



(Billing Code 5001-06)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 231

[Docket DARS-2016-0002]

RIN 0750-AI86

**Defense Federal Acquisition Regulation Supplement: Costs
Related to Counterfeit Electronic Parts (DFARS Case 2016-D010)**

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 implement a section of the National Defense Authorization Act for Fiscal Year 2016 that amends the allowability of costs of counterfeit electronic parts or suspect counterfeit electronic parts and the cost of rework or corrective action that may be required to remedy the use or inclusion of such parts.

DATES: Comments on the proposed 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 2016-D010, using any of the following methods:

o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2016-D010" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2016-D010." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2016-D010" on your attached document.

o Email: osd.dfars@mail.mil. Include DFARS Case 2016-D010 in the subject line of the message.

o Fax: 571-372-6094.

o Mail: Defense Acquisition Regulations System, Attn: Ms. Amy G. 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 G. Williams, telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to implement section 885(a) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114-92). Section 885(a) provides that the costs of counterfeit parts or suspect counterfeit parts and the cost of rework or corrective action that may be required to remedy the use or inclusion of such parts may be allowable if-

- The counterfeit electronic parts or suspect counterfeit electronic parts were obtained by the contractor in accordance with the regulations described in paragraph (c)(3) of section 818 of the NDAA for FY 2012, as amended;
- The contractor discovers the counterfeit electronic parts or suspect counterfeit electronic parts; and
- The contractor provides timely (i.e., within 60 days after the contractor becomes aware) notice to the Government.

A final rule is in process under DFARS Case 2014-D005, Detection and Avoidance of Counterfeit Parts—Further Implementation, to implement section 818(c)(3) of the NDAA for FY 2012, as amended. A proposed rule was published under DFARS Case 2014-D005 in the Federal Register on September 21, 2015 (80 FR 56939). The final rule under this case 2016-D010 will not be published until after publication of the final rule under DFARS Case 2014-D005.

II. Discussion and Analysis

This rule proposes to amend the cost principle at DFARS 231.205-71 to incorporate the new provisions of section 885(a) of the NDAA for FY 2016.

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 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.

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, et seq. Nevertheless, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This proposed rule implements section 885(a) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114-92).

The objective of this rule is to amend the allowability of costs for counterfeit parts or suspect counterfeit parts and the cost of rework or corrective action that may be required to remedy the use or inclusion of such parts. Such costs may be allowable if-

- The parts were obtained by the contractor/subcontractor in accordance with the regulations described at section 818(c)(3) of the NDAA for FY 2012, as amended (such regulations will be published as a final rule under DFARS Case 2014-D005);

- The contractor discovers the counterfeit electronic parts or suspect counterfeit electronic parts; and

- The contractor provides timely notice to the Government.

DoD is unable to estimate the number of small entities that will be impacted by this rule. This rule will apply to all DoD prime and subcontractors with cost contracts. This rule will only impact cost allowability if the contractor or subcontractor has complied with DFARS 246.870, but nevertheless acquired, used, or included counterfeit electronic parts or suspect counterfeit electronic parts in performance of a DoD contract or

subcontract, and has discovered such parts and provided timely notification to DoD.

There is no change to the projected reporting, recordkeeping, or other compliance requirements associated with the rule.

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

DoD has not identified any alternatives that are consistent with the stated objectives of the applicable statute. However, DoD notes that the impacts of this rule are expected to be beneficial, because it expands the allowability of costs for counterfeit parts or suspect counterfeit parts and the cost of rework or corrective action that may be required to remedy the use or inclusion of such parts.

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 2016-D010), in correspondence.

V. Paperwork Reduction Act

The rule does not contain 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 Parts 231

Government procurement.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 231 is proposed to be amended as follows:

PART 231—CONTRACT COST PRINCIPLES AND PROCEDURES

1. The authority citation for 48 CFR part 231 continues to read as follows:

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

2. Revise section 231.205-71 to read as follows:

231.205-71 Costs related to counterfeit electronic parts and suspect counterfeit electronic parts.

(a) Scope. This subsection implements the requirements of section 818(c)(2), National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112-81), as modified by section 833, National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239) and section 885 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92).

(b) The costs of counterfeit electronic parts and suspect counterfeit electronic parts and the costs of rework or corrective action that may be required to remedy the use or inclusion of such parts are unallowable, unless—

(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 pursuant to 244.303;

(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 [as proposed to be added at 80 FR 56939, September 21, 2015]; and

(3) The contractor—

(i) Discovers the counterfeit electronic parts or suspect counterfeit electronic parts; and

(ii) Provides timely (i.e., within 60 days after the contractor becomes aware) notice to the cognizant contracting officer(s).

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