

DFARS Procedures, Guidance, and Information

PGI 225—Foreign Acquisition

(Revised November 8, 2007)

PGI 225.70—AUTHORIZATION ACTS, APPROPRIATIONS ACTS, AND OTHER STATUTORY RESTRICTIONS ON FOREIGN ACQUISITION

PGI 225.7002 Restrictions on food, clothing, fabrics, specialty metals, and hand or measuring tools.

PGI 225.7002-1 Restrictions.

(a)(2)(A) The following are examples, not all-inclusive, of Federal Supply Classes that contain items of clothing:

(1) Clothing apparel (such as outerwear, headwear, underwear, nightwear, footwear, hosiery, or handwear) listed in Federal Supply Class 8405, 8410, 8415, 8420, 8425, 8450, or 8475.

(2) Footwear listed in Federal Supply Class 8430 or 8435.

(3) Hosiery, handwear, or other items of clothing apparel, such as belts and suspenders, listed in Federal Supply Class 8440 or 8445.

(4) Badges or insignia listed in Federal Supply Class 8455.

(B) The Federal Supply Classes listed in paragraph (a)(2)(A) of this subsection also contain items that are not clothing, such as—

(1) Visors;

(2) Kevlar helmets;

(3) Handbags; and

(4) Plastic identification tags.

(C) Each item should be individually analyzed to determine if it is clothing, rather than relying on the Federal Supply Class alone to make that determination.

(D) The fact that an item is excluded from the foreign source restriction of the Berry Amendment applicable to clothing does not preclude application of another Berry Amendment restriction in DFARS 225.7002-1 to the components of the item.

(E) Small arms protective inserts (SAPI plates) are an example of items added to, and not normally associated with, clothing. Therefore, SAPI plates are not covered

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under the Berry Amendment as clothing. However, fabrics used in the SAPI plate are still subject to the foreign source restrictions of the Berry Amendment. If the fabric used in the SAPI plate is a synthetic fabric or a coated synthetic fabric, the fibers and yarns used in the fabric are not covered by the Berry Amendment, because the fabric is a component of an end product that is not a textile product (see DFARS 225.7002-2(o)).

Example: A SAPI plate is compliant with the Berry Amendment if the synthetic fiber or yarn is obtained from foreign country X and woven into synthetic fabric in the United States, which is then incorporated into a SAPI plate manufactured in foreign country Y.

(b) Under Secretary of Defense (Acquisition, Technology, and Logistics) memorandum of June 1, 2006, Subject: Berry Amendment Compliance for Specialty Metals, provides guidance on dealing with specialty metal parts that are noncompliant with the requirements of the Berry Amendment (10 U.S.C. 2533a). Also see the DCMA interim instruction addressing noncompliance with the Preference for Domestic Specialty Metals clause, DFARS 252.225-7014, at <http://guidebook.dcmamil/225/instructions.htm>.

PGI 225.7002-2 Exceptions.

(b) *Domestic nonavailability determinations.*

(3) *Defense agencies.*

(A) A defense agency requesting a domestic nonavailability determination must submit the request, including the proposed determination, to—

Director, Defense Procurement and Acquisition Policy
ATTN: OUSD(AT&L)DPAP(CPIC)
3060 Defense Pentagon
Washington, DC 20301-3060.

(B) The Director, Defense Procurement and Acquisition Policy, will forward the request to the Under Secretary of Defense (Acquisition, Technology, and Logistics) as appropriate.

(C) If the domestic nonavailability determination is for the acquisition of titanium or a product containing titanium, the submission shall also include the associated congressional notification letters required by DFARS 225.7002-2(b)(4), for concurrent signature by the Under Secretary of Defense (Acquisition, Technology, and Logistics). The defense agency does not need to take any further action with regard to DFARS 225.7002-2(b)(4).

(4) *Army, Navy, and Air Force.*

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Send the copy of the congressional notification and the domestic nonavailability determination for the acquisition of titanium or a product containing titanium to—

Director, Defense Procurement and Acquisition Policy
ATTN: OUSD(AT&L)DPAP(CPIC)
3060 Defense Pentagon
Washington, DC 20301-3060.

(5) *Reciprocal use of domestic nonavailability determinations (DNADs).*

(A) The military departments should establish approval authority, policies, and procedures for the reciprocal use of DNADs. General requirements for broad application of DNADs are as follows:

(1) A class DNAD approved by the Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD(AT&L)) or the Secretary of a military department may be used by USD(AT&L) or another military department, provided the same rationale applies and similar circumstances are involved.

(2) DNADs should clearly establish—

(i) Whether the determination is limited or unlimited in duration; and

(ii) If application outside the approving military department is appropriate.

(3) Upon approval of a DNAD, if application outside the approving military department is appropriate, the approving department shall provide a copy of the DNAD, with information about the items covered and the duration of the determination, to DPAP/CPIC at the address provided in paragraph (b)(4) of this section.

(4) Before relying on an existing DNAD, contact the approving office for current guidance as follows:

(i) USD(AT&L): DPAP/CPIC, 703-697-9352.

(ii) Army: ASA/ALT, 703-604-7006.

(iii) Navy: DASN (Acquisition and Logistics Management), 703-614-9600.

(iv) Air Force: AQCK, 703-588-7040.

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(B) DNADs approved by USD(AT&L), that are currently available for reciprocal use, are listed at http://www.acq.osd.mil/dpap/cpic/ic/domestic_non-availability_determinations_dnads.html.

PGI 225.7002-3 Contract clauses.

(b) *Class Deviation 2006-00004, Restriction on Procurement of Specialty Metals, issued on December 6, 2006.*

(i) *Components and tiers.*

(A) *Components.*

(1) The term “component” is defined in the deviation to apply only to parts and assembled articles that are—

(i) Incorporated directly into the end product, meaning the aircraft, missile or space system, ship, tank or automotive item, weapon system, or ammunition (i.e., first-tier components); or

(ii) Incorporated directly into first-tier components (i.e., second-tier components).

(2) Other parts or assemblies are not components.

(3) Items that are not incorporated into the aircraft, missile or space system, ship, tank or automotive item, weapon system, or ammunition end product, such as factory test equipment and ground support equipment, are not components.

(B) *Tiers.* The term “tier” as used here does not apply to subcontractors in the supply chain. The tiers apply to assemblies of major systems in the six major product categories listed in paragraph (b) of the clause prescription of the deviation, and do not change from contract to contract. A component item may be purchased separately as a spare. In that case, it is an “end product” for that procurement, but its component tier status is determined based on its tier status in relation to the item in the covered six product categories where it will be used as a replacement. When the Government separately buys a first-tier component of an aircraft, the first-tier component is the end product of that procurement, and it is also a first-tier component of the aircraft. For example—

(1) An aircraft is Tier 0. Tier 1 assemblies are the first-level assemblies making up the aircraft. Tier 2 assemblies are the assemblies that go into the tier 1 assemblies. If a contractor is providing an item that the Government is buying at the tier 0, 1, or 2 level, it must be compliant at every sub-tier supplier level.

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(2) 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 be covered by the specialty metals restriction, even if purchased separately from the missile system. If the rocket motor contains a power supply (second-tier component), and the power supply was purchased as a separate line item, it would also be covered. If, however, a lower-level assembly or part (e.g., the printed circuit board contained within the rocket motor power supply) is purchased separately from the missile system (i.e., under a separate contract line item or a separate contract), the restriction does not apply.

(C) *Summary.* When the Government purchases—

(1) An aircraft, missile or space system, ship, tank or automotive item, weapon system, or ammunition (the six product categories), components and all parts and assemblies at all tiers must be compliant;

(2) First-tier components or second-tier components separately, such components, including all parts and assemblies at all tiers, must be compliant;

(3) Other parts or assemblies below the second tier separately (either a separate contract or separate line item), those parts and assemblies are not components and need not comply; or

(4) Items that are not incorporated into the end product, such as factory test equipment and ground support equipment, those items are not components and need not comply.

(ii) *Withholding.* Because this restriction now applies to the item containing the specialty metal, not just the specialty metal, the previous practice of withholding payment while conditionally accepting noncompliant items is not permissible for contracts entered into on or after November 16, 2006. The definition of “contract” with respect to this restriction is based on FAR 2.101 and FAR 43.103.

(iii) *Nonavailability.*

(A) *Fair and reasonable prices.* FAR 15.402 requires that contracting officers purchase supplies and services at fair and reasonable prices. Thus, contracting officers are experienced at determining whether any increase in contract price that results from providing compliant specialty metal is fair and reasonable, given the circumstances of the particular situation. In those cases where the contracting officer determines that the price would not be fair and reasonable, the Secretary of the military department concerned may use that information in determining whether the unreasonable price causes the compliant metal to be effectively “nonavailable.” Where these “reasonable” limits should be drawn is a case-by-case decision, keeping in mind that Congress would not have imposed the restriction unless they expected DoD to incur some additional cost.

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(B) *When needed.* A similar approach may be used to determine whether delays associated with incorporating compliant specialty metals into items being acquired results in the metals being effectively nonavailable.

(C) *Required form.* In determining whether specialty metal is available in the required form, consider the phrase “in the required form” to relate to specialty metal that is formed in some fashion into a part. For example, domestic specialty metals can be determined to be nonavailable in the form required if—

(1) Only bar stock is available, when the fastener industry needs wire rod;
or

(2) A turbine blade made predominantly of specialty metal is not available for an engine as and when needed.

(iv) *Commercially available electronic components.*

Example: A contractor is providing an aircraft as an end product, but purchases radio communication equipment for the aircraft from a subcontractor. The subcontractor is the producer of the radio communication equipment, buying some commercially available electronic components to assemble into the radio, as well as other components containing specialty metals. The radio communication equipment is a commercially available electronic component for which the value of the specialty metals melted or produced outside the United States, its outlying areas, or a qualifying country 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 radio manufacturer calculates the value of the specialty metal, because they are not produced by the radio manufacturer. 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 of the commercially available off-the-shelf electronic component.

PGI 225.7017 Restriction on Ballistic Missile Defense research, development, test, and evaluation.

PGI 225.7017-3 Exceptions.

(b) Before awarding a contract to a foreign entity for conduct of ballistic missile defense research, development, test, and evaluation (RDT&E), the head of the contracting activity must certify, in writing, that a U.S. firm cannot competently perform a contract for RDT&E at a price equal to or less than the price at which a foreign government or firm would perform the RDT&E. The contracting officer or source selection authority must make a determination that will be the basis for that certification, using the following procedures:

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- (i) The determination shall—
 - (A) Describe the contract effort;
 - (B) State the number of proposals solicited and received from both U.S. and foreign firms;
 - (C) Identify the proposed awardee and the amount of the contract;
 - (D) State that selection of the contractor was based on the evaluation factors contained in the solicitation, or the criteria contained in the broad agency announcement; and
 - (E) State that a U.S. firm cannot competently perform the effort at a price equal to, or less than, the price at which the foreign awardee would perform it.
- (ii) When either a broad agency announcement or program research and development announcement is used, or when the determination is otherwise not based on direct competition between foreign and domestic proposals, use one of the following approaches:
 - (A) The determination shall specifically explain its basis, include a description of the method used to determine the competency of U.S. firms, and describe the cost or price analysis performed.
 - (B) Alternately, the determination may contain—
 - (1) A finding, including the basis for such finding, that the proposal was submitted solely in response to the terms of a broad agency announcement, program research and development announcement, or other solicitation document without any technical guidance from the program office; and
 - (2) A finding, including the basis for such finding, that disclosure of the information in the proposal for the purpose of conducting a competitive acquisition is prohibited.
- (iii) Within 30 days after contract award, forward a copy of the certification and supporting documentation to the Missile Defense Agency, ATTN: MDA/DRI, 7100 Defense Pentagon, Washington, DC 20301-7100.