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Ms. Meredith Murphy
Defense Acquisitions Regulations System
OUSD(AT&L)DPAP/DARS
Room 3B855
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Washington, DC 20301-3060
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Subject: DFARS Case 2012-D055

References:
B. AIA Special Report, dated March 2011, “Counterfeit Parts: Increasing Awareness and Developing Countermeasures” (Attachment B)
C. Department of Defense Instruction (DoDI) Number 4140.67, dated April 26, 2013
D. SAE International, Aerospace AS5553A Standard – Counterfeit Electronic Parts; Avoidance, Detection, Mitigation, and Disposition (SAE AS5553A)

Dear Ms. Murphy:

The Aerospace Industries Association (AIA) welcomes the opportunity to comment on the proposed rule, DFARS Case 2012-D055, “Detection and Avoidance of Counterfeit Electronic Parts.” The Aerospace Industries Association (AIA) was founded in 1919. AIA is the premier United States based trade association representing over 350 major aerospace and defense manufacturers and suppliers and approximately 844,000 aerospace and defense workers. Our members represent the United States of America’s leading manufacturers and suppliers of civil, military, and business aircraft, helicopters, unmanned aerial systems, missiles, space systems, aircraft engines, materiel, and related components, equipment services, and information technology.

At the outset, we appreciate that the DAR Council hosted a public meeting on June 28, inviting preliminary comments from the public about the proposed rule. We view this as a positive start to engage in a government-industry dialogue in this particular rule-making process. During that meeting, we heard key government “owners” of the proposed rule comment that there are many unanswered questions associated with the statutory directive from Congress and its regulatory implementation. They also expressed openness to input on industry best practices and a willingness to listen to further recommendations from industry. In that spirit of openness, we provide our comments.
While these proposed additions to the Defense Federal Acquisition Regulation Supplement (DFARS) are an important step in addressing this serious issue, AIA believes the approach the proposed rule takes is imbalanced and leaves a number of key issues unresolved. For reasons detailed below, we believe it is essential that DoD and industry engage in a constructive dialogue that will result in the development of mutually acceptable solutions. To engage in that dialogue, we request that the comment deadline be extended by at least 12 months and that DoD establish immediately a process for regularly scheduled engagement with industry. Below, please find AIA’s specific comments on the proposed rule.

Introduction

DFARS Case 2012-D055 sets forth a proposed rule to partially implement Section 818 (paragraphs (c) and (f)) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2012 and amendments thereto made by Section 833 of the NDAA for FY2013 concerning contractor responsibilities for detecting and avoiding the use or inclusion of counterfeit electronic parts or suspect counterfeit electronic parts, the use of trusted suppliers, requirements for contractors to report counterfeit electronic parts and suspect counterfeit electronic parts, and allowability of costs relating to efforts to remedy the use or inclusion of such parts.

As evidenced by Attachment B, AIA’s 2011 Special Report on Counterfeit Parts: Increasing Awareness and Developing Countermeasures, industry shares DoD’s concerns regarding the introduction and potential proliferation of counterfeit electronic parts and suspect counterfeit electronic parts in the supply chain generally and in the Department of Defense (DoD) product supply stream in particular. As noted in Attachment A, AIA’s letter to Messrs. Sumpter, Peters, Jones, Torelli, dated June 1, 2012, Subject: Comments in Anticipation of Proposed Regulations to Implement Section 818 of the FY 2012 National Defense Authorization Act, industry has led and will continue to lead in the establishment of standards, procedures and best practices to enable the identification and mitigation of electronic counterfeit materials in the DoD product supply stream.

Industry is concerned that the proposed rule fails to adequately address the requirement of the FY2012 NDAA to implement a risk-based approach to minimize the impact of counterfeit and suspect counterfeit electronic parts. The proposed rule steps beyond the NDAA requirement and imposes unreasonable strict liability standards on industry in a constantly evolving environment -- regardless of significant and good faith efforts by industry to address the issue.

AIA encourages DoD to reconsider its original approach and instead collaborate with industry to develop a comprehensive risk-based approach to the counterfeit electronic parts issue consistent with Section 818. In that regard, AIA endorses the adoption of industry standards such as SAE AS5553A, “Counterfeit Electronic Parts; Avoidance, Detection, Mitigation, and Disposition,” developed by subject matter experts and designed for aerospace and military manufacturers and contractors but which are also used outside the aerospace industry. For example, SAE AS5553A provides uniform requirements, practices and methods to mitigate the risk of receiving and installing counterfeit electronic parts, including requirements, practices and methods related to (i) parts management, (ii) supplier management, (iii) procurement, (iv) inspection, test/evaluation, and
response strategies when suspect counterfeit electronic parts are discovered. It should be noted that SAE AS5553A is structured in a manner that takes into account that the “counterfeit parts” issue will continue to be an on-going problem. As a result, industry and government will need to engage in proactive coordination and have an on-going process to monitor advancements in counterfeit parts practices. This would enable us all to effectively and nimbly adjust our practices to mitigate the constantly evolving counterfeit electronic parts challenge.

Comments

I. Imbalanced Approach to Counterfeit Electronic Parts Detection and Avoidance

a. Risk-Based Versus Strict Liability Approach

As noted above, Section 818 of the FY 2012 NDAA calls for DoD to implement a risk-based approach to minimize the impact of counterfeit electronic parts or suspect counterfeit electronic parts on DoD programs. This risk-based approach requirement was echoed in DoD’s recently published internal guidance entitled DoD Counterfeit Prevention Policy (DoDI 4140.67, dated April 26, 2013), which stated that it is DoD policy to “employ a risk-based approach to reduce the frequency and impact of counterfeit material within DoD acquisition systems and DoD life-cycle sustainment processes...” It is DoD policy, as stated in DoDI 4140.67 to “[n]ot knowingly procure counterfeit material.” Consistent with that policy objective, the same internal guidance identifies prevention and early detection as the primary strategy in combating counterfeit parts. Rather than adopting a risk-based approach, however, the proposed rule unambiguously states in the Discussion section “[t]hat the intent of section 818 is to hold contractors responsible for detecting and avoiding the use or inclusion of counterfeit electronic parts or suspect counterfeit electronic parts.” [emphasis added]. Thus, rather than adopting an approach that employs risk-based analyses and strategies to encourage development of consistent, coherent and replicable detection and avoidance processes grounded on risk-based analyses, DoD has proposed a contrary approach. That is, one that is predicated on the notion that regardless of efforts made by a contractor to detect and avoid use and inclusion of counterfeit electronic parts or suspect electronic counterfeit parts, a contractor will be strictly liable for any failure to detect or avoid counterfeit electronic parts. We believe DoD should replace this rigid liability approach with a risk-based approach that conforms with Congress’s intent under Section 818.


We note the proposed rule provides a very limited exception—or safe harbor—to its strict liability construct. That exception is permitted if the use or inclusion of counterfeit parts or suspect counterfeit electronic parts arises from government-furnished equipment (GFE), the contractor has a government approved counterfeit part detection and avoidance system, and only if the contractor timely notifies the government that equipment provided by the government is counterfeit or suspected to be counterfeit.¹ Although a statutory basis for this may presently be lacking (see fn1),

¹ It is important to note that the GFE safe harbor is discussed differently in the “Discussion” section of the proposed rule than in Part 231—“Contract Cost Principles and Procedures” of the rule. We believe the “Discussion” definition strays from the statutory language contained in Section 833 of the NDAA for FY2013, but that the language is correct in Part 231. We believe that this is a drafting error that needs correction.
industry believes that the safe harbor should apply if counterfeit parts are provided as GFE or the contractor has an approved detection and avoidance system (and timely notifies the Government). Otherwise, a contractor is not protected – unfairly in industry’s opinion – from potentially significant cost disallowance if the Government provides counterfeit GFE at a time when the contractor (for whatever reason) does not have an approved avoidance and detection system.

Industry also believes it appropriate to expand the safe harbor exemption beyond GFE. Industry supports a safe harbor provision for contractors providing electronic parts pursuant to an acceptable counterfeit electronic parts avoidance and detection system, including any parts purchased from a government procurement center, such as DLA, or in any case where the part is purchased from a Government-directed source. Such an expansion of a safe harbor is particularly critical in light of the fact that DoD’s proposed rule exempts small businesses from compliance when operating as prime federal contractors. Notwithstanding such an exemption, prime contractors and higher tier subcontractors remain liable for any failure by a small business sub-tier contractor to detect and avoid the use or inclusion of counterfeit electronic parts or suspect counterfeit electronic parts. The effect of such strict liability is to impose on the higher tier contractor a requirement to test and/or assess counterfeit mitigation practices to verify the authenticity of any parts supplied by an otherwise exempt subcontractor. Any such testing and verification will necessarily increase costs to the government without a commensurate increase in responsibility and associated costs to be borne by the contractor that may have provided the counterfeit electronic part or suspect counterfeit electronic part.

Industry believes DoD has authority under the statute to extend the safe harbor exemption to commercial items generally and commercial off-the-shelf items (COTS) in particular. FY2012 NDAA Section 818 was specifically silent on commercial items, which means DoD can choose to (and industry believes Congress intended for DoD to) exempt these items from government-unique requirements such as those in the proposed rule. The failure to extend the safe harbor to commercial items and COTS will require contractors to impose new standards and increased costs within a system by definition not intended to be dedicated solely to providing parts for the government. Any increased costs will be borne not only by the government but by commercial purchasers of such products as a result of increased burdens imposed by the government. As a result, rather than embracing commercial business practices, the government is in effect forcing commercial business to adopt and pay for standards imposed by the government for non-commercial purposes. The better approach is to explicitly recognize that commercial items and COTS purchased directly from original equipment manufacturers (OEMs) and their authorized distributors should continue to be held to the requirements of the commercial warranties and any other standard commercial obligations but not the flowdown of the unique requirements in Section 818. This exemption should also flow to prime contractors supplying commercial items to the government.

c. Supply Chain and Small Business Impact

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We believe “COTS” includes COTS assemblies as well as COTS components. Many COTS components (piece parts) are counterfeited and industry should continue to perform authentication testing on COTS components when not purchased from OCMs or their authorized sources. COTS assemblies are the much harder area to control and authenticate, and should enjoy safe harbor protection.
The proposed rule has little guidance on how covered contractors are to impose the requirements on their supply chains, except where the preamble exempts small businesses from the rules as prime federal contractors. Since small business suppliers are part of every covered contractor’s supply chain, it is reasonable to conclude that small businesses will be impacted by the counterfeit electronic parts policy despite the regulatory exemption as primes. It is also reasonable to conclude that as covered contractors flow down detection and avoidance system requirements to all subcontractors, many small businesses will be significantly and negatively impacted by the new rules. Even recognizing the disparate impact of these policy objectives on small businesses, in order to meet the goals of the statute, and ensure compliance throughout the supply chain, it is important to make the operative clause a mandatory flow-down requirement for use in all subcontracts and at every tier.

II. Definitions

Key counterfeit terms should be defined in alignment with industry standards. Industry standards have proven to be effective ways to develop consensus and communicate uniform requirements. DoD should leverage industry consensus standards such as AS5553A as much as possible including their definitions for “counterfeit” and “suspect counterfeit.” AIA has consistently endorsed this approach (see Attachments A and B).

a. “Counterfeit Part”

There are several concerns regarding the way in which critical terms are defined in the proposed rule or, in some cases, not defined at all. For example, the proposed rule defines “counterfeit part” rather than “counterfeit electronic part.” In doing so, the rule goes well beyond the statutory prescription which is confined to counterfeit electronic parts. Industry believes that the proposed rule should be strictly limited to the corners of the statutory requirement, which is the detection and avoidance of counterfeit electronic parts.

Additionally, the definition of “counterfeit part” consists of three parts. The first part of the definition is consistent with DODI 4140.67 and the definition of “counterfeit material” applied by DoD to its own internal anti-counterfeiting policies and procedures. The second part of the definition goes beyond DoD’s own internal definition of “counterfeit material,” but is consistent with and furthers the intent of the statute which, among other things, utilizes the Lanham Act to combat the issue of counterfeit part proliferation. The third part of the definition, however, is particularly problematic for industry. Rather than establishing counterfeit parts as a subset of non-conforming parts, subparagraph (3) broadly deems to be counterfeit any non-conforming part that fails to meet “the performance requirements for intended use” – including a new, unused genuine part from the original manufacturer that is discovered to have an unintentional quality issue. Section 818 clearly required DoD’s definition to cover “previously used parts represented as new,” but the proposed rule goes well beyond this requirement and will have adverse cost and implementation consequences that ripple throughout the quality systems of the DOD supply chain.

b. “Trusted Supplier”
One of the tenets of Section 818 is that contractors and subcontractors obtain electronic parts that are (i) in production or currently available in stock from the original manufacturers of such parts or their authorized distributors, or from trusted suppliers who obtain such parts from the original manufacturer or their authorized distributors or (ii) not in production or currently available in stock from trusted suppliers. The proposed rule, however, fails to provide a definition of “trusted supplier.” Given the statutory reliance on the role of a trusted supplier, AIA believes it is essential that the proposed rule provide clear guidance and objective criteria to enable industry to properly identify and use a “trusted supplier.” We believe “trusted suppliers” should include OEM/OCM or their authorized distributors, resellers and sales agents and other distributors of diminishing manufacturing sources and material shortage (DMSMS) items that are vetted within a well-established protocol defined by DOD.

c. “Obsolete Parts”

Finally, whether through the definition of “counterfeit electronic part” or otherwise, DoD should address the issue of parts obsolescence. As proposed, the rule fails to address vulnerabilities in the supply chain created by demand for obsolete parts in legacy programs and fails to address the increasing constraints on DoD regarding its ability to support and fund alternatives to eliminate the use of obsolete parts. We believe the safe harbor exemption should be extended to cover obsolete parts for which the government has considered but declined the opportunity to fund redesign or replacement of the part. Electronic components, particularly microelectronics, have life cycles far shorter than the defense and aerospace products utilizing them. As a result, DoD and its contractors with effective through-life support contracts will be challenged to provide appropriate support without clear guidance as to who is a trusted supplier of applicable products. It is incumbent on DoD to provide clear guidance in the rule so that contractors can develop supply chain processes to mitigate risks inherent with obsolete parts requisitioning.

d. Other Definitions

Other definitions that are problematic include “legally authorized source,” which fails to include authorized distributors/dealers, a key element of the trusted supplier concept under Section 818. In context, trusted suppliers are different from legally authorized sources, but the rule should clarify what that difference is and provide better definitions and rationale. Likewise, the proposed rule fails to provide a definition of “current design activity,” a term which is used nowhere else in the DFARS. Due to definitional overlap and resulting potential confusion, clear differentiation is needed between the terms “legally authorized source” and “trusted supplier” if the intent is to treat these parts sources differently.

III. Inclusion of Contractor Counterfeit Electronic Part Avoidance & Detection System in Contractor Purchasing System, and Failure to Establish System Criteria

Section 818 requires DoD to implement a program to enhance contractor detection and avoidance of counterfeit electronic parts. The statutory requirement further delineated nine elements of any detection and avoidance system and requires DoD to establish processes and systems for review and
approval of these contractor systems comparable to processes established for contractor business systems. The statute does not require the creation of a new business system, nor does it require the inclusion of a counterfeit parts detection and avoidance system in an existing business system.

The proposed rule places contractor counterfeit electronic parts detection and avoidance systems within existing contractor purchasing systems and contractor quality assurance systems. Consequently, if a contractor fails to establish and maintain an acceptable detection and avoidance system, it could result in disapproval of the contractor’s entire purchasing system and the withholding of payments. Moreover, contractors are placed in regulatory limbo during the time between rule adoption and a successful CPSR including assessment of the contractor’s counterfeit part avoidance and detection system—specifically as to the treatment of costs incurred in addressing investigations, rework, and corrective actions associated with counterfeit parts or suspected counterfeit parts.

The proposal to incorporate the counterfeit electronic parts detection and avoidance system in the contractor purchasing system is particularly troubling in light of the fact the proposed rule fails to define any objective criteria for determining the acceptability of a counterfeit electronic parts detection and avoidance system. Numerous resources are available to DoD to assist in the establishment of an appropriate detection and avoidance system, including SAE AS5553A, an industry standard developed with government involvement and adopted by the government shortly after its original publication in 2009 (see NAVAIR Statement of Objectives for Small Tactical Unmanned Aircraft System and NASA Policy Directive NPD8730.2c—NASA Parts Policy, in each case mandating compliance with SAE AS5553). Among other things, AS5553A includes a risk-based approach with elements of a counterfeit electronics parts control plan that could be used to inform the requirements and define implementation details within the proposed rule.

Absent clearly articulated objective criteria, contractors are at risk for wide disparity among DoD purchasing systems evaluators in the interpretation of what constitutes an acceptable counterfeit electronic parts avoidance and detection system. While industry recommends AS5553A as the overarching governance risk-mitigation documents, various interpretations are being implemented. Therefore, there needs to be objective—not subjective—governance and implementation guidance throughout the product lifecycle.

We would note, however, that even if the proposed rule is revised to include a delineation of objective criteria, inclusion of the counterfeit electronic parts avoidance and detection system within the purchasing system is well beyond the intended scope of a contractor’s purchasing system and fails to acknowledge or incentivize responsible corrective action.

**Conclusion**

As we have detailed in these comments, AIA believes the proposed rule (1) fails to appropriately align with the requirements of Section 818, particularly in its lack of a risk-based approach; (2) improperly imposes undue risks and full responsibility and liability for counterfeit escapes on prime contractors; and (3) will not optimize the government and industry’s efforts and mutual desire to
reduce the proliferation of counterfeit electronic parts.

On behalf of its member companies, AIA requests that DoD consider extending and revising its current rulemaking process by at least 12 months to allow for the development of a government/industry series of substantive meetings to address the significant issues raised in these comments and to support a unified approach to implementing Sections 818 and 833. As evidenced by our strong focus on this challenge over the past several years, including standards and best practices development, industry supports the goal of minimizing counterfeit electronic parts in the defense supply chain and seeks to be a partner with DoD in this important effort.

AIA appreciates the opportunity to provide comments. If you have any questions or require further information, please contact me by telephone at (703) 358-1054 or by email at rusty.rentsch@ai-aerospace.org.

Sincerely,

James R. Rentsch
Assistant Vice President, Technical Operations

Cc: Frank Kendall, USD AT&L; Katrina McFarland, ASD Acquisition; Paul Peters, OSB AT&L