

Cross Your Heart and Hope to Die – New DFARS Clauses Target Counterfeit Electronic Parts

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On August 2, 2016, the **Department of Defense** (“DOD”) rolled out new requirements for defense contractors that provide electronic parts and assemblies containing electronic parts, and with the new rules imposing significant risks on DOD contractors. One clause mandates a specific purchasing hierarchy, with requirements to purchase from the original manufacturer or authorized suppliers thereof when available. When an original source is not available, contractors are now required essentially to “vouch” for their suppliers, assuming all the risks if a vendor delivers a counterfeit or defective part. Simultaneously, DOD issued a second clause, which requires certain covered contractors in the DOD supply chain to establish and maintain an acceptable electronic part detection and avoidance system. Failure to implement an effective plan may disqualify a vendor from providing products to the DOD. These new rules come very close to imposing a near “strict liability” standard on DOD contractors, asking them to essentially guarantee the supply chain. Cross your heart and hope to die.

DFARS 252.246-7008, Sources of Electronic Parts

The first new clause requires contractors to purchase from specified sources when available, creating a three-tier hierarchy for purchasing:

1. If the electronic part is in production or in stock from an original, authorized, or approved sources, then the part must be sourced from the original manufacturer, their authorized suppliers, or suppliers that obtain parts exclusively the original manufacturer or authorized supplier.
2. If the electronic part is not in production and not in stock from an original, authorized, or approved source, then the part must be sourced from a “contractor-approved supplier” – essentially, a source that the contractor verifies meets industry standards and for which the contractor bears responsibility for the risk of any counterfeit parts.
3. If the electronic part is not in production and not available from any of the previously

mentioned sources, or if the part is sourced from a subcontractor that refused flowdown of this clause, or if the contractor or subcontractor cannot otherwise confirm the part is new, that is has not been comingled in supplier new production or stock with used, refurbished, reclaimed or returned parts, then the contractor must “promptly” notify the Contracting Officer, in writing, of its sourcing. The contractor is responsible for inspecting, testing, and authenticating the parts. And, presumably, the Contracting Officer may refuse to accept the unverified parts.

The age-old principle of *caveat emptor* (“let the buyer beware”) is officially turned on its head. It is now the supplier that needs to be aware – aware of where it is buying from, aware of whether the product meets the quality requirements, and aware of the risks inherent in supplying products to the DOD.

DFARS 252.246-7007, Contractor Counterfeit Electronic Part Detection and Avoidance System

Prime contractors subject to the federal cost accounting standards, as well as their subcontractors and suppliers of electronic parts or assemblies containing electronic parts, must have an electronic part detection and avoidance system. The system must include risk-based policies and procedures addressing twelve key areas:

1. Training personnel.
2. Inspection and testing of electronic parts.
3. Processes to abolish counterfeit parts proliferation.
4. Risk-based processes that enable tracking of electronic parts from the original manufacturer to product acceptance by the Government, whether supplied as discrete electronic parts or contained in assemblies.
5. Use of suppliers in accordance with 252.246-7008, Sources of Electronic Parts (described above).
6. Reporting and quarantining of counterfeit electronic parts and suspect counterfeit electronic parts.
7. Methodologies to identify and rapidly determine if a suspect counterfeit part is, in fact, counterfeit.
8. Design, operation, and maintenance of systems to detect and avoid counterfeit electronic parts and suspect counterfeit electronic parts.
9. Flow down of these requirements to all subcontractors that supply electronic parts or assemblies containing electronic parts, or perform authentication testing.
10. Process for staying abreast of current counterfeiting information and trends.
11. Process for screening Government-Industry Data Exchange Program (GIDEP) reports and

other credible sources of counterfeiting information to avoid the purchase or use of counterfeit electronic parts.

12. Control of obsolete electronic parts.

Per new regulations issued on August 30, 2016, failure to have an appropriate detection and avoidance system may affect the allowability of costs relating to counterfeit or suspect counterfeit electronic parts as well as the cost of rework or corrective action. Further, the Contracting Officer may disapprove of the purchasing system or withhold payments.

These clauses stem from the 2012 National Defense Authorization Act's mandate to purchase electronic parts from trusted suppliers. Notably, the requirements only apply to DOD contracts, as they seek to ensure weapon system integrity and protect troops' lives. Defense contractors that supply electronic parts should examine their supply chains to determine if their current sourcing meets DOD's new mandates. Failure to do so imposes significant risks on all government contractors, including those who simply in the "routine" supply chain.

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National Law Review, Volume VI, Number 266

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