

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
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October 3, 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-D013,
Amendments Related to Sources of Electronic Parts

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-D013, Amendments Related to Sources of Electronic Parts, published in the *Federal Register* on August 2, 2016. The proposed rule is the sixth 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. Four of those cases have been finalized, with the instant case out for comment and the FAR case on Expanded Reporting currently on hold at the FAR Council.²

We note that there is a seventh increment of rule-making to implement Section 818 that will attempt to establish DoD qualification requirements for electronic parts or parts suppliers per 10 U.S.C. 2319 which may further inform some of industry concerns expressed here with qualifying contractor sources and DoD approval authorities and processes, but that case has not yet been published.³

Industry has commented in depth on all of the previous regulatory cases. As in the previous letters to the FAR and DAR Council related to implementing Section 818, industry appreciates the approach taken by DoD to ensure that the requirements are implemented with minimal disruptions to the DoD supply chain. Industry understands the risks associated with counterfeit parts and is committed to establishing effective mitigation practices throughout the DoD supply chain. We again urge the Department to ensure that, upon finalizing the electronic counterfeit parts policy framework, the rules align with the other relevant procurement and contract administration policies in the most efficient way possible.

Introduction

The proposed rulemaking, Amendments Related to Sources of Electronic Parts, seeks to implement Subsection 885(b) of the Fiscal Year 2016 National Defense Authorization Act (NDAA). Section 885⁴

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.

² 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 Fiscal Year (FY) 2016 National Defense Authorization Act (NDAA), Section 885, Amendments Concerning Detection and Avoidance of Counterfeit Electronic Parts, amending Section 818(c), Detection and Avoidance of Counterfeit Electronic Parts, FY 2012 NDAA.

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contained subsections (a) pertaining to cost allowability policy, while subsection (b) changed elements of the statute related to trusted suppliers and subsequently embedded in the relevant regulatory sourcing clause.⁵

Subsection 885(a) provided for a conditional safe harbor from strict liability for costs associated with rework or corrective action required to remedy the use or inclusion of counterfeit electronic or suspect counterfeit electronic parts discovered in the DoD supply chain. Implementation of the safe harbor was completed with the finalization of DFARS Case 2016-D010, Costs Related to Counterfeit Electronic Parts, on August 30, 2016.⁶ Those rules were complimentary to the final implementation of DFARS Case 2014-D005, Detection and Avoidance of Counterfeit Electronic Parts – Further Implementation, which set forth the final rules on the acquisition of electronic parts from trusted sources on August 2, 2016.⁷

Subsection 885(b) adds the phrase “review, audit, and approval” to Section 818(c)(3)(D)(iii) of the underlying statute, which is implemented here in a revision to DFARS clause 252.246-7008(b)(2)(iii), Sources of Electronic Parts, adding Contracting Officer approval as one of the operative conditions applying to the use of “contractor-approved suppliers” when necessary to acquire parts no longer available from original manufacturers, authorized suppliers, or other exclusive or authorized suppliers, as those terms are defined in the sourcing rules.

While the change appears relatively minor, and limited to those situations where contractors or their subcontractors are acquiring parts from “contractor-approved suppliers”, industry is concerned about how the condition of CO approval will impact management of their supply chains, especially where legacy platforms will require parts throughout a lengthy lifecycle.

Comments

1. The proposed rule creates some ambiguities about the term “approval by the Contracting Officer”. The underlying statute originally called for the “review and audit” of the selection of what are now defined as contractor-approved suppliers by “appropriate Department officials.” The proposed regulations for clause 252.246-70XX in DFARS Case 2014-D005 used the term “Department of Defense officials” where “review and audit” were still the only conditions listed in the clause for use of what are now termed “contractor-approved suppliers”, while the final rules in DFARS case 2004-D005 establishing the final text of clause 252.246-7008, Sources of Electronic Parts, changed the review and audit cognizance for selection of contractor-approved suppliers to “...the contracting officer” (hereafter CO) presumably to comport with the incipient statutory change in Section 885. While the term “CO” is not inconsistent with the term “DoD

⁵ DFARS 252.246-7008, Sources of Electronic Parts

⁶ The final safe harbor rules contain 3 conditions for cost allowability at DFARS 231.205-71:

(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 252.246-7008, Sources of Electronic Parts; and (b)(3) Contractor--i. Becomes aware of the counterfeit electronic part(s) or suspect counterfeit electronic part(s) through inspection, testing and authentication efforts of the contractor or its subcontractor; (or) through a GIDEP alert; or by other means; and ii. Provides timely (within 60 days after the contractor becomes aware) written notice to—

(A) The cognizant contracting officer(s); and

(B) GIDEP.....

⁷ Federal Register, Volume 81, No. 148, August 2, 2016,

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officials”, the addition in the statute of an approval function conducted by a CO will change how companies supplying end items to DoD have to set up their internal controls and buying and quality assurance processes to account for this additional DoD oversight function.

At the time, industry comments to DFARS case 2014-D005 speculated that the “review and audit” of the contractor selection process for “contractor-approved suppliers” by “DoD officials” might be satisfied through the Contractor Purchasing System Review (CPSR) process, but that was not addressed in the final rules on trusted sources nor is it expressly stated or authorized here. The new CO approval requirement of the contractor selection of “contractor-approved suppliers” creates uncertainty about how, when, and by whom such oversight is to be conducted.

Given the confusion created by this new condition for the use of contractor-approved suppliers, industry has a significant number of concerns about the process and the DAR Council should clarify the following issues regarding the phrase “review, audit and approval by the Contracting Officer”:

- a. It is fundamentally unclear whether the CO approval function applies to the institutional internal selection process used by contractors to approve electronic parts suppliers for parts out of production, such as might be performed in CPS reviews conducted by the DCMA, or whether DoD intends, or reserves the right for CO’s, wherever situated, to review, audit and approve the selection of each part delivered by a “contractor-approved supplier” on each contract transaction.
- b. It also appears that contractor selection of contractor-approved suppliers can be subject to (emphasis added) review, audit and approval by the CO, implying that such processes are optional and not mandatory actions, whether that function is conducted on individual transactions or through a CPSR; the DAR Council should clarify whether the acts of a CO to review, audit and approve a contractor supplier are discretionary or non-discretionary quality assurance acts required before contractors can use their approved suppliers.
- c. The term CO can mean a Procurement Contracting Officer (PCO) or an Administrative Contracting Officer (ACO). Those officials have different duties and work in different areas of the acquisition process, with PCOs conducting transactions and other pre-award functions and ACO’s mostly providing post-award management and oversight. The rule is unclear whether, with respect to the selection or approval process of contractor-approved suppliers, the function will be performed by a PCO on each transaction or by an ACO as part of a CPSR or other administrative process, or some mix of either or both. How this authority is implemented by DoD agencies is critically important to contractors purchasing electronic parts to meet the requirements of their entire supply chain and for use on multiple and diverse contracts, commercial and federal.

Depending on which CO performs the cited functions and whether those are discretionary or not will create different levels of costs and risks for contractors, so clarity on which CO will have the authority to “review, audit and approve” contractor-approved suppliers and when that process will occur will be vital for contractors to control contract cost and schedule impacts. It is reasonable to conclude that, for most DoD contractors subject to the rule, a transactional approach conducted by a PCO pre-award would be the costliest and create the most disruption to contractor supply chains and contract performance. Conversely, an

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ACO approval process conducted post-award or on an administrative systems basis could also lead to delays in the supply chain or contract enforcement problems if a contractor-approved supplier is retroactively disapproved by an ACO.

It is unclear whether both PCO's and ACO's might be authorized to seek approval rights at various points in the process. This will cause conflicts for contractors where authorities are asserted by both an ACO and a PCO in any given contract situation. For example, if a DoD ACO approves a contractor-approved supplier as part of the CPSR process, does an individual transactional PCO have a right or requirement under the 7008 clause to another review, audit and approval of the same contractor-approved supplier; conversely, can a PCO approval of a part purchased by a contractor from a contractor-approved supplier in any given transaction override a negative CPSR finding about that supplier by an ACO. Where jurisdiction over the approval process is not clear, industry recommends that the DAR Council change the rules to provide contractors the flexibility to cite a previous CO "approval" of a supplier or a supplier selection process in any given situation where another CO seeks approval rights;

- d. Notwithstanding the concerns about specific CO authority above, the revised policy and the contract clause can reasonably be read to focus on the review, audit and approval of a contractor-approved supplier by a PCO on a specific contract or transaction. It is not clear how any review, audit or approval of contractor-approved suppliers will be conducted in individual cases, but if the DoD chooses to manage the process at the PCO level on a transactional basis, the proposed rule should be revised so that PCOs conduct those activities prior to contract award, or as close as practicable after execution of the contract, and any approval should apply across all contracts and subcontracts where that supplier is utilized. This is more efficient than having individual CO's review, audit and approve individual contractor-approved suppliers or parts on a contract-by-contract basis, but will require some coordination between industry, DoD agencies and CO's. It should, however, eliminate contract delays attributable to continual CO reviews of the same contractor-approved suppliers for individual contracts or subcontracts. Moreover, absent CPSR applicability, any review, audit and approval processes conducted on individual transactions should be left to the individual contractor and the CO to manage with a goal of minimum disruption, and in no case should the process interfere with an award or subsequent performance, except in cases where a contractor-approved supplier reasonably creates heightened pre-award risk of inserting a counterfeit electronic part in the supply chain or a counterfeit part is discovered prior to award.
- e. Under the rule as written, the timing of the CO approval process is unbounded and thus of great concern where industry values reliability and predictability in their supply chains. A CO may be able to review, audit and approve contractor-approved suppliers at various points in the acquisition process, including pre-award through contract closeout, creating significant uncertainty for contractors as they approve suppliers on an ongoing basis for requirements on many different DoD contracts and subcontracts, purchase electronic parts, and perform those contracts. Under the rules, a CO would not be prohibited from disapproving a supplier long after contract award, potentially requiring the contractor to resort to other available options to cure any contract non-conformance. Those options include rapidly qualifying other suppliers, producing the parts "in house", purchasing additional quantities from other qualified contractor-approved suppliers, and even potentially require a contractor to replace all electronic parts from the disapproved supplier in items already delivered to the

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government, notwithstanding the safe harbor discussed above. This unbounded CO authority to approve or disapprove a supplier at any time will increase the risk of interruptions in performance, cause cost increases and schedule delays and may inadvertently and unfairly negate the safe harbor in DFARS 231.205-71(b)(2) where a CO asserts that the contractor did not comply with the conditions in the clause at 252.246-7008, Sources of Electronic Parts.

- f. Assuming a PCO transactional approval process, the proposed rule does not address situations where different PCO's disagree on the approval of a supplier on different contracts and subcontracts. As stated above, where ACOs and PCO's could present conflicting findings about a supplier to a contractor, what happens if one PCO reviews and approves a supplier on one contract and another PCO reviews and disapproves that same supplier on a different contract? Which CO's determination controls? If a PCO on one contract or subcontract disapproved the contractor or subcontractor's choice of a supplier, what would the effect be on other existing contracts or subcontracts using electronic parts from that disapproved supplier? Does disapproval of a contractor-approved supplier on a single transaction make that supplier ineligible for use by other contractors or subcontractors on other contracts or subcontracts for different electronic parts? To mitigate these risks, industry recommends that DoD implement a mechanism to communicate disapprovals across DoD or mediate conflicting determinations from PCO's on the same suppliers. This mechanism could be the same one used to communicate approval of suppliers across DoD discussed above.
 - g. DoD should clarify how PCO's will obtain the quality assurance expertise needed to conduct the review, audit and approval of contractor-approved electronic parts suppliers.
- 2. Industry appreciates the ostensible flexibility in the rule allowing Contractors to proceed with the acquisition of electronic parts from a contractor-approved supplier unless otherwise notified by DoD because that will allow contractors to maintain a continuously flowing supply chain and avoid risk of interruption from any CO review, audit and approval process, however that process is managed; as stated above, industry again recommends any review, audit or approval of a contractor-approved supplier by a PCO should be performed prior to contract award or as close as practicable after award;
 - 3. It is unclear what happens to the safe harbor at 231.205-71 in the event that a CO does not review, audit or approve any contractor-approved suppliers whatsoever or until after a counterfeit or suspect counterfeit electronic part inadvertently escapes in the DoD supply chain. One condition of the safe harbor is to obtain parts per the clause at 252.246-7008; if the contractor complies with the clause in its entirety and the CO does not attempt to review, audit or approve any contractor-approved supplier selection, industry understands the new rule to indicate that any CO failure to review, audit and approve, or to give subsequent notice disapproving the use of a contractor-approved supplier, does not obviate the safe harbor even where a counterfeit electronic part from a contractor-approved supplier may be discovered in the supply chain at a later date;
 - 4. DoD should clarify what constitutes notice from DoD to discontinue acquisition of parts from a specific contractor-approved supplier; again, the rules have changed the review and audit functions associated with contractor-approved suppliers from "DoD officials" to review, audit and approval by the CO, but the rule states that any notice (presumably of non-compliance or

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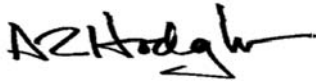


heightened risk of non-conformance) will come from “DoD.” Industry recommends that DoD provide guidance on a standard notice format and provide for a centralized DoD capability to provide timely notice to contractors and subcontractors about any contract-approved suppliers who are disapproved or where specific electronic parts are disapproved or found to be counterfeit. Industry does not believe that any of the existing disclosure models, such as GIDEP or ERAI, can be scaled to act as notice provider on parts escapes, nor that they are designed to perform such notice duties?

Conclusion

Industry associations strongly support the implementation of Sections 818 and 885 as consistent with a risk-based framework to capture counterfeits. At the same time, effective implementation of the law and regulations will require clarity about the issues identified herein.

CODSIA appreciates the opportunity to provide comments on this proposed rule. Please contact David Drabkin at codsia@codsia.org for any clarification.

Sincerely,

	
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