



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 225, and 252

[Docket DARS-2020-0035]

RIN 0750-AK94

Defense Federal Acquisition Regulation Supplement: Restriction on the Acquisition of Tantalum (DFARS Case 2020-D007)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Interim rule.

SUMMARY: DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2020 that prohibits the acquisition of tantalum metal and alloys from North Korea, China, Russia, and Iran.

DATES: Effective October 1, 2020.

Comments on the interim rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2020-D007, using any of the following methods:

- o *Federal eRulemaking Portal:* <http://www.regulations.gov>.

Search for "DFARS Case 2020-D007" under the heading "Enter keyword or ID" and selecting "Search." Select "Comment Now" and follow the instructions to submit a comment. Please include your name, company name (if any), and "DFARS Case 2020-D007" on any attached document.

- o *Email:* *osd.dfars@mail.mil*. Include DFARS Case 2020-D007 in the subject line of the message.

- o *Fax:* 571-372-6094.

- o *Mail:* Defense Acquisition Regulations System, Attn: Ms. Amy Williams, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is revising the DFARS to implement section 849 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92). Section 849 adds tantalum to the definition of

"covered materials" in 10 U.S.C. 2533c. With some exceptions, 10 U.S.C. 2533c prohibits the acquisition of any covered material melted or produced in any covered country (North Korea, China, Russia, or Iran), or any end item, manufactured in any covered country, that contains a covered material. "Covered material" also includes samarium-cobalt magnets, neodymium-iron-boron magnets, tungsten metal powder, and tungsten heavy alloy or any finished or semi-finished components containing tungsten heavy alloy.

II. Discussion and Analysis

This rule adds tantalum to the restriction at DFARS 225.7018, by amending the title of the section, adding "tantalum metal and alloys" to the definition of "covered material" at DFARS 225.7018-1, and including tantalum in the explanation of exceptions at DFARS 225.7018-3 paragraphs (c)(1)(ii) (exception for commercially available off-the-shelf (COTS) items inapplicable to a mill product that has not been incorporated into an end item, subsystem, assembly, or component) and (d)(1) (meaning of nonavailability of a covered material in the required form). Although the 10 U.S.C. 2533c provides that the exception to the restriction on tungsten for COTS items does not apply to a COTS item that is 50 percent or more tungsten by weight, DoD notes that section 849 does not add a similar condition with regard to tantalum metal and alloys.

In addition, a new paragraph (c) is added at DFARS 225.7018-2, Restriction, to explain that the restriction on production of tantalum metal and alloys, including the reduction of tantalum chemicals such as oxides, chlorides, or potassium salts, to metal powder and all subsequent phases of production of tantalum metal and alloys, such as consolidation of metal powders.

These same changes are also incorporated in the clause at 252.225-7052, now titled "Restriction on the Acquisition of Certain Magnets, Tantalum, and Tungsten," and there are conforming changes to the clause title at DFARS 212.301(f)(ix)(FF) and 225.7018-5. There are no changes to the procedures for nonavailability determinations.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule amends the clause at DFARS 252.225-7052, Restriction on Acquisition of Certain High Performance Magnets and Tungsten, to apply to tantalum. DFARS 252.225-7052 does not apply to acquisitions below the simplified acquisition threshold, in accordance with 41 U.S.C. 1905, but applies to contracts for the acquisition of commercial items, except as provided in the statute at 10 U.S.C. 2533c(c)(3).

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations. DoD does not intend to make that determination. Therefore, this rule will not apply below the simplified acquisition threshold.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including COTS Items

10 U.S.C. 2375 governs the applicability of laws to contracts and subcontracts for the acquisition of commercial items, including COTS items, and is intended to limit the applicability of laws to contracts and subcontracts for the acquisition of commercial items, including COTS items. 10 U.S.C. 2375 provides that if a provision of law contains criminal or civil penalties, or if the Under Secretary of Defense (Acquisition and

Sustainment) (USD(A&S)) makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items. Due to delegations of authority from USD(A&S), the Principal Director, DPC, is the appropriate authority to make this determination. DoD has made that determination to apply this rule to the acquisition of commercial items, including COTS items, if otherwise applicable.

10 U.S.C. 2533c specifically exempts the acquisition of an end item that is a COTS item, other than a COTS item that is 50 percent or more tungsten by weight, or a mill product that has not been incorporated into an end item, subsystem, assembly, or component. Although 10 U.S.C. 2533c does not refer to 10 U.S.C. 2375 and does not provide that, notwithstanding that statute, it shall be applicable to contracts for the procurement of commercial items, it is the clear intent of 10 U.S.C. 2533c to cover commercial items other than those specifically exempted. Therefore, DoD has signed a determination of applicability to acquisitions of commercial items, except as exempted in the statute.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory

alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not subject to the requirements of E.O. 13771, because this rule is issued with respect to a national security function of the United States.

VI. Regulatory Flexibility Act

DoD does not expect this interim rule to 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. However, an initial regulatory flexibility analysis (IRFA) has been performed and is summarized as follows:

This rule is required to implement section 849 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020.

The objective of the rule is to prohibit acquisition of tantalum metal and alloys from North Korea, China, Russia, or Iran.

Based on Federal Procurement Data System data for FY 2017, DoD awarded in the United States 13,400 contracts that exceeded \$250,000 and were for the acquisition of manufactured end products, excluding those categories that could not include tantalum (such as clothing and fabrics, books, or lumber products). These contracts were awarded to 5,073 unique entities, of which 3,074 were small entities. It is not known what percentage of these awards involved tantalum, or what lesser percentage might involve tantalum from China, North Korea, Russia, or Iran.

There are no projected reporting or recordkeeping requirements. However, there may be compliance costs to track the origin of covered materials.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

DoD is exempting acquisitions equal to or less than the simplified acquisition threshold in accordance with 41 U.S.C. 1905. DoD was unable to identify any other alternatives that would reduce burden on small businesses and still meet the objectives of the statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (DFARS Case 2020-D007), in correspondence.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

VIII. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. Section 849 adds tantalum to the other covered materials prohibited by 10 U.S.C. 2533c if melted or produced in any covered country or any end item that contains a covered material manufactured in any covered country. Covered countries are North Korea, China, Russia, and Iran.

Implementation of this prohibition is urgent, because the law was effective upon enactment (December 2019) and decreasing our

dependence on covered materials that originate in covered countries is a matter of national security. It is a matter of national security to reduce U.S. dependence on the covered countries specified in section 849, because tantalum is an important element in the supply chain for production of both U.S. military systems, and nonmilitary systems that DoD uses. A shortage of supply of these covered materials would therefore hinder maintenance and replacement of many DoD military systems, and would also have a negative impact on the broader industrial base upon which DoD depends. Restricting acquisition from China and the other covered countries will promote growth in domestic capability and reduce dependence on foreign sources that are not our allies.

However, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), DoD will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 212, 225, and 252

Government procurement.

Jennifer D. Johnson,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 225, and 252 are amended as follows:

Authority: 41 U.S. C. 1303 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

2. Amend section 212.301 by revising paragraph (f) (ix) (FF) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(ix) * * *

(FF) Use the clause at 252.225-7052, Restriction on the Acquisition of Certain Magnets, Tantalum, and Tungsten, as prescribed in 225.7018-5.

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PART 225—FOREIGN ACQUISITION

3. Amend section 225.7002-2 by revising paragraph (b) (2) to read as follows:

225.7002-2 Exceptions.

* * * * *

(b) * * *

(2) The supporting documentation for the determination shall include an analysis and written certification by the requiring activity, with specificity, why alternatives that would not require a domestic nonavailability determination are unacceptable.

* * * * *

4. Amend section 225.7003-3 by revising paragraph (b) (5) (i) to read as follows:

225.7003-3 Exceptions.

* * * * *

(b) * * *

(5) * * *

(i) The Secretary of the military department concerned is authorized, without power of redelegation, to make a domestic nonavailability determination that applies to only one contract. The supporting documentation for the determination shall include an analysis and written documentation by the requiring activity, with specificity, why alternatives that would not require a domestic nonavailability determination are unacceptable.

* * * * *

5. Revise the section 225.7018 heading to read as follows:

225.7018 Restriction on acquisition of certain magnets, tantalum, and tungsten.

* * * * *

6. In section 225.7018-1 revise the definition of "Covered material" to read as follows:

225.7018-1 Definitions.

* * * * *

Covered material means—

(1) Samarium-cobalt magnets;

- (2) Neodymium-iron-boron magnets;
- (3) Tantalum metal and alloys;
- (4) Tungsten metal powder; and
- (5) Tungsten heavy alloy or any finished or semi-finished component containing tungsten heavy alloy.

* * * * *

- 7. Amend 225.7018-2 by
 - a. Redesignating paragraph (c) as paragraph (d); and
 - b. Adding a new paragraph (c).

The addition reads as follows:

225.7018-2 Restriction.

* * * * *

(c) For production of tantalum metal and alloys, this restriction includes the reduction of tantalum chemicals such as oxides, chlorides, or potassium salts, to metal powder and all subsequent phases of production of tantalum metal and alloys, such as consolidation of metal powders.

* * * * *

225.7018-3 [Amended]

- 8. Amend section 225.7018-3 by
 - a. In (c) (1) (ii) removing "tungsten heavy alloy mill product" and adding "tantalum metal, tantalum alloy, or tungsten heavy alloy mill product" in its place;

- b. In (c) (2) removing "PGI 225.7018-3(c) (1) (ii)" and adding "PGI 225.7018-3(c) (2)" in its place;
 - c. In paragraph (d) introductory text removing "concerned," and adding "concerned, as specified in 225.7018-4," in its place;
and
 - d. In paragraph (d) (1) removing "tungsten heavy alloy" and adding "tantalum metal, tantalum alloy, or tungsten heavy alloy" in its place.
9. Amend section 225.7018-4 by—
- a. Revising paragraph (a) (2); and
 - b. In paragraph (a) (3) (ii) removing "individual waivers" and adding "individual nonavailability determinations" in its place.

The revision reads as follows:

225.7018-4 Nonavailability determination.

(a) * * *

(2) The supporting documentation for the determination shall include an analysis and written certification by the requiring activity that describes, with specificity, why alternatives that would not require a nonavailability determination are unacceptable. The template for an individual nonavailability determination is available at PGI 225.7018-4 (a) (2).

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225.7018-5 [Amended]

10. Amend section 225.7018-5 by removing "Magnets and Tungsten" and adding "Magnets, Tantalum, and Tungsten" in its place.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

11. Amend section 252.225-7052 by—

- a. Revising the section heading, clause title, and clause date;
- b. In paragraph (a) revising the definition of "Covered material"
- c. Redesignating paragraph (b) (3) as paragraph (b) (4);
- d. Adding new paragraph (b) (3);
- e. In paragraphs (c) (1) (i) (B) and (c) (2) (i) removing "tungsten heavy alloy" and adding "tantalum metal, tantalum alloy, or tungsten heavy alloy" in both places; and
- f. Adding a paragraph heading to paragraph (d).

The revisions and additions read as follows:

252.225-7052 Restriction on the Acquisition of Certain Magnets, Tantalum, and Tungsten.

* * * * *

RESTRICTION ON THE ACQUISITION OF CERTAIN MAGNETS, TANTALUM, AND TUNGSTEN (OCT 2020)

(a) * * *

Covered material means—

- (1) Samarium-cobalt magnets;
- (2) Neodymium-iron-boron magnets;
- (3) Tantalum metal and alloys;]

(4) Tungsten metal powder; and

(5) Tungsten heavy alloy or any finished or semi-finished component containing tungsten heavy alloy.

* * * * *

(b) * * *

(3) For production of tantalum metal and alloys, this restriction includes the reduction of tantalum chemicals such as oxides, chlorides, or potassium salts, to metal powder and all subsequent phases of production of tantalum metal and alloys, such as consolidation of metal powders.

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(d) *Subcontracts.* * * *

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