

CLIENT ALERT

Proposed FAR Rule to Expand Requirements for Reporting Nonconforming Items

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Following closely on the heels of the recent Department of Defense (DoD) final rule for detection, avoidance and reporting of counterfeit electronic parts (discussed [here](#)), the government on June 10, 2014, published a new [proposed FAR rule](#) to expand the requirements for contractors and subcontractors to report nonconforming items. While this proposed rule has important links to the recent DoD rule, the proposed rule is much broader in scope. As stated in the preamble to the proposed rule, "the problem of counterfeit and nonconforming parts extends far beyond electronic parts and can impact the mission of all Government agencies." Accordingly, the proposed rule would apply to procurements by any FAR-covered agency, to any type of item, and to a broader range of nonconformances.

The proposed rule would be implemented primarily through amendments to the quality assurance provisions of FAR part 46 and the creation of a new contract clause, mandatory for all contracts for the acquisition of supplies, or services that include supplies, at FAR 52.246-XX. Commercial item procurements would not be exempt from this new clause, and contractors would be required to include it in all subcontracts for supplies, or services that include supplies, at any tier.

The proposed rule would require reporting of items that are "counterfeit" or "suspect counterfeit," or that have a "major nonconformance" or "critical nonconformance." But the reporting requirements differ depending upon the type of nonconformance. The rule also would require contractors and subcontractors to screen reports in the Government-Industry Data Exchange Program (GIDEP), to avoid the use and delivery of reported items. These requirements are addressed separately below.

Counterfeit and Suspect Counterfeit Items

A contractor would be required to report to the contracting officer within 30 days of becoming aware that any "end item, component, subassembly, part or material contained in supplies purchased by the Contractor for delivery to, or for the Government is counterfeit or suspect counterfeit." In addition, a contractor would be required to report within 60 days to GIDEP if any "item purchased by or for the Contractor for delivery to, or for the Government" is counterfeit or suspect counterfeit.

The proposed rule defines "counterfeit item" and "suspect counterfeit item" as follows:

Counterfeit item means an unlawful or unauthorized reproduction, substitution, or alteration that has been knowingly mismarked, misidentified, or otherwise misrepresented to be an authentic, unmodified item from the original manufacturer, or a source with the express written authority of the original manufacturer or design activity, including an authorized aftermarket manufacturer. Unlawful or unauthorized substitution includes used items represented as new, or the false identification of grade, serial number, lot number, date code or performance characteristics.

Suspect counterfeit item means an item for which credible evidence (including but not limited to, visual inspection or testing) provides reasonable doubt that the item is authentic.

These definitions closely follow the wording used to define "counterfeit electronic parts" and "suspect counterfeit electronic parts" in the recently published DoD final rule on detection, avoidance, and reporting of counterfeit electronic parts – except that they are not limited to "electronic" parts.

Major or Critical Nonconformance

The proposed rule would require a contractor to report to GIDEP within 60 days of becoming aware that an item "purchased by or for the contractor for delivery to, or for the Government" contains a "major or critical nonconformance" – but only if the item is also (a) a "common item" and (b) "[c]onstitutes a quality escape that has resulted in the release of like nonconforming items to more than one customer."

Definitions are provided for the key terms "major nonconformance," "critical nonconformance," "common item," and "quality escape."

Critical nonconformance means a nonconformance that is likely to result in hazardous or unsafe conditions for individuals using, maintaining, or depending upon the supplies or services; or is likely to prevent performance of a vital agency mission.

Major nonconformance means a nonconformance, other than critical, that is likely to result in failure of the supplies or services, or to materially reduce the usability of the supplies or services for their intended purpose.

Quality escape means a situation in which a supplier's internal quality control system fails to identify and contain a nonconforming condition.

Common item means an item that has multiple applications versus a single or peculiar application. Common items include, for example, raw or processed materials, parts, components, subassemblies, and finished assemblies that are commonly available products (such as nondevelopmental items, off-the-shelf items, National Stock number items, or commercial catalog items).

GIDEP Screening

By amendment to FAR 46.105, the proposed rule would also require contractors to screen reports in GIDEP to avoid the use and delivery of items that are counterfeit or suspect counterfeit or that contain a major or critical nonconformance.

Civil Liability

The National Defense Authorization Act for FY 2012 (Pub. L. 112-81) established the statutory requirement for contractor reporting of counterfeit and suspect counterfeit electronic parts – as subsequently implemented by the DoD final rule on May 6, 2014. The Act also provided that a contractor or subcontractor providing a written report as required under the Act would not be subject to civil liability on the basis of such reporting, "provided that the contractor or subcontractor made a reasonable

effort to determine that the end item, component, part, or material concerned contained counterfeit electronic parts or suspect counterfeit electronic parts." The proposed FAR clause 52.246-XX includes similar language, but only "if this is a contract with the Department of Defense."

Comments

Comments to the proposed rule must be submitted by August 11, 2014. A public meeting also is scheduled for June 16, 2014, in Washington, D.C.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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