.

**Q9. What is the definition of “Specialty Metals”?**

A9. The definition of specialty metals is contained in [DFARS 252.225-7008](#):

1. 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

2. Metal alloys consisting of –

- Nickel or iron-nickel alloys that contain a total of alloying metals other than nickel and iron in excess of 10 percent; or
- Cobalt alloys that contain a total of alloying metals other than cobalt and iron in excess of 10 percent;

3. Titanium and titanium alloys; or

4. Zirconium and zirconium base alloys

**Q10. If the first melting occurs in Korea, but the metal is melted again in the U.S., is it considered compliant?**

A.10 The foundry location where final smelting is accomplished establishes domesticity. For titanium, if sponge is shipped to the United States for final smelting into ingots or finished stock, it is compliant. If domestic steel is remelted overseas to create a different specialty metal, it is NOT compliant (unless the melting is done in a qualifying country and the end product to DoD is not the metal itself). If domestic steel is remelted overseas to produce a product of the same material (i.e. in a casting operation) it is not compliant unless the casting is incorporated into a commercially available off-the-shelf item or subsystem.

**Q11. I am a prime contractor preparing a proposal for DoD to deliver an airplane component for DoD. One or more of my suppliers state that their parts may not be compliant, (specialty metal melted or produced in the U.S. or a qualifying country). How do I apply the exceptions in DFARS?**

A11. If your delivered item is a commercial derivative military article, you can certify to the contracting officer in your proposal under the CDMA exception. However, this exception cannot be used in conjunction with the de minimis exception or the COTS exception.

If you are not going to propose reliance on the CDMA exception, you can layer the electronic components, COTS and de minimis exceptions, if any of these exceptions apply to the non-compliant parts. You are responsible for providing this information in your proposal so that the contracting officer will know specifically how you propose to comply with [DFARS 252.225-7009](#) or [252.225-7029](#). If you plan to rely on the COTS exception, be aware of the additional compliance requirements for fasteners, castings and forgings and high performance magnets that contain specialty metals.

If an alternative, compliant item is acceptable, you should consider using it, provided it meets all other contract requirements.

Only in the case where the specialty metals themselves are not available in the required form, should you request a non-availability exception. The availability exception requires you to demonstrate that compliant specialty metal of satisfactory quality and sufficient quantity, and in the required form, cannot be procured as and when needed. Compliant specialty metal means specialty metal melted or produced in the United States, or a qualifying country, or where the part is manufactured or produced in a qualifying country.

See [DFARS 225.225.7003-3\(b\)\(5\)](#) for information on DNADs.

**Q12. Where are the definitions for “assembly,” “commercial derivative military article,” “component,” “electronic component,” “end item,” “produce,” “high performance magnet,” “required form,” and “subsystem” in the DFARS?**

A12. These definitions are in [DFARS 225.7009](#).

**Q13. I am a contracting officer and I have reason to believe that one of my Contractors may be in violation of the specialty metals restriction. What should I do?**

A13. Steps to follow are:

- Determine if any exception listed in Q&A #3 applies, including the one-time waiver.
- Verify that the non-compliant item is indeed subject to the specialty metals restriction and ask the contractor to confirm the origin of the melted or produced specialty metal. You are not authorized to accept non-compliant supplies.
  - For contracts entered into on or after November 16, 2006, DoD cannot continue the practice of withholding payment while conditionally accepting noncompliant items. The one-time waiver ([section 842\(b\) of the NDA for FY 2007](#)) may be applicable in these cases if all of the requirements of that waiver are determined to be met, and the Senior Acquisition Executive or USD(AT&L) approves.
  - For contracts entered into prior to November 16, 2006, if the contractor will be providing an item that was produced, manufactured or assembled prior to the date of enactment (i.e., October 17, 2006), and final acceptance takes place after the date of enactment, but not later than September 30, 2010, the one-time waiver exception may be applicable. If the contractor will not be providing items that were produced, manufactured, or assembled prior to the date of enactment (October 17, 2006), the one-time waiver cannot be used, but you can use conditional acceptance and withhold.
- Notify your legal counsel.
- Suspend Government acceptance of non-compliant items in accordance with [FAR 46.407](#)
- Ensure DFAS suspends payment on non-compliant supplies pending resolution
- If feasible, require the contractor to replace the non-compliant parts with compliant ones.
- If no domestic item can be found, the contractor will have to determine if a substitute compliant item is available.
- You, the customer, must determine if the substitute item(s) are acceptable
- If justified, prepare a domestic non-availability determination (DNAD) request for signature prior to acceptance.

**Q14. Would the exercise of options or a new delivery order be considered a “new” or “old” contract?**

A14. The question as to whether a contract was entered into prior to November 16, 2006, should be determined based on the definition of “contract” in the FAR (see FAR 2.101 and FAR 43.103). Thus, bilateral modification of contracts would generally be considered “new” contracts where new scope is being added. Exercise of priced options, in-scope change orders, and funding of later program years of multi-year contracts would generally not be considered a “new” contract unless new scope was being added.

**Q15. I am a distributor of aerospace specialty metals and we supply many of the major defense contractors. We provide bar stock, plate, sheet, strip, wire, and tubing. This material is normally acquired from mill sources and /or other distributors which are all domestic. Are any of the following situations considered compliant with the specialty metals restriction?**

- a. Material melted in Korea and finished in a U.S. mill ?**
- b. Material melted and finished in Korea?**
- c. Material melted in France and finished in a U.S. mill?**
- d. Material melted in France and finished in France?**

**A15.**

Both a. and b. are not compliant. The pertinent issue here is whether the SM was "melted or produced" in the US or in a qualifying country. Specialty metal melted in Korea would not be considered compliant under the specialty metal restriction (unless another exception applied).

Material melted in France is compliant, as long as it is not being delivered to the Government as an end product.

Material melted and manufactured in France is compliant, as long as it is not being delivered to the Government as the end product.

**Q16. I am a contracting officer procuring military aircraft containing specialty metals. There are numerous incidental specialty metal items such as nuts, bolts, springs, etc. that are used in the assembly of the aircraft. These incidental items containing specialty metals represent a small dollar percentage to the overall contract price. The contractor has indicated that he can get these incidental items from a source that is neither a US nor a “qualifying country” source much more cheaply than he can from a US or qualifying country supplier. The contractor has even offered not to charge the Government for these items if he can buy them from this “non-qualifying country” supplier because he would be more competitive. Since**

**the contractor is not charging the Government for these items which contain specialty metals, and therefore we are not using funds made available to the US DoD to purchase them, can I accept the aircraft containing these items?**

A16. No, the Government cannot accept the aircraft unless the specialty metal is not available in the U.S. or unless you deem that an exception (see Q. and A. 3) applies because the Government cannot accept “free” items from contractors. However, there are several exceptions that may be applicable. For example, there is an exception that applies to fasteners that are incorporated into commercial off-the-shelf items, or if the fastener manufacturer certifies that it will purchase, during the relevant calendar year, an amount of domestically melted specialty metal in the required for use in the production of such fasteners for sale to the Department of Defense and other customers that is not less than 50% of the total amount of the specialty metal that it will purchase to carry out the production of such fasteners.

Another example is the de minimis exception. The Secretaries of the military department, and the Under Secretary of Defense for Acquisition, Technology and Logistics, can accept delivery of an item containing specialty metals that were not melted in the U.S. if the total amount of noncompliant specialty metals in the end product does not exceed 2% of the total weight of specialty metals in the item. (This exception does not apply to high performance magnets).

If the noncompliant specialty metal is incorporated in an electronic component, there is also an exception that may apply. See the definition of electronic component at DFARS 225.7009.

**Q17. I have searched extensively for a domestic supplier or a supplier from a qualifying country for a particular part containing specialty metal. I cannot find a compliant source. Who should I contact?**

A17. If you are a prime contractor, you should contact the Government contracting officer responsible for this procurement. If you are a subcontractor, you should contact your prime contractor and provide your market research. Your prime contractor should contact the contracting officer for the DoD contract.

Please be aware that the Specialty Steel Industry of North America has established a hotline for specialty metals and titanium buyers interested in finding domestic sources. You can contact this site for more information – [www.ssina.com](http://www.ssina.com).

**Q18. I represent a foreign company from a “qualifying country” listed in [DFARS 225.872-1](#), who manufactures or assembles a product that incorporates specialty metal for producing one of the following: aircraft, tank, missile, ammunition, ship, or weapons. I would like to submit a proposal in response to a DoD solicitation for which my product meets the specifications or performance criteria. The DoD solicitation includes, [DFARS 252.225-7009](#). My product has some parts or assemblies that contain specialty metal melted in a non-qualifying country. Is my product compliant under the specialty metals restriction of 10 U.S.C. 2533b and do I qualify to be a subcontractor?**

A18. Yes. If you are from a “qualifying country” and manufacture a product contained in aircraft, tanks, missiles, ammunition, ships, or weapons, then your product is considered compliant under [DFARS 225.7003\(n\)](#) and may use “non-qualifying country” sources for raw material or components of your product and still meet the requirements of [DFARS 252.225-7009](#) as long as the specialty metals are either melted or produced in a qualifying country, or the part or assembly is manufactured/assembled in a qualifying country.

**Q19. I understand that specialty metals waivers, referred to as DNADs, have been approved by the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L))for circuit card assemblies and fasteners. Is this true and can all suppliers rely on them?**

A19. In 2007, several domestic non-availability determinations were approved by the USD(AT&L). These include DNADs for lids and leads in circuit card assemblies, fasteners, needle roller bearings and specific Caterpillar diesel engine parts, see Note below. These DNADs expired for purposes of reliance in new contracts on July 26, 2008. If your contract was awarded prior to that date, and the contracting officer awarded the contract based on reliance on one of more of those DNADs, you can continue to rely on the DNAD(s) for performance under your contract. But for contracts or new procurement actions awarded after that date, use of these DNADs have been cancelled. Cancellation of these DNADs is based on the language in section 804(h) in the fiscal year 2008 National Defense Authorization Act, and based on the new definition of “in the required form” which makes the use of renewing these DNADs difficult to support.

Note:

On January 4, 2007, the USD(AT&L) approved a broad DNAD for [lids and leads in populated circuit card assemblies](#). This waiver was extended to contracts issued pursuant to 10 U.S.C. 2533a on February 7, 2007.

On April 10, 2007, the USD(AT&L) approved a DNAD for [fasteners](#) in Federal Supply Classes (FSC) 5305, 5306, 5307, 5310, and 5325.

On June 7, 2007, the USD(AT&L) approved a DNAD for [needle roller bearings](#) within NAICS 332991.

On October 24, 2007, the USD(AT&L) approved a DNAD for [a specific list of parts in COTS engines produced by Caterpillar](#).

**Q20. To comply with my weapon system contract, can any of my subcontractors purchase components that include specialty metals melted or assembled outside the United States?**

A20. Under [DFARS 252.225-7009](#), subcontractor purchases of specialty metals under a DoD prime contract for any of the six products listed in Answer 1 have the same restrictions, at every tier, as the prime contractor. (See the qualifying country exception in [DFARS 252.225-7009\(c\)\(4\)](#)).

**Q21. I am a U.S. manufacturer of desk top and laptop computers in the U.S. I would like to submit a proposal in response to a DoD solicitation for which my product meets the specifications or performance criteria. The prime contract is not acquiring an end item of the six types (aircraft, ship, etc). I think my product includes specialty metals that were not melted in the US. Can my company submit a proposal for this procurement?**

A21. Since the prime contract is not acquiring one of the six major product categories listed in Answer 1, the specialty metals restriction does not apply to the contract or your product.

**Q22. I am a foreign company from a “qualifying country” who manufactures a product that incorporates specialty metal for use in producing something OTHER THAN the following: aircraft, tank, missile, ammunition, ship, or weapons. I would like to submit a proposal in response to a DoD solicitation for which my product meets the specifications or performance criteria. My product has some specialty metal components that were not melted in the US or a “qualifying country”. Can my firm submit a proposal for this procurement?**

A22. Your item does not have to comply with the specialty metals restriction because the prime contract is not for one of the six types of end items or components listed in the statute and you are not providing specialty metals (raw materials such as ingot or bar stock) to the DoD or prime contractor for delivery to the DOD. Please note that under the Buy American Act, 21 of the 22 qualifying countries have blanket public interest exceptions to the Buy American Act and as such, products from these 21 countries are treated as if they were domestic. Items from Austria are reviewed on a case-by-case basis under the Buy American Act.

**Q23. I am a foreign company from a “qualifying country” who manufactures a product or component that incorporates specialty metal for use in producing aircraft. I would like to submit a proposal in response to a DoD solicitation for which my product meets the specifications and performance criteria. The DoD solicitation includes [DFARS 252.225-7009](#). My product has some specialty metals that were not melted in the US or a “qualifying country”. Can my firm submit a proposal for this procurement?**

A24. Yes, your item complies with the specialty metals restriction because it is manufactured or assembled in a qualifying country.

**Q25. I am suspicious that one of my competitors, who was awarded a DoD contract to manufacture an item containing specialty metals, is using a non-domestic source for some of his specialty metals. Who can I notify about this?**

A25. You should notify the contracting officer responsible for this defense procurement. The Contracting Officer will investigate whether or not the item being acquired must comply with the specialty metals restriction and, if so, will investigate to ensure that the contractor is complying with the contract.

**Q26. I have been informed by one of my subcontractors that they may have delivered some aircraft components that are in breach of the specialty metals restriction. It could take several months to find out the extent of the breach, and with current market conditions and scarcity of specialty metal supplies, I will be unable to get compliant components for several months. This product is critical to US military operations; how should I proceed?**

A26. See the answer to [Qs and As 12 and 13](#) and -

- **Immediately** notify the Government contracting officer of the potential breach!
- Immediately conduct a review to determine the extent of the breach as soon as possible.
- In conjunction with the PCO, develop a recovery/correction plan and investigate whether the one-time waiver authority can be used in your situation. If the one time waiver authority is not an option, the alternatives available to DoD and to you are (1) to replace all non-compliant components once domestically sourced materials are available, (2) to obtain an exception as outlined in Answer 4 numbers 1 or 3 through 8, or (3) to obtain an availability exception as outlined in Answer 4, number 2.

**Q27. What is the difference between non-conforming parts and non-complaint parts?**

A27. Non-conforming parts are parts do not meet the performance specifications or technical requirements in the contract. Parts that are not in compliance with the terms and conditions of the contract are referred to as non-compliant.

An example of a non-compliant part is a foreign stainless steel wire screen used in an end item airplane. The wire screen may meet all performance specifications in the contract, but it does not meet the specialty metals requirements of 10 U.S.C. 2533b and [DFARS 252.225-7009](#), and therefore is a non-compliant part.

**Q28. [DFARS 225.7003](#) permits a qualifying country manufacturer to provide articles containing specialty metals to the DoD under the specialty metals restriction, however it does not restrict the qualifying country manufacturer's source of specialty metal, even permitting the manufacturer to use foreign metals from non-qualifying countries. But US companies may not procure specialty metals from non-qualifying countries. Why doesn't the exception for specialty metals from "qualifying countries in [DFARS 225.7003](#) restrict foreign companies in qualifying countries from providing foreign specialty metals from non-qualifying countries?**

A28. The exception for qualifying countries comes from the specialty metals restriction in the law ([10 U.S.C 2533b](#)), paragraph (d). This law allows DoD to procure specialty metals or items containing specialty metals manufactured in qualifying countries if the procurement will further agreements with foreign governments in which both such governments agree to remove barriers to purchases of supplies produced in the other country or services performed by sources in the other country; and where any such agreement with a foreign government complies with the requirements of section 36 of the Arms Export Control Act (22 U.S.C. 2776), where applicable.

DoD has negotiated Reciprocal Defense Procurement Memorandums of Understanding with 22 countries. These countries are considered to be qualifying countries. These agreements promote rationalization, standardization, and interoperability of defense equipment with allies and friendly governments. Each country waives their respective "buy national" restrictions and customs duties, and allows the other's contractors to participate, on a competitive basis, in their defense procurements without unfair discrimination.