

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
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May 24, 2016

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

Subject: Defense Federal Acquisition Regulation Supplement (DFARS) Case 2016-D010, Costs Related to Counterfeit Electronic Parts - CODSIA Case No. 2016-03

Dear Ms. Williams:

On behalf of the undersigned members of the Council of Defense and Space Industry Associations (CODSIA),¹ we offer the following comments to DFARS Case 2016-D010, Costs related to Counterfeit Electronic Parts, published in the *Federal Register* on March 25, 2016. As described herein, CODSIA supports the statute that DOD proposes to implement through this DFARS case. At the same time, we urge DOD to align the implementation of this rule with the other final and pending rulemakings on this topic in order to ensure an efficient and effective system of reducing the entry of counterfeit electronic parts into the DOD supply chain.

Introduction

The proposed rule is the fifth increment of acquisition rulemaking to implement Section 818 of the Fiscal Year (FY) 2012 National Defense Authorization Act (NDAA), Detection and Avoidance of Counterfeit Electronic Parts, modified later by Section 833 of the FY13 NDAA, Section 803 of the FY14 NDAA, Section 817 of the FY15 NDAA, and Section 885 of the FY16 NDAA.

While the incremental regulatory approach fostered by the annual revisions to the underlying statute has been challenging, we applaud the deliberate and thoughtful approach by the Department of Defense (DoD) to proceed with great care over a period of years to ensure the requirements are implemented with minimal disruptions to the DoD supply chain.

The implementation has been conducted through both FAR and DFARS cases, two of which have been finalized (Detection and Avoidance Systems and Quality requirements)

¹ At the suggestion of the Department of Defense, CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues. CODSIA consists of six associations – the Aerospace Industries Association, the American Council of Engineering Companies, the Information Technology Alliance for Public Sector, the National Defense Industrial Association, the Professional Services Council, and the U.S. Chamber of Commerce. CODSIA acts as an institutional focal point for coordination of its members' positions regarding policies, regulations, directives, and procedures that affect them. Combined these associations represent thousands of government contractors and subcontractors. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

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and two which are actively being processed and have yet to be completed (Trusted Sources and Reporting).² CODSIA has commented in depth on both outstanding regulatory cases. We also acknowledge that there is a sixth increment of rules (DFARS) to implement Section 818 in the regulatory pipeline to establish qualification requirements per 10 U.S.C 2319, but the timing of that case has not yet been revealed by the DoD.³ This proposed rule, the fifth increment, seeks comments on the implementation of Section 885(a) of the FY 2016 NDAA, Amendments Concerning Detection and Avoidance of Counterfeit Electronic Parts.⁴

Industry wholeheartedly supports the change to the statute to expand the conditional safe harbor from strict liability for costs to remedy damage resulting from the discovery of counterfeit electronic parts and suspect counterfeit electronic parts in end products delivered to the DoD. Prior to passage of Section 885, the conditional safe harbor was established only for government-furnished property, which did not capture the bulk of industry supply chains and was not an effective incentive for industry investment in systems, compliance tools and reporting structures to avail themselves of the safe harbor.

The most significant change in Section 885(a) expands the safe harbor established previously in DFARS 231.205-71, "Cost of remedy for use or inclusion of counterfeit electronic parts and suspect counterfeit electronic parts", by modifying the conditions governing exemption from unallowability of cost for rework and corrective action to add (1) acquisition from sources compliant with DFARS 252.246-70XX, Sources of Electronic Parts, mostly centered on the use of "trusted suppliers," a term in the process of being defined in a parallel rule-making being conducted concurrent with this case, and (2) discovery of counterfeit electronic parts and suspect counterfeit electronic parts as a triggering factor for the contracting officer (CO) notice requirement.

The background information for this proposed rule states that the final rules under this case will not be published until after the final rules in DFARS Case 2014-D005 addressing required sources for electronic parts for DoD contractors and subcontractors is complete. No mention of the disposition of the FAR case on Expanded Reporting is included, notwithstanding that case is also critical for contractors to understand how to fulfill the new obligations under the instant Section 885(a) implementation herein.

² DFARS Case 2014-D005, Detection and Avoidance of Counterfeit Electronic Parts –Further Implementation, published September 21, 2015 and FAR Case 2013-002, Expanded Reporting of Nonconforming Items, published June 10, 2014.

³ DFARS Case 2015-D020, DoD Use of Trusted Suppliers for Electronic Parts, date TBD

⁴ SEC. 885. AMENDMENTS CONCERNING DETECTION AND AVOIDANCE OF COUNTERFEIT ELECTRONIC PARTS.

(a) AMENDMENTS RELATED TO CONTRACTOR RESPONSIBILITIES.— Section 818(c)(2)(B) of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81; 10 U.S.C. 2302 note) is amended— (1) in clause (i), by inserting "electronic" after "avoid counterfeit"; (2) in clause (ii)— (A) by inserting "covered" after "provided to the"; and (B) by inserting "or were obtained by the covered contractor in accordance with regulations described in paragraph (3)" after "Regulation"; and (3) in clause (iii), by inserting "discovers the counterfeit electronic parts or suspect counterfeit electronic parts and" after "contractor".

(b) (section omitted)"

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The rule itself is brief, and does not add any new contract clauses, but instead revises the existing DFARS 231.205-71 policy as “Costs related to counterfeit electronic parts and suspect counterfeit electronic parts,” and identifies the essential elements for cost recovery as:

“(b)(1) The contractor has an operational system to detect and avoid counterfeit parts and suspect counterfeit electronic parts that has been reviewed and approved by DoD per 244.303, Contractor Purchasing System Reviews;

(b)(2) The counterfeit electronic parts or suspect counterfeit electronic parts are Government-furnished property as defined in FAR 45.101 or were obtained by the contractor in accordance with the clause at DFARS 252.246-70XX, Sources of Electronic Parts; and

(b)(3) Contractor-

- i. Discovers the counterfeit electronic part(s) or suspect counterfeit electronic part(s); and
- ii. Provides timely (within 60 days after the contractor becomes aware) notice to the cognizant contracting officer(s).”

Each of these 4 conditions contain one or more elements subject to definition or policy changes currently being considered by the DAR and FAR Councils on the case cited above following industry comments in 2014 and 2015. So while CODSIA strongly supports the changes implementing Section 885(a), we want to insure they are consistent with industry comments in the earlier rules, and have the following additional comments.

As in previous letters concerning Section 818 implementation, we also urge the Department to ensure that, upon finalizing the policy framework, the rules fit together with each other and align with other relevant procurement and contract administration policies in the most cost consistent and efficient way possible.

Comments

1. Cost Allowability Condition – Detection and Avoidance (D/A) system

While the rules on the elements of a D/A system and the Contractor Purchasing System (CPS) have been finalized, both systems are dependent on the forthcoming rules on the use of Trusted Suppliers and Timely Reporting as elements of compliance to the counterfeit electronic parts framework. When finalized, those rules may shape those policies and systems in ways not contemplated in this rulemaking. CODSIA recommends that where changes in final rules to the pending FAR and DFARS rules cause contractor or subcontractor D/A or CP systems to go out of alignment with any of the elements related to cost allowability herein, or their previously approved systems, the FAR and DAR Councils should adopt a time-out from compliance enforcement and allow contractors and subcontractors time to adjust those systems to any new or modified requirements impacting the safe harbor.

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The condition in the proposed (b)(1) uses the phrase “detect and avoid *counterfeit parts* and suspect counterfeit electronic parts” (emphasis added) and omits the word “electronic” from the first phrase even though the rest of the proposed rule cites “counterfeit electronic parts” throughout and in the clauses at 252.244-7001(c)(19-21), Contractor Purchasing System Administration, and 252.246-7007, Contractor Counterfeit Electronic Part Detection and Avoidance System. The underlying statutes refer to Counterfeit Electronic Parts (emphasis added). The omission of the word “electronic” indirectly broadens the scope of counterfeit parts that the D/A system is required to identify to fulfill the cost allowability condition, so CODSIA recommends that the DAR Council address that gap by adding “electronic” after “counterfeit” everywhere it appears before finalizing this rule.

2. Cost Allowability Condition – Sourcing of Electronic Parts

The cost allowability condition at (b)(2) requires that any counterfeit electronic parts or suspect counterfeit electronic parts discovered in the supply chain either be provided to industry as government property or be obtained by industry per the pending DFARS clause 252.246-70XX, Sources of Electronic Parts (hereafter 70XX). Among other things, the proposed 70XX clause defines suppliers variously as “Trusted” or “Non-Trusted” depending on a variety of factors, and the term “Trusted Supplier” is cross-referenced with the definitions in 252.246-7007, Contractor Counterfeit Electronic Part Detection and Avoidance System.

Insofar as the proposed 231.205-71 conditions the safe harbor on parts acquired in compliance with the proposed 70XX clause, that clause appears to identify 3 distinct categories, with accompanying conditions, of “trusted suppliers” of electronic parts:

- a. Those identified as “trusted”, including Original Manufacturers (OM), OM authorized dealers and suppliers acquiring from OM’s or authorized OM dealers in 70XX(b)(1);
- b. Those categorized through 70XX(b)(2) tasking as “trustworthy” for the acquisition of electronic parts no longer in production or currently available in stock from OM’s, but dependent on meeting additional conditions; and
- c. Those that are “non-trusted” in 70XX(d), but whose parts are capable of being transformed into “trusted” based on the contractor or subcontractor conducting additional quality assurance and assorted compliance and authentication activities.

Each category of sources identified in the 70XX clause has its own unique set of qualities and conditions needed to meet the safe harbor in the proposed policy. For example, a “trustworthy” supplier must meet several additional conditions to be compliant including using established industry counterfeit prevention standards to identify risks (the definition in 7007 uses “DoD-adopted,” which prior CODSIA comments highlighted as needing clarity), DoD review and audit of contractor “selection” processes and the assumption of responsibility by a contractor for authenticity of parts acquired under such conditions.

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It is reasonable to conclude that the DoD “review and audit” process may be satisfied through the Contractor Purchasing System Review process, but it is unclear what constitutes a contractor “assumption” of responsibility for authenticity. Neither the existing 205-71 policy nor the proposed 205-71 policy herein contains language relevant to any formal offeror representation of authenticity. Such examples of differing interpretations about where the extant Counterfeit Electronics Parts regulatory cases are still in flux.

Considering how linked the pending FAR and DFARS rules are with the requirements in the proposed 231.205-71 policy case, and how previous CODSIA comments have identified inconsistencies in the term “trusted supplier,” DoD should clarify and/or confirm that the safe harbor condition based on acquiring parts in accordance with the 70XX clause will be broadly construed and available where contractors acquire from any of the categories of suppliers defined in the proposed version of the 70XX clause. This is critical where the terms “trustworthy” or “non-trusted” may be perceived by CO’s to imply a standard inferior to that of “trusted supplier” or conclude that use of such sources could prevent contractors from availing themselves of the safe harbor.

3. Cost Allowability Condition – Discovery, Timely Notice, and Awareness

The safe harbor is further conditioned on discovery by the contractor of counterfeit electronic parts or suspect counterfeit electronic parts and notice to the relevant CO within 60 days after such discovery.

Our previous CODSIA letters to the open FAR and DFARS cases referenced above explore these issues at great length and we will not readdress them here, except to state again that the DAR and FAR Councils need to complete those outstanding cases, establish an effective process and for CO’s to be able to fairly and promptly adjudicate claims related to the safe harbor conditions.

Conclusion

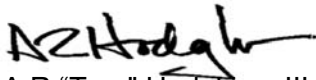
CODSIA associations strongly support the implementation of Section 885(a) as consistent with a risk-based framework designed to capture counterfeits and with creating and incentivizing a private sector infrastructure to protect the DoD supply chain.

Given that the safe harbor from strict liability contains four very specific conditions dependent on the yet to be concluded results of an extensive comment and rule-making process regarding counterfeit electronic parts and suspect counterfeit electronic parts over a period of years, it is critically important for industry and DoD to get as much clarity as possible in this rulemaking in conjunction with finalizing the other outstanding regulations. CODSIA urges the DAR Council in this case to consider these industry comments in context with the open cases and align all three open cases to create a safe harbor that is efficient and complementary to the goal of building a risk based framework to reduce the risk of counterfeit parts from entering the DoD supply chain.

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We appreciate the opportunity to comment on the rule in advance of its final publication, and offer our availability to answer any questions you may have regarding these comments. Please contact David Drabkin, CODSIA Administrator, at codsia@codsia.org for more information.

Respectfully submitted,



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