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DOD

DOD Following Up on Counterfeit Parts Rule With Public Meetings on Next Steps

The Defense Department will hold two public meetings June 16 on further efforts to meet mandates for detection and avoidance of counterfeit electronic parts set out in section 818 of the fiscal year 2012 National Defense Authorization Act.

The DOD recently signed off on final changes to the Defense Acquisition Regulation Supplement (DFARS) detailing contractors' responsibility for detecting and avoiding use of counterfeit electronic parts (101 FCR 507, 5/6/14).

In addition to the public meeting on implementing the final DFARS rule issued May 6, the DOD, General Services Administration and National Aeronautics and Space Administration together are holding an afternoon meeting at the same location on expanded reporting of nonconforming items in the Government-Industry Data Exchange Program (GIDEP). The afternoon meeting will center on Federal Acquisition Regulation (FAR) Case 2013-002.

"Expanded GIDEP reporting of nonconforming items is expected to mitigate the growing threat that counterfeit items pose and to reduce the risk of counterfeit items entering the supply chain," the agencies said in announcing the meeting May 15.

"Such expanded reporting would build on existing contractor inspection system requirements, utilizing existing terminology, and would add a requirement for contractors to report to the GIDEP database a counterfeit item, a suspect counterfeit item, or an item that contains a major or critical nonconformance that is a common item and that constitutes a quality escape that has resulted in the release of like nonconforming items to more than one customer," they said.

GIDEP is a reporting portal related to export controls and currently is limited to companies holding licenses to export military goods, Trey Hodgkins, senior vice president of the Information Technology Industry Council (ITIC), told Bloomberg BNA May 14.

The DOD's challenge is how to use GIDEP, which currently targets a small community of firms, on an "exponentially different scale," he said. Section 818's requirements for reporting counterfeits and suspect counterfeits apply to prime contractors, subcontractors and suppliers.

There is also a balancing act involved with "when to report" and "what to report," given the sensitive nature of the microelectronic components involved and the

widespread application of the reporting requirements, Hodgkins said.

Industry supports transparency regarding the threats counterfeits pose, he said. On the other hand, how the government implements section 818's reporting requirements is "an entirely different question."

Input on FAR Case. GIDEP, which "has been used as an information exchange when failed electronic parts are found, ... has not worked perfectly, but industry and government will want to be sure that its replacement works at least as well and does not impose excess burden and costs," Rogers Joseph O'Donnell P.C. Partner Robert Metzger said in an e-mail to Bloomberg BNA.

Among other things, he said, industry is concerned that "the new FAR case will require new reporting of 'nonconformance,' which could include many forms of product defect or deficiency, rather than being limited to 'suspect' or confirmed 'counterfeit' parts."

Contractors also worry that expanded reporting obligations will encompass other items and categories of supply—"materiel"—where definitions will be vague and boundaries uncertain. In the view of industry, there is no need for burdensome new regulations to expand reporting for nonconforming materiel, Metzger said.

"What section 818 requires, by law, is better reporting of 'suspect' and 'counterfeit' electronic parts," he said. However, "even experts disagree on how to decide when a part is 'suspect' or confirmed as a 'counterfeit.'"

In addition, there may be fears that:

- the reports will be premature or erroneous;
- companies will be deterred from reporting if they risk being sued by the supplier that furnished the part on which a report was filed;
- it is unclear how and to whom the government will distribute reports of counterfeit electronics;
- there won't be a safe-harbor for good-faith but erroneous reporting;
- a counterfeit parts "alert" might disclose proprietary information; and
- some of the information might be subject to U.S. export controls.

Meeting Details. The DOD announced the public meeting on the new DFARS counterfeit rule in a May 9 Federal Register notice. In the notice, it said it was seeking recommendations for further implementation of section 818.

Among recommendations in the 50 comments submitted in response to the proposed DFARS rule, published May 16, 2013, was establishment of government-industry dialogue. The final rule expanded criteria for detection and avoidance systems by adding new elements, including a process for screening government-industry data exchange program reports and other credible sources of counterfeiting information.

The DOD meeting will be held from 8:30 to 12:30 at the NASA Headquarters Auditorium, 300 E. St., S.W., Washington, D.C., 20546. An earlier public meeting seeking input on carrying out section 818 requirements was held March 27.

The DOD, GSA and NASA meeting on reporting non-conforming items will be held from 1:00 to 5:00 at the NASA Headquarters Auditorium.

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The DOD's May 9 public meeting notice is available at: <http://www.gpo.gov/fdsys/pkg/FR-2014-05-09/pdf/2014-10680.pdf>notice. The DOD, GSA NASA notice is available at: <https://www.federalregister.gov/articles/2014/05/15/2014-11225/expanded-reporting-of-nonconforming-items>.