

OE-3: 2020-03

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Final FAR Rule Requires Implementing Clause in New Contracts and Expands Counterfeit, Suspect Counterfeit, and Non-Conformance Government-Industry Data Exchange Program (GIDEP) Reporting Requirements for the Department of Energy

PURPOSE

This Operating Experience Level 3 (OE-3) document, which does not constitute contractual direction, provides information on implementing the Federal Acquisition Regulation (FAR) Final Rule that requires Government-Industry Data Exchange Program (GIDEP) screening and reporting by contractors and subcontractors of counterfeit or suspect/counterfeit items (S/CI), and certain major or critical non-conformances. The FAR rule, [Reporting Nonconforming Items](#), requires the new clause at [FAR 52.246-26](#) to be inserted into all new contracts or subcontracts with critical quality requirements.

BACKGROUND

Given the breadth and depth of DOE's missions, the undetected use of counterfeit parts have the potential to cause significant near and long-term adverse consequences, posing safety risks to workers, the public, the environment, or DOE missions. GIDEP reports are critical to keeping the DOE acquisition community up to date on products with the potential to cause problems that could lead to injuries, technical failures, security breaches, or damage to sensitive facilities.

The FAR rule expands contractor/subcontractor reporting obligations under covered contracts. The terms "critical non-conformance" and "major non-conformance," as used in the FAR rule, generally fall within the Department of Energy (DOE) category of "nonconforming items," which must be reported pursuant to DOE Order 414.1D, *Quality Assurance*. The definitions of "counterfeit" and "suspect counterfeit," which are required to be reported into GIDEP, are also included in [FAR 52.246-26](#). These definitions have similarities to and overlap with the

definition of S/CI found in DOE Order 414.1D. If you need to report a nonconformance into GIDEP and have questions about this difference, refer to [FAR 52.246-26](#) for the specific definitions. However, it is important to note that FAR 52.246-26 does not affect the requirements of DOE Order 414.1D or its Contractor Requirements Document (CRD).

DISCUSSION

The FAR rule, which went into effect on December 23, 2019, requires the insertion of the implementing clause at [FAR 52.246-26](#) into applicable DOE solicitations, contracts and subcontracts. Where the clause is required, no alterations are permitted by DOE other than to identify the parties to the contract. Applicable contracts or subcontracts involve one of four categories:

1. Items subject to higher-level quality standards when the agency is concerned about the risk of a non-conformance in a complex and critical item
2. Items the Contracting Officer has determined to be "critical," i.e., an item, the failure of which is likely to result in:
 - Hazardous or unsafe conditions for individuals using, maintaining, or depending upon the item;
 - Prevention of performance of a vital agency mission
3. Optional but recommended: Electronic parts, or items containing electronic parts, for contracts that exceed the simplified acquisition threshold (currently \$250K for DOE)
4. Services provided in conjunction with any of the three categories above. This specifically includes contracts whose services are provided in connection with the procurement of the items described above in Items 1-3.

If a contract or subcontract is applicable and contains the newly required language as described above, the Contractor SHALL:

1. Screen existing GIDEP reports as a part of the Contractor's quality assurance (QA) or inspection process to avoid the use and delivery of counterfeit or suspect counterfeit, or delivery of items that contain a major or critical nonconformance; and;
2. Provide written notice to the Contracting Officer within 60 days of becoming aware or having reason (by inspection, testing, record review or notification from another source) to suspect 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; and
3. Retain the counterfeit or suspect counterfeit item until Contracting Officer provides disposition instructions; and
4. Submit a GIDEP report within 60 days of becoming aware or having reason to suspect that an item purchased by the Contractor for delivery to, or for, the Government is:
 - A counterfeit or suspect counterfeit item; or
 - A common item that has a major or critical nonconformance.

There are several notable exceptions where a Contractor is not required to submit a GIDEP report pursuant to the Final Rule:

- If the Contractor is a foreign corporation or partnership that does not have a place of business, or fiscal paying agent in the United States; or
- If the Contractor is aware that the counterfeit or suspect counterfeit, or nonconforming item is the subject of an ongoing criminal investigation (unless the relevant law enforcement agency approves the GIDEP report); or
- For nonconforming items (other than counterfeit or suspect counterfeit items) where it can be confirmed that the organization where the defect was generated (e.g., original component manufacturer, original equipment manufacturer, aftermarket manufacturer) has not released the item to more than one customer.

Additionally, the implementing contract clause should NOT be inserted in subcontracts for:

- [Commercial items](#); or
- Medical devices that are subject to the Food and Drug Administration reporting requirements at [21 CFR 803](#).

Any reports submitted pursuant to the reporting requirement SHALL NOT INCLUDE:

- Trade secrets or confidential commercial or financial information protected under the Trade Secrets Act ([18 U.S.C. 1905](#)); or
- Any other information prohibited from disclosure by statute or regulation.

RECOMMENDATIONS

Although this OE-3 does not constitute contractual direction, it does provide information on implementing the requirements in FAR 46.317. Inclusion of the clause at FAR 52.246-26 will help to protect DOE and its contractors from potential harm due to counterfeit, suspected counterfeit, and non-conforming items. When appropriate, Contracting Officers may also consider commencing negotiations to bilaterally modify relevant existing contracts to add the clause.

CONCLUSION

The FAR 52.246-26 represents an expansion of reporting obligations to be included in applicable federal solicitations and contracts. Through implementation of this rule, Contractors must report counterfeit or suspect counterfeit items, as well as major or critical non-conformances, to the DOE Contracting Officer as well as to GIDEP. Recognizing that counterfeits may result in failure of individual items or, dependent upon application, failure of complete systems, DOE contractors must continue to protect against the delivery, acceptance, and use of S/CI or defective items. Please note that, in addition to the FAR requirements, the CRD for DOE Order 414.1D still requires DOE contractors who have the CRD in their contracts to ensure the detection, control, reporting and disposition of S/CI. DOE Order 414.1D also requires that S/CI be reported to the Office of the Inspector General (OIG), and in accordance with DOE Order 232.2A, *Occurrence Reporting and Processing of Operations Information*, or a later version.



REFERENCES

[FAR 2.101](#) – Definitions

[FAR 46.203](#) - Criteria for use of Contract Quality Requirements

[FAR 46.311](#) - Higher-Level Contract Quality Requirement

[FAR 46.317](#) - Reporting Nonconforming Items

[FAR 52.246-11](#) - Higher-Level Contract Quality Requirement

[FAR 52.246-26](#) - Reporting Nonconforming Items (New FAR Rule)

[18 U.S.C. 1905](#) - Disclosure of Confidential Information

Questions regarding this OE-3 document can be directed to Colette Broussard at (301) 903-5452 or e-mail Colette.Broussard@HQ.DOE.gov.

This OE-3 document requires no follow-up report or written response.



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