



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212, 246, and 252

[Docket DARS-2016-0014]

RIN 0750-AI92

**Defense Federal Acquisition Regulation Supplement: Amendments
Related to Sources of Electronic Parts (DFARS Case 2016-D013)**

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

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2016 that makes contractors and subcontractors subject to approval (as well as review and audit) by appropriate DoD officials when identifying a contractor-approved supplier of electronic parts.

DATES: Effective **[Insert date of publication in the FEDERAL REGISTER]**.

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

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the Federal Register at 81 FR 50680 on August 2, 2016, to implement section 885(b) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114-92), which amends section 818(c)(3)(D)(iii) of the NDAA for FY 2012 (Pub. L. 112-81). Section 885(b) provides that contractors and subcontractors are subject to approval (as well as review and audit) by appropriate DoD officials when identifying a contractor-approved supplier of electronic parts. Four respondents submitted public comments on the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the formulation of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Significant Changes from the Proposed Rule.

The final rule clarifies at DFARS 246.870-2(a)(1)(ii)(C) and 252.246-7008(b)(2)(iii) that the review, audit, and approval of contractor-approved suppliers by the Government will generally be in conjunction with a contractor purchasing system review (CPSR) or other surveillance of purchasing practices by the contract administration office, unless the Government has credible evidence that a contractor-approved supplier has provided counterfeit parts.

B. Analysis of Public Comments.

The respondents shared concerns about the details of how, what, when, and by whom the Government approval (or disapproval) of contractor-approved suppliers would be conducted. There was also concern about the impact of disapproval, how the notification would occur, and the extent of flow-down to subcontracts.

1. Mandatory or discretionary?

Comment: Several respondents commented on whether the review, audit, and approval are mandatory or discretionary. One respondent stated that the rule is silent as to whether the review, audit, and approval will take place. Another respondent noted that it appears that contractor selection of contractor-approved suppliers can be subject to (emphasis added) review, audit, and approval by the contracting officer, implying that such processes are optional and not mandatory actions, whether that function is conducted on individual transactions or through a CPSR or other surveillance of purchasing practices. Yet another respondent questioned the criteria for deciding when to review, audit, and approve suppliers that have been approved by the contractor.

Response: It is not mandatory that the Government review, audit, and approve contractor-approved suppliers. The final rule has been amended at DFARS 246.870-2(a)(1)(ii)(C) and 252.246-7008(b)(2)(iii) to clarify that such review, audit, and

approval will generally be in conjunction with a CPSR by the contract administration office, or if the Government obtains credible evidence that a contractor-approved supplier has provided counterfeit parts.

2. What is being reviewed and audited and how?

Comment: One respondent noted that separate regulations address contractor purchasing system criteria and recommended that the audits conducted under the proposed DFARS rule providing for Government review, audit, and approval be limited to confirming that the contractor's process for selecting suppliers is based on appropriate industry standards and processes for counterfeit prevention. The respondent further recommended that DoD clarify that the Government would not impose additional requirements based on internal DoD standards for identifying trusted electronic parts suppliers. Another respondent stated that it was unclear if the proposed DFARS contracting officer approval function applied to the process used by contractors to approve electronic parts suppliers for parts out of production or if DoD intended to reserve the right to review, audit, and approve the selection of each part delivered by a contractor-approved supplier on each contract transaction. The same respondent commented that industry comments on 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 CPSR process.

Response: The Government's review, audit, and approval of contractor-approved suppliers of electronic parts generally will be conducted during the CPSR or other surveillance of purchasing practices to verify that the contractor is using established counterfeit prevention industry standards and processes (including inspection, testing, and authentication), such as the DoD-adopted standards at <https://assist.dla.mil>, to select their suppliers, as required by DFARS clause 252.246-7008(b)(2)(i).

The contractor's authorization to identify and purchase electronic parts from their own contractor-approved suppliers and DoD's authority to review, audit, and approve those contractor-approved suppliers relates only to those suppliers of electronic parts that are not in production by the original manufacturer or an authorized aftermarket manufacturer and that are not currently available in stock from the original manufacturer, their authorized suppliers, or suppliers that obtain such parts exclusively from the original manufacturers of the parts or their authorized suppliers (see DFARS 246.870-2(a)(1)(ii)(C) and 252.246-7008(b)(2)(iii)). The rule grants the authority for the Government to review, audit, and approve or disapprove contractor-approved suppliers of electronic parts outside of a CPSR or other surveillance of purchasing practices

by the contract administration office if there is credible evidence that a contractor-approved supplier has provided counterfeit electronic parts. As the basis of its review, audit, and approval, the Government generally intends to use established counterfeit prevention industry standards and processes.

3. Timing.

Comment: All respondents had concern about the timing of the review, audit, and approval of contractor-approved suppliers. The respondents are concerned that the rule does not specify when the review, audit, and approval of contractor-approved suppliers should occur. According to the respondents, the contracting officer is able to review and approve electronic parts suppliers any time from contract award until closeout. If the contracting officer disapproves a supplier after the fact, this would likely cause significant cost increases and schedule delays. The respondents recommended that the contracting officer should establish schedules for these reviews and, to the maximum extent practicable, review and approve a contractor's electronic parts suppliers at the time of contract award or as early as possible during contract performance.

One respondent requested that a contracting officer's disapproval of a contractor-approved source should constitute a contract change that qualifies for equitable adjustment in the

contract price, the delivery schedule, or both, pursuant to the Changes clause at FAR 52.243-1.

Response: DoD's authority to review, audit, and approve contractor-approved suppliers relates only to those suppliers of electronic parts that are not in production by the original manufacturer or an authorized aftermarket manufacturer and that are not currently available in stock from the original manufacturer, their authorized suppliers, or suppliers that obtain such parts exclusively from the original manufacturers of the parts or their authorized suppliers (see DFARS 246.870-2(a)(1)(ii)(C) and 252.246-7008(b)(2)(iii)). DoD relies primarily on the contractor to use established counterfeit prevention industry standards and processes (including inspection, testing, and authentication), such as the DoD-adopted standards at <https://assist.dla.mil>, as required by DFARS clause 252.246-7008(b)(2)(i). However, DoD also has the authority to review an individual supplier. DoD generally intends to exercise its right to review, audit, and approve contractor-approved suppliers in conjunction with a periodic CPSR (see FAR subpart 44.3, DFARS subpart 244.3, and DFARS 252.246-7007(d)) or other surveillance of purchasing practices, or if there is credible evidence that a contractor-approved supplier has supplied electronic counterfeit parts. DoD shares the desire of the contractors to avoid significant schedule

delays, cost increases, and resultant impairment of operational readiness.

The contracting officer's disapproval of a contractor-approved source does not constitute a contract change that qualifies for equitable adjustment in the contract price, the delivery schedule, or both, pursuant to the Changes clause at FAR 52.243-1. The contract clause already provides that the contractor selection of a contractor-approved supplier is subject to review, audit, and approval by the Government, and therefore such review, audit, and approval or disapproval by the Government does not constitute a change to the contract.

4. Is it the procurement contracting officer or the administrative contracting officer who approves contractor-approved suppliers?

Comment: One respondent was concerned whether it would be the procurement contracting officer or the administrative contracting officer who would approve contractor-approved suppliers. The respondent was concerned about potential overlap in authority. The respondent recommended that a contractor be able to cite to a prior approval, if another contracting officer seeks approval rights. The respondent also questioned how a procurement contracting officer would obtain the quality assurance expertise needed to conduct a review, audit, and approval of contractor-approved electronic parts suppliers.

Response: For a specific contract, the procurement contracting officer always has final approval authority, and may delegate certain functions to the administrative contracting officer. The contracting officer relies on the assistance of DoD quality experts, who make recommendations to the contracting officer. The FAR specifies that it is the administrative contracting officer who determines the need for a CPSR. The cognizant administrative contracting officer is responsible for granting, withholding, or withdrawing approval of a contractor's purchasing system.

5. Impact of approval or disapproval.

a. Effect of an approved or disapproved supplier on other contracts.

Comment: Most respondents questioned whether approval or disapproval of a specific supplier would impact other contracts. The respondents were also concerned about the scenario in which contracting officers disagree on the approval of a supplier on different programs. According to one respondent, both the revised policy and the contract clause focus on the review, audit, and approval of a specific supplier by the contracting officer on a specific contract. However, the respondent notes that a prime contractor may select a specific supplier and use electronic parts sourced from that supplier across a wide variety of end items and contracts. Several respondents

recommended that the approval of one procurement contracting officer should be binding across all contracts where the electronic parts supplier is used, and also recommended a mechanism to communicate such approval or disapproval of a supplier across all contracts and subcontracts where the supplier is utilized.

Response: If the contractor is covered by the cost accounting standards, the contractor's counterfeit electronic part detection and avoidance system under DFARS 252.246-7007 is part of the contractor's purchasing system. Any deficiencies in the contractor's purchasing system will impact the contractor across all Government contracts. If a contractor-approved supplier is not acceptable to the Government, the reasons for that unacceptability should be entered in the Government-Industry Data Exchange Program (GIDEP) when appropriate and may lead to suspension or debarment of that contractor-approved supplier, in accordance with FAR subpart 9.4. The list of all entities suspended, debarred, or proposed for debarment is publicly available in the System for Award Management (SAM) database. Procurement contracting officers dealing with common issues at the same contractor would generally coordinate with each other and with the cognizant administrative contracting officer. While each contracting officer retains ultimate authority for decisions with regard to a particular contract, the contracting

officer would be likely to respect the decision of another prior contracting office unless new facts were available.

Furthermore, regardless of Government approval or disapproval of a contractor-approved supplier, the contractor is responsible for the authenticity of parts provided by a contractor-approved supplier.

b. Approved purchasing system.

Comment: One respondent recommended that if a contractor has an approved purchasing system before DoD publishes the ensuing final rule, the prior approval should remain in effect until the next review of the contractor's purchasing system.

Response: That is generally the case. However, if due to changing CPSR thresholds or other circumstances, the requirement for a CPSR is no longer applicable to the contractor, then the approval would remain in effect for 3 years, after which time the status would be "not applicable."

However, whether the approval of the contractor purchasing system is relevant with regard to this case would depend on whether, at the time of prior approval, the system contained the operational system to detect and avoid counterfeit electronic parts and suspect counterfeit electronic parts, as required by DFARS clause 252.247-7007.

c. Interference with award and performance.

Comment: One respondent stated that in no case should the review, audit, and approval process interfere with an award or subsequent performance, except in cases where a contractor-approved supplier reasonably creates heightened preaward risk of inserting a counterfeit electronic part in the supply chain or a counterfeit part is discovered prior to award.

Response: It is not in the interest of DoD to interfere with the award or performance of DoD contracts except in cases where the risk of counterfeit parts is sufficiently high to counterbalance the negative impact on timely fulfillment of DoD requirements.

d. Impact on "safe harbor."

Comment: According to one respondent, it is unclear what happens to the safe harbor at DFARS 231.205-71 in the event that a contracting officer 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 DFARS 252.246-7008; if the contractor complies with the clause in its entirety and the contracting officer does not attempt to review, audit, or approve any contractor-approved supplier selection, industry understands the new rule to indicate that if a contracting officer does not 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.

Response: Whether DoD exercises its authority to review, audit, and approve contractor-approved suppliers has no impact on the applicability of the safe harbor provisions at DFARS 231.205-71, except to the extent that the contractor must have an operational system to detect and avoid counterfeit electronic parts and suspect counterfeit electronic parts that has been reviewed and approved by DoD, which is one of the required criteria for the safe harbor.

6. Notification

Comment: One respondent requested that DoD should clarify what constitutes notice from DoD to discontinue acquisition of parts from a specific contractor-approved supplier. The respondent recommended that DoD should 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. The respondent did not believe that any of the existing disclosure models, such as GIDEP or Electronic Resellers Association International (ERAI), can be

scaled to act as notice provider on parts escapes, nor that they are designed to perform such notice duties.

Response: If a problem is identified in the course of a CPSR, the contractor will be notified in the standard means of communication consistent with FAR subpart 44.3 and DFARS subpart 244.3.

The contracting officer will provide written notice to the prime contractor if a contractor-approved supplier is not acceptable to the Government. In addition, that information should be entered in GIDEP when appropriate. If the contractor-approved supplier is found to have provided counterfeit parts, that may lead to suspension or debarment of that contractor-approved supplier, in accordance with FAR subpart 9.4. The list of all entities suspended, debarred, or proposed for debarment is publicly available in the SAM database.

7. Subcontracts

Comment: One respondent commented that DoD may not have the resources to review, audit, and approve the counterfeit-prevention selection process implemented by each entity in the supply chain for a given program and recommended that DoD adopt a more limited or flexible approach to flowdown of the proposed clause.

Response: The flowdown requirement to subcontractors using contractor-approved suppliers of electronic parts is required by

the statute. However, as previously stated, it is not the intent of DoD to review, audit, and approve the counterfeit prevention selection process by each entity in the supply chain, but on a selective basis, as determined necessary by DoD.

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

This rule does not add any new provisions or clauses to implement section 885(b) of the NDAA for FY 2016, which amends section 818 of the NDAA for FY 2012. It revises an existing clause at DFARS 252.246-7008, Sources of Electronic Parts, which applies to acquisitions at or below the SAT and to contracts and subcontracts for the acquisition of commercial items (including COTS items). A determination and findings was signed under DFARS Case 2014-D005 on May 26, 2016, by the Director, Defense Procurement and Acquisition Policy, to justify the application of section 818(c) of the NDAA for FY 2012, as amended, to acquisitions at or below the SAT and to contracts and subcontracts for the acquisition of commercial items (including COTS items).

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 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.

V. Executive Order 13771

This rule is not subject to E.O. 13771, Reducing Regulation and Controlling Regulatory Costs, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

This rule implements section 885(b) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114-92), which amended section 818 of the NDAA for FY 2012. The objective of this rule is to provide to DoD the authority to approve contractor-approved suppliers of electronic parts, in accordance with section 885(b) of the NDAA for FY 2016.

There were no significant issues raised by the public in response to the initial regulatory flexibility analysis.

The review, audit, and approval of a contractor-approved source generally occurs in conjunction with a contractor purchasing system review (CPSR) or other surveillance of purchasing practices by the contract administration office. The Defense Contract Management Agency (DCMA) performs approximately 128 CPSRs per year. In addition, the contract administration office validates about 256 purchasing systems per year. There is also a quality management system audit of the purchasing system, which is performed on a risk-based basis at least once every three years. There are approximately 3,292 higher-level quality contractors, resulting in 1,097 possible reviews per year. Adding the purchasing system reviews and the quality management system audits totals 1,481 reviews (128 + 256 + 1097). However, DCMA estimates that it is likely that contractors using "contractor-approved" sources, would be limited to 10 percent or less of the contractors subject to these audits and reviews, i.e. not more than 148 contractors. DCMA further estimates that of those using "contractor-approved" sources, not more than 15 (10 percent) per year would result in issues or disapprovals by the Government.

This rule does not impose any reporting, recordkeeping, or other compliance requirements other than being subject to

approval by DoD if the contractor or subcontractor identifies a contractor-approved supplier of electronic parts and the Government selects the contractor for review and audit. Since contractor selection of contractor-approved sources was already subject of review and audit, addition of "and approval" does not change much, because if the Government reviewed and audited a source and found a serious problem, the Government would require corrective action to prevent entry of such electronic parts into the supply chain. Furthermore, the contractor may proceed with the acquisition of electronic parts from a contractor-approved supplier unless otherwise notified by DoD.

DoD was unable to identify any significant alternatives that would reduce the economic impact on small entities and still fulfill the requirements of the statute. However, DoD does not expect this rule to have any significant economic impact on small entities, because it does not impose any new requirements on contractors or subcontractors. Contractors may proceed with the acquisition of electronic parts from a contractor-approved supplier unless otherwise notified by DoD.

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).

List of Subjects in 48 CFR Parts 212, 246, and 252

Government procurement.

Amy G. Williams,

Deputy, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212, 246, and 252 are amended as follows:

1. The authority citation for parts 212, 246, and 252 continues to read as follows:

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

PART 212—ACQUISITION OF COMMERCIAL ITEMS

212.301 [Amended]

2. In section 212.301, amend paragraph (f)(xix)(C) by removing “(Pub. L. 113-291)” and adding “(Pub. L. 113-291 and section 885 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92))” in its place.

PART 246—QUALITY ASSURANCE

246.870-0 [Amended]

3. Amend section 246.870-0, by removing “(Pub. L. 113-291)” and adding “(Pub. L. 113-291 and section 885 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92))” in its place.

4. In section 246.870-2, revise paragraph (a)(1)(ii)(C) to read as follows:

246.870-2 Policy.

(a) * * *

(1) * * *

(ii) * * *

(C) The selection of such contractor-approved suppliers is subject to review, audit, and approval by the Government, generally in conjunction with a contractor purchasing system review or other surveillance of purchasing practices by the contract administration office, or if the Government obtains credible evidence that a contractor-approved supplier has provided counterfeit parts. The contractor may proceed with the acquisition of electronic parts from a contractor-approved supplier unless otherwise notified by DoD.

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PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Amend section 252.246-7008 by—

a. Removing the clause date "(DEC 2017)" and adding "(MAY 2018)" in its place;

b. In paragraph (b) introductory text, removing "(Pub. L. 113-291)" and adding "(Pub. L. 113-291 and section 885 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92))" in its place; and

c. Revising paragraph (b) (2) (iii).

The revision reads as follows:

252.246-7008 Sources of Electronic Parts.

* * * * *

(b) * * *

(2) * * *

(iii) The Contractor's selection of such contractor-approved suppliers is subject to review, audit, and approval by the Government, generally in conjunction with a contractor purchasing system review or other surveillance of purchasing practices by the contract administration office, or if the Government obtains credible evidence that a contractor-approved supplier has provided counterfeit parts. The Contractor may proceed with the acquisition of electronic parts from a contractor-approved supplier unless otherwise notified by DoD;
or

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[FR Doc. 2018-09491 Filed: 5/3/2018 8:45 am; Publication Date: 5/4/2018]