DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 252

RIN 0750–AH78

Defense Federal Acquisition Regulation Supplement; Specialty Metals—Definition of ''Produce'' (DFARS Case 2012–D041)

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

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to revise the definition of ''produce'' as it applies to specialty metals. The National Defense Authorization Act for Fiscal Year 2011 directed DoD to review the definition of ''produce'' to ensure its compliance with the statutory restrictions on specialty metals and to determine if a revision to the current rule was necessary and appropriate.

DATES: *Comment Date:* Comments on the proposed rule should be submitted in writing to the address shown below on or before September 24, 2012, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2012–D041, using any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by entering ''DFARS Case 2012–D041'' under the heading ''Enter keyword or ID'' and selecting ''Search.'' Select the link ''Submit a Comment'' that corresponds with ''DFARS Case 2012–D041.'' Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''DFARS Case 2012–D041'' on your attached document.
- *Email: dfars@osd.mil.* Include DFARS Case 2012–D041 in the subject line of the message.
- *Fax:* 571–372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Amy Williams, OUSD(AT&L)DPAP/DARS, Room 3B855, 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, Defense Acquisition Regulations System, OUSD (AT&L) DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301–3060. Telephone 571–372–6106; facsimile 571–372–6101. Please cite DFARS Case 2012–D041.

SUPPLEMENTARY INFORMATION:

I. Background

As required by section 823 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2011 (Pub. L. 111–383), DoD sought comments in the **Federal Register** (76 FR 18383) on July 25, 2011, regarding the definition of ''produce'' as it applies to the production of specialty metals. The final rule under DFARS Case 2008–D003 (74 FR 37626 on July 29, 2009) defined ''produce'' to mean ''the application of forces or processes to a specialty metal to create the desired physical properties through quenching or tempering of steel plate, gas atomization or sputtering of titanium, or final consolidation of non-melt derived titanium powder or titanium alloy powder.''

Seventeen sources submitted comments in response to the request for comments in the 2011 **Federal Register** notice, focusing almost exclusively on whether such processes as quenching and tempering should continue to be considered as production of thin specialty metal steel armor plate. Some of the information provided was proprietary. DoD has reviewed and analyzed the comments received in response to the **Federal Register** notice. In addition, DoD considered current technologies for production of specialty metals other than titanium and analyzed the impact any change in the definition would have on DoD's ability to meet its mission requirements. As a result, DoD is proposing to amend the definition of ''produce'' to eliminate the phrase ''quenching and tempering'' of armor steel plate, and to expand the application of the other listed technologies, currently restricted just to titanium and titanium alloys, to any specialty metal that could be formed by such technologies.

II. Discussion and Analysis of Comments

A. General

Two of seventeen respondents supported the current definition, and the other fifteen respondents opposed the current definition of ''produce,'' because it includes processes in addition to melting regarding the production of steel armor plate, but they acknowledged that other processes are appropriate to the definition of ''produce'' for other specialty metals.

B. Quenching or tempering of steel plate

1. Berry Amendment

Comment: The majority of respondents contended that the current definition of ''produce'' is contrary to the Berry Amendment. Prior to enactment of 10 U.S.C. 2533b, the restriction on specialty metals was part of the domestic source restriction legislation commonly known as the Berry Amendment, included in annual defense appropriations act restrictions since 1973, and was eventually codified (with certain modifications) by section 832 of the NDAA for FY 2002 at 10 U.S.C. 2533a. In the NDAA for FY 2007, Congress deleted the specialty metals restrictions from 10 U.S.C. 2533a and created a new section at 10 U.S.C. 2533b to set forth the restrictions on specialty metals.

The respondents contended that, since the Berry Amendment required products to be wholly manufactured in the United States, the specialty metals restrictions should be equally restrictive. They stated that ''melted or produced'' means ''melted'' in the case of steel armor plate. These respondents averred that, although the legislation uses ''melted or produced,'' it was not intended to weaken the requirement. However, some respondents did cite the report accompanying the Senate version of the bill, which indicated the intent to allow some flexibility in obtaining critical materials.

DoD Response: The law has never included a definition of ''produce'' regarding the requirement to acquire domestic specialty metals. When Congress created the new provisions on specialty metals in 10 U.S.C. 2533b, it expressly eliminated the prior restrictions on specialty metals in 10 U.S.C. 2533a and created new provisions regarding specialty metals at 10 U.S.C. 2533b, one of which was the phrase ''melted or produced.'' DoD interprets this new phrase ''melted or produced'' as clearly permitting processes in addition to melting for the creation of specialty metals. One of the reasons for removing specialty metals from the rest of the Berry Amendment restrictions and enacting 10 U.S.C. 2533b was the need to differentiate the statutory restrictions for specialty metals from the statutory restrictions on other items covered by the Berry Amendment. The statement in the Senate report that 10 U.S.C. 2533b was

intended to provide flexibility in obtaining critical materials provides support for DoD's definition of ''produce'' which gave DoD critical access to thin-gauge armor steel plate that was quenched or tempered in the United States, regardless of where the steel was melted.

2. Former Secretary of Defense Melvin Laird Memorandum

Comment: Some respondents stated that the Laird Memorandum (November 20, 1972) used the term ''melted'' when the Secretary of Defense addressed DoD's implementation of the restriction in section 724 of the DoD Appropriations Act for Fiscal Year 1973 (Pub. L. 92–570) that added specialty metals to the Berry Amendment list of items that must, with some exceptions, be ''grown, reprocessed, reused, or produced in the United States.''

DoD Response: The comment is factually correct. The Laird memorandum represented the DoD implementation of the law as it existed at that time, which was upheld in the courts. However, the statute now uses the terms ''melted or produced,'' and it would be redundant to add the term ''produced'' unless it had a meaning different than ''melted.''

3. Acme of Precision Surgical v. Weinberger

Comment: According to some respondents, the U.S. District Court of the Eastern District of Pennsylvania, 580 F. Supp. 490, 504–07, concluded that there was a reasonable basis in law for DoD's requirement that ''all specialty metal products used in hardware by the military be formed from specialty metals melted in the United States.''

DoD Response: In Acme of Precision Surgical v. Weinberger, the plaintiff alleged that DoD violated the Buy American Act because the ''Buy American'' provisions required that all articles of ''specialty metals'' must be manufactured entirely in the United States, and not just ''melted'' in the United States. The court found on behalf of DoD, finding reasonable DoD's interpretation of the provisions as requiring only the melting in the United States of specialty metals rather than the performance in the United States of all processes associated with the manufacture of specialty metals. However, this decision was based on the law and implementing regulations as they existed at the time of the decision, not on the current statute and regulations.

4. Restriction on Acquisition of Carbon, Alloy, and Armor Steel Plate

Comment: Some respondents cited the additional restriction on armor steel plate in DFARS 252.225–7030, which requires armor plate to be ''melted and rolled in the United States or Canada'' to support their request to remove the terms ''quenching and tempering'' from the definition of ''produce.'' They cited the annual Defense appropriations acts that since 1972 have contained language that armor plate for DoD procurements must be ''melted and rolled in the United States or Canada.''

DoD Response: The Defense appropriations act restriction on the acquisition of steel plate as an end product for use in a Government-owned facility or a facility under the control of DoD is not pertinent to the interpretation of ''melted or produced'' for purposes of acquisition of specialty metals in accordance with 10 U.S.C. 2533b because 10 U.S.C. 2533b applies to manufactured products for all specialty metals in contrast to the DFARS clause restricting steel plate that is ''melted and rolled.''

5. The Federal Transit Administration (FTA) Buy America Restrictions, the American Recovery and Reinvestment Act of 2009 (ARRA), and the Customs and Border Protection Act

Comment: Several respondents cited other acts that restrict use of foreign iron, steel, and manufactured products in Federally funded projects to those ''produced in the United States.''

DoD Response: These acts are not germane to this definition, which is implementing 10 U.S.C. 2533b. The language and applicability of these statutes is very different from 10 U.S.C. 2533b. The FTA and Customs and Border Protection Act do not apply to DoD procurements. The ARRA only applies to construction material in acquisitions utilizing ARRA funds. Furthermore, the FTA and ARRA do not apply to specialty metals or armor steel plate but to iron and steel used in construction.

6. The Intent of Congress and Chevron USA, Inc. v. the National Resources Defense Council

Comment: The majority of respondents claimed that including quenching and tempering in the definition of ''produce'' for steel armor plate is against the intent of Congress. One respondent cited Chevron USA, Inc. v. the National Resources Defense Council (Chevron USA, Inc.) that concluded that agency regulations such as the DFARS should be subject to a two-part test that first considers the intent of Congress.

DoD Response: Chevron USA, Inc. applies only if the intent of Congress is not clear. DoD looks primarily to the language of the statutes enacted by Congress to determine the requirements of the law. Here, the statute does not define the term ''produce.'' As the court in Chevron USA, Inc. stated, ''if the statute is silent or ambiguous with respect to the specific issue,'' the question for the court is ''whether the agency's answer is based on a permissible construction of the statute.'' Committee reports and letters from individual or groups of representatives or senators are not law and, in any event, do not necessarily reflect the intent of the majority of Congress. Moreover, although the House of Representatives' version of the specialty metals provision could have been interpreted as specifically excluding quenching and tempering from the definition of ''produce,'' this version of the bill was not enacted. Finally, although section 823 requested a review of the definition by DoD, it did not direct a particular outcome of that review.

7. Sufficient Domestic Capacity

Comment: Many respondents stated that there is sufficient domestic capacity of armor steel plate melted, rolled, quenched, and tempered in the United States to meet DoD's demand and that the number of specialty metal steel manufacturers has increased since 2006.

DoD Response: One of the reasons for including quenching and tempering of armor steel plate in the definition of ''produce'' was an assessment that there was an insufficient amount of thin-gauge MIL–A grade steel armor to meet peak demand to satisfy critical need for Mine Resistant Ambush Protection (MRAP) vehicles for contingency operations. Since that time, the U.S. industrial base has grown (even with the current definition of ''produce''). In fact, both the number of specialty metal steel plate manufacturers and their overall production capacities have increased steadily since the current definition of ''produce'' was introduced. Further, some of the manufacturers that were previously sourcing specialty metals melted in Mexico for quenching and tempering in the United States, are now obtaining steel melted in Canada (which is a qualifying country and part of the national technology and industrial base). DoD's assessment is that there is now sufficient capacity to meet DoD requirements, if DoD were to remove ''quenching and tempering'' from the definition of ''produce.''

8. Provide Protection and an Incentive to U.S. Manufacturers and Create Jobs

Comment: Many respondents addressed the need to protect and incentivize U.S. industry and to create U.S. jobs. Some respondents stated that the current definition encourages the use of foreign metals, while discouraging investment in domestic industry. These respondents also stated that excluding quenching and tempering processes would provide a more financially secure market and provide an incentive for U.S. manufacturers to innovate. Many respondents indicated that changing the definition would increase specialty metal steel production and increase the number of jobs in the United States.

DoD Response: Melting is only one stage in a multi-step process that is used to produce a product with properties that meet the requirements of an application, i.e., specifications. Quenching and tempering are not considered as ''low-value finishing processes'' (see preamble to final rule under DFARS Case 2008–D003, 74 FR 37630, July 29, 2009). The proposed change to the definition of ''produced'' may provide a more financially secure market to large specialty metals steel manufacturers, but the large, complex, and highly segmented specialty metal industry has many other stakeholders. The specialty steel industry appears to be thriving. Therefore, although not required by the law, for the reasons stated in section II.B.7. of this preamble, DoD is proposing to eliminate quenching and tempering of steel armor plate from the definition of ''produce.''

9. Other Ways to Meet Shortages

Comment: While acknowledging DoD's critical need for armor steel plate for MRAP vehicles, a number of respondents suggested that DoD could have used other exceptions in the law, such as the domestic nonavailability exception or national security waiver to procure armor steel plate or use of the Defense Priorities and Allocation System (DPAS) to meet demands through domestic production.

DoD Response: The Defense Priorities and Allocation System is designed to provide priority production and shipment for ongoing production lines, but it does not increase overall production capacity when urgently needed. At the time of issuance of the final DFARS rule under DFARS Case 2008–D003, DoD considered the options of processing a domestic nonavailability determination or a national security exception, but found both options to be unsuitable (see 74 FR 37631).

10. Impact on Price

Comment: Several respondents stated that changing the definition to eliminate quenching and tempering would raise prices, because it would reduce competition. Another respondent claimed that changing the definition would not raise the price of specialty metal steel armor plate.

DoD Response: DoD considers that there are now sufficient sources of steel armor plate melted in the United States or Canada that a change to the definition would not seriously impact the level of competition, or the price of specialty metal steel armor plate.

C. Processes for Titanium Products

Comment: None of the respondents objected to production processes for titanium products such as gas atomization, sputtering, and powder consolidation production processes for titanium products in the definition of ''produce.''

DoD Response: The proposed rule expands the application of these newer technologies to any types of specialty metals that might utilize such processes in their production.

III. 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 not a significant regulatory action and, therefore, was not 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.

IV. Regulatory Flexibility Act

DoD does not expect this 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. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The proposed rule affects primarily producers of specialty metal steel armor plate, and manufacturers that supply steel armor plate that will be incorporated into end items to be acquired by DoD. Producers of specialty metals are generally large businesses. There is a high capitalization requirement to establish a business that can melt or produce specialty metals. The small business size standard for primary metal manufacturing ranges from 500 to 1,000 employees. All the specialty metals producers reviewed had more than 500 employees. There are numerous manufacturers of products containing specialty metals, either as prime contractors or subcontractors. DoD does not have the data to determine the total number of these manufacturers, or the number that are small businesses, because the Federal Procurement Data System only collects data on prime contractors and end items, not subcontractors and components of end items.

There are no projected reporting, recordkeeping, or other compliance requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules.

DoD did not identify any significant alternatives to the rule which would minimize any impact of the rule on small entities and still meet the requirements of the statute 10 U.S.C. 2533b.

DoD invites comments from small businesses 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 2012–D041), in correspondence.

V. 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).

List of Subjects in 48 CFR Part 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 252 is proposed to be amended as follows:

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

1. The authority citation for 48 CFR part 252 continues to read as follows:

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

252.212–7001 [Amended]

2. Section 252.212–7001 is amended—

a. By removing the clause date ''(JUN 2012)'' and adding ''(DATE)'' in its place;

b. In paragraph (b)(7), by removing the clause date ''(JUL 2009)'' and adding ''(DATE)'' in its place; and

c. In paragraph (b)(8), by removing the clause date ''(JUN 2012)'' and adding ''(DATE)'' in its place.

3. Section 252.225–7008 is amended—

a. By removing the clause date ''(JUL 2009)'' and adding ''(DATE)'' in its place; and

b. In paragraph (a), by removing the numerical designations (1) through (4) from the definitions and revising the definition of ''produce'' to read as follows:

252.225–7008 Restriction on Acquisition of Specialty Metals.

* * * * *

(a) * * *

Produce means the gas atomization, sputtering, or final consolidation of non-melt derived metal powders.

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4. Section 252.225–7009 is amended—

a. By removing the clause date ''(JUN 2012)'' and adding ''(DATE)'' in its place; and

b. In paragraph (a), by removing the numerical designations (1) through (14) from the definitions and revising the definition of ''produce'' to read as follows:

252.225–7009 Restriction on Acquisition of Certain Articles Containing Specialty Metals.

* * * * *

(a) * * *

Produce means the gas atomization, sputtering, or final consolidation of non-melt derived metal powders.

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252.244–7000 [Amended]

5. Section 252.244–7000 is amended by removing the clause date ''(JUN 2012)'' and adding ''(DATE)'' in its place and in paragraph (b), removing the clause date ''(JUN 2012)'' and adding ''(DATE)'' in its place.

[FR Doc. 2012–17590 Filed 7–23–12; 8:45 am]

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DEPARTMENT OF DEFENSE

48 CFR Parts 204, 212, and 252

RIN 0750–AH58

Defense Federal Acquisition Regulation Supplement: Ownership of Offeror (DFARS Case 2011–D044)

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

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to provide a provision for offerors, if owned or controlled by another business entity, to identify the Commercial and Government Entity (CAGE) code and legal name of that business entity.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before September 24, 2012, to be considered in the formation of the final rule.

ADDRESSES: Submit comments identified by DFARS Case 2011–D044, using any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting ''DFARS Case 2011–D044'' under the heading ''Enter keyword or ID'' and selecting ''Search.'' Select the link ''Submit a Comment'' that corresponds with ''DFARS Case 2011–D044.'' Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''DFARS Case 2011–D044'' on your attached document.
- *Email: dfars@osd.mil.* Include DFARS Case 2011–D044 in the subject line of the message.
- *Fax:* 571–372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Ms. Veronica Fallon, OUSD(AT&L)DPAP/DARS, Room 3B855, 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. Veronica Fallon, telephone 571–372–6087.

SUPPLEMENTARY INFORMATION:

I. Background

DoD proposes to collect the CAGE code and name from offerors, if owned or controlled by another business entity, in a new provision with an offeror's representations and certifications. The CAGE code is a five-character identification number used extensively within the Federal Government, and is administered by the Defense Logistics Information Service. A search feature for CAGE codes is available at *http://www.logisticsinformationservice.dla.mil/cage_welcome.asp.* CAGE codes for vendors located in the United States may be obtained via registration in the Central Contractor Registration (CCR) application, available at *http://www.acquisition.gov.* Additional information about CAGE code assignments is available at *https://www.fsd.gov/app/answers/detail/a_id/186.*

The ability to consistently, uniquely, and easily identify owners of offerors for DoD contractors is becoming increasingly required to support the implementation of business tools that provide insight into spending patterns for entire corporations. This new provision will—

- Enable the tracking of performance issues that affect the entire corporation;
- Provide insight for the deployed commander on contractor personnel in-theater;
- Support the Office of the Under Secretary of Defense for Acquisition, Technology and Logistics' preferred supplier program; and
- Facilitate Defense Procurement and Acquisition and Policy priorities for a common price negotiation and audit history tool.

This case requires that a provision be included in the annual representations and certifications completed in the Online Representations and Certifications Application (ORCA). The Defense Logistics Agency (DLA) will be able to access the ORCA data and use it to supplement the CAGE file maintained by its DLA Logistics Information Service.

DoD published a notice of public meeting in the **Federal Register** at 76 FR 64902 on October 19, 2011, with public comments due December 9, 2011. No public comments were received.

This rule requires offerors to represent that, if it is owned by another business entity, it has entered the CAGE code and name of that owner. As such, this rule proposes the following DFARS changes:

- Revise 204.1202, Solicitation provision and contract clause, to add the provision at 252.204–70XX, Ownership of Offeror;