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February 3, 2014

General Services Administration
Regulatory Secretariat (MVCB)
1800 F Street, N.W. 2nd Floor
Washington, D.C. 20405-0001
Attn: Hada Flowers

Ref: FAR Case 2012-032 – Higher-Level Contract Quality
CODSIA Case 01-14

Dear Ms. Flowers:

On behalf of the Council of Space and Defense Industry Associations (CODSIA),[1] we are pleased to submit comments on the proposed Federal Acquisition Regulation (FAR) rule titled "Higher-Level Contract Quality Requirements" that was published in the Federal Register on December 3, 2013.[2] The deadline for the submission of comments is February 3, 2014.

Introduction

The proposed rule is one of four planned or already released acquisition rules slated to implement a counterfeit electronic parts risk mitigation and compliance framework attributable to the enactment of Section 818 of the FY12 National Defense Authorization Act (NDAA), Detection and Avoidance of Counterfeit Electronic Parts.[3] Aside from the proposed FAR rule addressed herein, the framework includes the proposed DFARS rule for Detection and Avoidance of Counterfeit Electronic Parts currently in the regulatory process,[4] a yet to be

[1] CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues at the suggestion of the Department of Defense. CODSIA consists of seven associations – the Aerospace Industries Association (AIA), the American Council of Engineering Companies (ACEC), the Information Technology Alliance for the Public Sector (ITAPS), the National Defense Industrial Association (NDIA), the Professional Services Council (PSC), TechAmerica, and the Chamber of Commerce of the United States. CODSIA's member associations represent thousands of government contractors nationwide. The Council acts as an institutional focal point for coordination of its members' positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.
[2] 78 Fed. Reg. 232, et. seq., December 3 2013, http://www.gpo.gov/fdsys/pkg/FR-2013-05-16/pdf/2013-11400.pdf
[3] P.L. 112-81, December 31,2011
[4] See CODSIA Comments to Meredith Murphy USD AT&L on DFARS Case 2012-D055, July 15, 2013

released proposed FAR Case on Expanded Reporting of Non-conforming Supplies,[5] and another yet to be released proposed DFARS rule on the further implementation of Section 818.[6]

The proposed changes to the FAR are an important facet of a set of complex, integrated industrial activities being fostered by the federal government to establish an operative government-wide anti-counterfeiting framework. We applaud the ongoing government efforts to address the root causes of global counterfeiting of electronic parts through the cumulative rulemakings, and commend the many parallel independent industry efforts to identify and pursue technical solutions as important elements to gaining ground on counterfeiters, but caution the FAR Council that the overarching framework should drive the policy rather than an incremental rulemaking approach.

As CODSIA comments related to implementation of Section 818 have articulated in prior letters, the entire federal industrial base continues to maintain that establishing an effective private-public counterfeit electronic parts risk mitigation framework through continued communication with industry supply chain and technical experts and/or through a parallel alternative rule promulgation process would be the most efficient way to implement an effective strategy.[7] Even at this late stage, as implementation proceeds along many policy fronts, CODSIA recommends that the government foster broader conversations with the industrial base as a way to eliminate policy missteps.

Notwithstanding the federal rulemakings, our member associations and industry partners have continuously worked towards reducing counterfeit risk by updating and expanding their controls and systems through a risk management based approach to establish more robust processes to combat increasing levels of global counterfeiting.

Thus, while industry has long acted to prevent counterfeiting as a matter of managing business and market risk, the proposed rule gives rise to concerns about the nature of the many rules in process which could result in inconsistent implementation or not be wholly integrated at the completion of the entire rulemaking process on counterfeit parts. We are also concerned about regulatory over-reach and the expansion of rules to include standards not necessarily related to counterfeit electronic parts, which were not identified as part of the problem that Section 818 was originally passed to address. This seemingly minor policy change will significantly impact company supply chains, especially where commercial items are being acquired, create difficult to enforce contracting requirements, add costs to products sold to the federal government to account for new government oversight processes, and frighten off suppliers from doing business with the federal government in any way, especially small and innovative businesses. Our detailed comments on the proposed rule are below.

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[5] Presumptive FAR Case 2013-002

[6] Presumptive DFARS Case 2014-D005, Detection and Avoidance of Counterfeit Electronic Parts – Further Implementation

[7] See CODSIA Comments On DFARS Case 2012-D055, July 11, 2013

Substantive Materials and Comments

In addition to updating the list of sample quality standards in FAR Part 46, the purpose of the proposed rule is to provide guidance to contracting officers (COs) on how and when it is appropriate to include higher-level quality requirements in solicitations and contracts based on a risk assessment that evaluates likelihood and impacts. Prior to this rule, the choice of higher-level quality requirements was determined almost entirely by contracting officials based more or less on their own experience and with the consultation of technical personnel during the requirements generation process. Thus, although FAR Part 46, Contract Quality Requirements, has long included illustrative examples of standards for use where the product or service being acquired demanded a higher-level of quality assurance, the proposed changes are designed to specifically use FAR Part 46 as a platform to supplement the detection and avoidance system requirements of Section 818 being developed in the parallel regulatory cases.

While industry commends the Government with attempting to craft a "purpose" statement underlying the rulemaking, the background information in the rule asserts that there is a direct link between globalization in the marketplace and counterfeit parts of all types, not only electronic parts. Based on that assertion, the FAR Council has drafted a rule directed at all non-conforming supplies rather than target counterfeit and suspect counterfeit electronic parts as set forth in Section 818. This over-broad application of a narrowly prescribed statute creates the potential for significant unintended cost impacts throughout industry supply chains and for their federal customers.

With respect to the Initial Regulatory Flexibility Act analysis (IRFA), industry comments to, and public testimony on, the initial Section 818 rulemaking made clear that there would be significant impacts to small businesses, at the very least through federal subcontracting compliance requirements and contract flow-down policies, even for commercial items, while the analysis in the IRFA continues to state that the proposed rule will have no significant impact to small businesses mainly because it contains no new reporting requirements. As addressed below, this is inconsistent with integrating this case into the overall counterfeit parts mitigation framework contained in this and the other rulemaking cases identified above, and ignores the reality that the industrial base includes many small businesses as primes, subcontractors and suppliers that will be impacted by the framework.

For our purposes, the CODSIA comments track generally to the following principal changes:

- Adds implementation of higher-level quality standards as an evaluation element of a contractor's Purchasing System (FAR 44.303);

- Requires agencies to create a process to determine when higher-level quality standards should be included in any solicitation or contract and how to determine

which of the standards examples to cite through a risk assessment of likelihood and impact (FAR 46.202-4);

- Adds design and testing to technical requirements requiring contractor control and thus implicate higher-level quality requirements (FAR 46.202-4);

- Creates an exclusive list of higher-level quality standards to be cited as examples in the relevant 52.246-11 clause (FAR 46.202-4 and 46.303); and

- Revises 52.246-11 to remove the opportunity for an offeror to propose another quality standard in lieu of the standard cited by the CO in the model form contract.

Recommendations:

1. **Do not incorporate higher-level quality system oversight within Purchasing System reviews without adding compliance flexibility:**

Including higher-level quality standards implementation in the contractor Purchasing System review is duplicative to existing quality oversight (Quality Management Systems) coverage in the FAR and DFARS and inconsistent with previous recommendations by industry opposing the placement of the Detection and Avoidance system in DFARS 244.303, and under the clause at 252.244-7001, Contractor Purchasing System Administration. As set forth in the prior CODSIA comments on the Detection and Avoidance system implementation, industry opposes inclusion of quality related oversight into the purchasing system review because purchasing systems are designed to insure that proper business and analytical processes are in place to assure the government of a fair and reasonable price in contractor subcontract and lower tier transactions and to insure the flow-down of appropriate terms and conditions to protect the government's business interests.

Adding quality standards oversight to the purchasing system as stand-alone review elements leads to functional disconnects with other quality assurance functions, including engineering, material management, design and other technical disciplines whose controls are governed elsewhere already. A shift of higher-level quality standards oversight to the purchasing system will require significant additional industry cost to replicate processes and procedures already embedded in other industry oversight areas. Moreover, inclusion of higher-level quality standards in the purchasing system poses the risk that a single counterfeit incident could cause DoD to withdraw purchasing system approval over a matter that is the responsibility of a separate technical function to control.

While regulating supplier quality through the Purchasing System may be convenient to propose for implementation because it shifts the burden to contractors, it should not be included in the

purchasing system approval process for the reasons set forth above. A consistent and efficient compliance approach would dictate that quality be governed by existing quality system oversight requirements. The possibility that prime contractors can ensure subcontractor or other third party supplier compliance to higher-level quality standards throughout the entire supply chain and in all cases is illusory and, to assert in this rule that such a policing function can be mandated through the purchasing system approval process is not realistic or efficient, nor does it comport with the broader government attempts to reduce acquisition costs.

If the government is determined to insure that FAR purchasing system oversight include higher-level quality system implementation (presumably to align with the DFARS proposed approach to include the detection and avoidance system oversight in the purchasing system review), we recommend that the FAR rule allow for a contractor to self-certify their compliance with higher-level quality standards implementation during any oversight review and/or until such time as processes are in place at both contractor and oversight activities to objectively determine contractor and subcontractor compliance with any standards.

We further recommend that any revised policy allow for a contractor to demonstrate compliance to the DCMA to higher-level quality standards by allowing compliance certification by an accredited 3rd party organization, such as those provided in the ordinary course of business to assess internal compliance to ISO and other relevant AS quality standards. Without such flexibility, there will inevitably be delays in completing business systems reviews and executing contract awards.

2. **Do not require mandatory flow-down of higher-level quality standards to commercial item or COTS suppliers or subcontractors**

It is still unsettled that the detection and avoidance system requirements of Section 818 will apply to commercial items/COTS and we continue to believe that Congress did not intend to apply Section 818 requirements to commercial items/COTS. Prior industry comments reflected the concern that the flow-down of detection and avoidance system requirements not apply to commercial item/COTS suppliers. It is similarly unclear in this case whether higher-level quality standards will be applied to commercial items/COTS products or be required to be flowed down through the entire supply chain.

While the case does not directly impose flow-down language, the background states that a contractor must insure subcontractor adherence to the cited quality standards with the implication that contractors will strictly enforce through their purchasing power with oversight being done through the prime contractor purchasing system approval process conducted by the government. Subcontract flow-down policy is thus of tremendous significance to the entire supply chain where the rule states that contractors must insure subcontractor adherence to any higher-level quality standard as part of their business systems compliance process. It is reasonable to conclude that any such mandatory flow-down of higher-level quality requirements will add

significant cost to the entire tiered supply chain to account for such prescriptive requirements and represents an additional unnecessary intrusion by government into the management of industry supply chains.

We recommend that any higher-level quality standards requirements designated in a federal government contract not be required to be flowed down to commercial item subcontractors or to COTS supplier/vendors and to allow contractors the flexibility and authority to manage their own supply chains to a risk-based conformance model.

3. **Coordinate with industry on crafting Contracting Officer policy guidance and/or subject CO determinations to higher-level agency approval**

The proposed rule at FAR 46.202-4 requires agencies to develop guidance for COs to use to determine clause applicability. The scope of the guidance is mostly unclear at this stage and may take some time to develop. As a preliminary step, CODSIA recommends that agency guidance should be completed before implementing any new higher-level quality FAR policy and, as stated below, phased in over time to insure a consistent approach among agencies. Conversely, the government should also consider establishing a working group with industry to build consensus for when higher-level quality requirements may be appropriate or to help define government-wide criteria for when to cite higher-level quality requirements in any given solicitation.

Absent those steps, government should consider that as they create agency procedures to determine which standards to use in any given acquisition, CO's, technical and oversight personnel should also be cross-trained to understand the fundamental differences among the technical standards and the rationale behind any contractual application. It is reasonable to conclude that while contracting officials will rely on technical support personnel to make standards determinations, it is procedurally unclear how the risk assessment and determination will be conducted and documented: will the choice of standard be documented in the procurement file and will the agency risk determination guidance be subject to the regulatory comment process? In any case, we recommend that CO higher-level quality standards determinations be subject to higher-level acquisition approval authority and subject matter expert concurrence to insure the correct determination is made and that such documents are included in the contract file.

As currently written, the FAR allows CO's discretion when to invoke the higher-level quality requirements, but as stated herein, there is little government-wide guidance at this time on the meaning of complex or critical items or other relevant terms of art, so it is possible that the proposed rule could result in arbitrary or widespread inappropriate use of the clause. CODSIA recommends that any guidance focus CO attention towards larger acquisitions to help avoid the indiscriminate use of the higher-level quality requirements clause in smaller value or

inappropriate acquisitions and to comport with the risk-based mitigation framework currently contemplated by Section 818.

As currently written, the proposed rule requires each executive agency to determine its own procedures on determining when to use higher-level quality requirements. Absent further coordination with industry, such an approach will inevitably lead to different procedures at each agency and unduly escalate the cost of compliance for all contractors and the supply chain, while it may have little or no discernible impact on mitigating the flow of counterfeit items. Furthermore, as stressed herein, federal agencies should consider or plan to engage on counterfeit electronic parts policy more broadly with industry to ensure alignment and integration across all the federal agencies.

Agency guidance should also include steps on how any cited higher-level quality standards will integrate new DoD policies on product obsolescence, diminishing manufacturing sources and attempts to leverage the DoD expedited process for the identification and replacement of obsolete electronic parts (as required by Section 803 of the FY 2014 National Defense Authorization Act enacted December 26, 2103).

4. <u>Do Not Cite Immature or Unapproved Standards as Higher-level Quality Requirements</u>

The apparent expansion of this rulemaking to cite standards unrelated to electronic parts quality requires that all relevant terms of art be more clearly defined than they are now (i.e., critical items, complex items) and aligned with the efforts in the Detection and Avoidance System regulatory case. Moreover, until such time as the entire supply chain has sufficient notice as to the new policy requirements of the totality of all counterfeit electronic parts regulatory cases, and progress made on standards cited as examples in 46.202-4(b), SAE AS 5553 and AS 6174 should be cited as guidance in lieu of firm contract requirements. It is pertinent that those particular standards are the only ones added to the standards list in FAR Part 46 and specifically designated for use to combat counterfeit parts, but they are currently in a state of flux and not mature enough to use as firm requirements at this stage and thus inappropriate to cite as examples.

Before expanding the regulatory coverage and requiring additional new default standards, we believe more guidance is needed from federal agency customers on the extent to which counterfeits beyond electronic parts have emerged as a significant threat to their supply chains. This will also allow more time for the governing standards bodies to complete their efforts to align the new standards to a more comprehensive supply chain risk based management approach.

There is also concern within industry that citing SAE AS5553 or SAE AS6174 as default requirements choices at this stage of their integration into industrial usage will result in inconsistent agency implementation and lead to additional unnecessary contract costs. It is unsettled that government agencies will accept the proposed revision of SAE AS5553 to be compliant with the nine detection and avoidance system criteria currently being contemplated for

adoption in DFARS 246.870-2(b) and government needs to align all such requirements to achieve its goal of mitigating counterfeit electronic parts risk and keep costs stable.[8] The incorporation of multiple counterfeit electronic part requirements (SAE AS5553 and adoption of the nine system criteria) as default standards and contract requirements for all industry sectors will drive up costs to meet both sets of requirements without a clear set of compliance or verification criteria and thus create additional unwarranted risk for disapproval of contractor's Purchasing System.

Further, SAE AS6174 is an immature standard based on an unfinished SAE AS5553 model, which has been partially successful only because of similar product characteristics among the supply base for electronic parts, while the requirements defined in SAE AS6174 apply to the supply chain for all non-electronic commodities. Neither industry nor SAE have defined verification criteria or provided guidelines on how AS6174 can be successfully implemented across all non-electronic commodities and it is currently considered a guidance document only. Invoking AS6174 across all non-electronic commodities will thus dilute efforts to reduce risks and balkanize broader industry efforts at a streamlined, holistic industrial base approach on counterfeit electronic parts, which are the most at-risk area for the US industrial base.

Likewise, industry has commented extensively on a lack of clear definitions of many of the terms of art in the Detection and Avoidance system rules, which in some cases are modeled on AS5553 or AS6174 and sometimes not. Since consensus has yet to be reached on definitions, it is premature in this FAR case to cite standards which may contain definitions inconsistent with the eventual versions adopted by the government and industry through the various rules. It should also be emphasized that strict compliance with higher-level quality standards may deter many small businesses from acting as primes or subcontractors on federal contracts and generally reduce the level of competition, especially where contractors cannot propose alternate quality processes (see below).

5. <u>Allow Offeror/Contractor Flexibility to propose Standards in the Transaction Process</u>

Industry should be able to propose relevant alternate quality standards for any given requirement rather than default to a limited number of exclusive standards identified in the FAR and inserted in the boilerplate clause by contracting officials. It is reasonable to conclude that even with guidance and technical input from its customers, contracting officials at individual agencies will insert one or more of the "example" standards into the 52.246-11 clause without much understanding of those systems or their associated costs. While there is no rationale posited in the rule for eliminating the opportunity to propose alternate standards or quality assurance processes, and no such direction exists in Section 818, contractors have a more complete

[8] See CODSIA Comments to Meredith Murphy USD AT&L on DFARS Case 2012-D055, July 15, 2013 suggesting agencies explicitly recognize self-certification to AS5553.

knowledge of their products and their quality systems and would be better poised to propose an appropriate quality standard in any given transaction. What if the CO cites a quality standard from the FAR which does not apply to the product being acquired? It would appear offerors would be prohibited from rebutting the directed standard. What if the CO cites multiple standards in any given acquisition, some which apply, and some which do not? Again, it would appear offerors would be prohibited from rebutting or deviating from use of the directed standard without risk of being found non-responsive, or later, in breach of contract.

Many questions thus exist about execution of such a prohibition against negotiation and industry recommends that the rule be adjusted to allow for flexibility by the contracting parties to identify the most appropriate standard. This can be accomplished easily through the standard transactional process while not undermining the goal of identifying an appropriate quality standard under the conditions of any specific requirement, especially given that agency procedures for determining risk may lag well behind implementation of this rule-making, and thus create a set of default quality standards that will be used for some time without any other substantive guidance for CO's.

The rule should also state in FAR 46.202-4(b) that if the 52.246-11 clause is used, the cited standard(s) will take precedence over any other higher-level quality requirement separately cited in any other contract documents, including Statements of Work, Contract Data Requirements, etc. If more than one standard is cited in the clause, and their use is appropriate or needed under the conditions involved in the transaction, the CO should declare which of the multiple standards takes precedence in the event of conflict. As improbable as it may seem now, if a CO cites a technical standard and insists that the contractor comply, and there is an escape allowing a counterfeit item into the supply chain attributable to citing an inappropriate standard or forcing a contractor to forego use of a more appropriate standard, will the contractor be immunized from liability for the costs associated with correcting such an escape?

6. <u>Phase in Implementation to Align with other Counterfeit Electronic Parts rules</u>

Implementation should be phased in over time to allow contractors, subcontractors and others in the supply chain to implement processes and procedures relevant to compliance with any given technical standard requirement and allow them to adjust for changes in market and contracting conditions. A phase-in period would also comport and align with the requirements of the other Section 818 regulatory cases as they go through the rulemaking process in a way that would be efficient and properly scale industry and government oversight efforts to minimize the cost of compliance involved with implementing the many disparate parts of the counterfeit electronic parts risk mitigation framework.

7. <u>Clarify the role of Higher-level Quality Systems Rules on Source Selection Policy</u>

Procedurally, source selection in a predominantly low price contracting environment will be an ongoing challenge to the entire federal industrial base for the foreseeable future. The cost to

compete for opportunities will almost certainly be a matter of slim margins and narrow price differences. In cases where higher-level quality requirements are called out, the ability to conform a price to include those requirements and remain competitive will be a challenge for those in the government market or contemplating market entry, especially small businesses acting as primes or subcontractors, and it is reasonable to conclude that companies will address this differently, but all with an eye on reducing their costs to be as competitive as possible. Moreover, it is consistent with the desire to mitigate the risk from counterfeit parts throughout the supply chain that higher-level quality standards will become more of a standard requirement in government acquisitions than in the past and its inclusion could become significantly more important as a price discriminator to a CO during the source selection process.

At this time, the identification of a higher-level quality system as a contract requirement obligates the contractor to maintain such systems as an element of their performance subject to strict compliance, but the cost of those systems can sometimes be invisible to government contracting officials whose goal is to achieve the lowest price possible. As such, it is imperative that proper attention be given by government during acquisition planning to the role of higher-level quality standards in the requirements generation and source selection processes and, where higher-level quality requirements are determined to be needed, this should be reflected in the choice of contract type and source selection process and ideally as an indicator that an award decision should not be governed entirely by price.

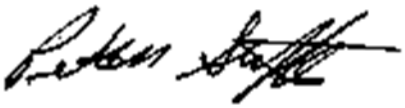
It is not unthinkable that sources could be summarily excluded from acquisitions based on selection or non-selection of a higher-level quality requirement and thus the use or non-use of such a requirement alone could determine the scope of competition and should be considered carefully, although those problems could be mostly obviated by proper guidance and workforce training. In alignment with recommendation 3 above, we suggest that direction on the use of higher-level quality requirements as part of a broader source selection policy be included in the required agency guidance and tied appropriately to evaluation of proposal and performance price and risk.

Conclusion

Thank you for your attention to these comments. As emphasized above, many of the concerns articulated herein would be much easier to address if a collaborative industry-government open-forum approach were used to address the relevant issues and we strongly recommend that further dialogue between industry and the government take place before implementing any of the Section 818 rules. We would welcome the opportunity to meet to discuss these comments. In the interim, if you have any questions or need any additional information, please do not hesitate to

contact Will Goodman of the National Defense Industries Association, who serves as the CODSIA project officer for this case, or Bettie McCarthy, CODSIA's administrative officer. Bettie can be reached at (703) 875-8059 or at codsia@pscouncil.org.

Sincerely,



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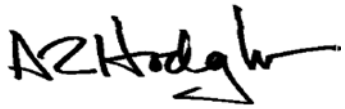

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