

ALERT

Fake Parts Remain in Focus: FAR Council Expands Counterfeit Reporting Rules

November 25, 2019

WHAT: On Friday, November 22, 2019, the Federal Acquisition Regulatory (FAR) Council published a long-awaited final rule expanding the requirement to report counterfeit electronic parts in their supply chains. This requirement, previously applicable to defense contractors, will now apply to all U.S. federal contractors and require them to report to the Government-Industry Data Exchange Program (GIDEP) any counterfeit or potentially counterfeit parts used in "complex items with critical applications," as well as nonconforming parts that do not meet contractual specifications. GIDEP is a widely available federal database, and the FAR Council believes that this mandatory reporting to the GIDEP will allow contractors to share knowledge of counterfeits and critical nonconformance. This, in turn, should reduce the risk of counterfeits from penetrating procurement supply chains.

The new rule applies to electronic parts and items that contracting officers determine to be "critical" or that require "higher-level quality standards items" that could jeopardize vital agency missions or risk injury or death. However, the rule does not generally apply to 1) commercial items; 2) contracts below the simplified acquisition threshold; 3) medical devices already subject to U.S. Food and Drug Administration reporting requirements; 4) items subject to an ongoing criminal investigation; 5) items only sent to one customer; and 6) foreign companies without a place of business in the U.S.

WHEN: The FAR Council published the Final Rule on November 22, 2019, and it goes into effect on December 23, 2019.

WHAT DOES IT MEAN FOR INDUSTRY: All contractors should assess their counterfeit exposure and make appropriate changes to their compliance programs. Under the final rule, contractors must actively:

1. Screen GIDEP routinely as an integral control step;
2. Notify the contracting officer and report in GIDEP within 60 days of when the contractor "becomes aware" or has reason to suspect that an item is counterfeit or suspect counterfeit; and
3. Retain any counterfeit or suspect counterfeit items possessed at the time of discovery until the contracting officer provides disposition instructions.

The rule may benefit the contractors by providing more accurate and plentiful data for the contractors to work with to avoid using counterfeit items. According to the Office of Federal Procurement Policy (OFPP), all government agencies use GIDEP as the central data base for receiving and disseminating information about nonconforming products. Previously, contractor participation was largely voluntary. Mandatory reporting should now increase contractor participation, thereby enriching the data available for all to combat counterfeit parts. The FAR Council predicts that this will materially improve the total safety, quality and reliability of systems and components during the acquisition and logistics phases of the life cycle, and reduce costs in the development and manufacture stage. Contractors should capitalize on the increased data available to them.

Despite these benefits, the new rule comes with new compliance challenges. Now, contractors must report counterfeit items and "suspect counterfeit items." Suspect counterfeit items are defined as items for which credible evidence provides "reasonable doubt" that the items are authentic. But the rule does not define reasonable doubt. Without knowing what constitutes reasonable doubt, contractors may find it hard to know when their obligations to disclose the items apply. As these and other key terms become better defined over time, extra care may be warranted, and contractors may, following careful internal review and consultation, want to err on the side of caution and disclose any suspect items.

Moreover, as seen through the public comments submitted on the rule, this new obligation to report at first may appear redundant with the mandatory disclosure requirements of FAR 52.203-13. This clause requires disclosure of credible evidence of violations by, among other persons, subcontractors of certain Federal criminal laws and the False Claims Act. But the new rule is distinct on several levels, not the least of which is that, for counterfeit items, contractors are on a 60-day clock even though under FAR 52.203-13, the disclosure period is undefined. Thus, the new counterfeit reporting rule deserves its own place in any contractor's compliance regime.