Dear Ms. Williams:

On behalf of the American Bar Association (“ABA”) Section of Public Contract Law (“Section”), I am submitting comments in response to the Proposed Rule cited above.1 The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the ABA’s Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the policy of the ABA.2

1 Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Marian Blank Horn, Kristine B. Kassekert, and Heather K. Weiner, members of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

2 This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic “Acquisition Reform and Emerging Issues.”
I. INTRODUCTION

The Department of Defense (“DoD”) has proposed amending the Defense Federal Acquisition Regulation Supplement (“DFARS”) to implement Section 885(b) of the National Defense Authorization Act for Fiscal Year 2016 as part of a broader effort to address concerns about counterfeit electronic parts in the defense supply chain. In addition to the DFARS changes proposed here, DoD is undertaking related changes through separate rulemakings. The Federal Acquisition Regulation Council also is engaged in related rulemakings to address this and other counterfeit parts supply chain concerns. The Section encourages coordination as a comprehensive regulatory framework is developed to address procedures for the avoidance and detection of counterfeit electronic parts in the supply chain and on allowable costs. The Section further encourages that the final framework provide clear guidance to contractors and the Government while retaining sufficient flexibility in how they fulfill their roles.

Section 885(b) makes the selection of trusted suppliers by DoD contractors and subcontractors subject to approval, as well as review and audit, by appropriate DoD officials. See 81 Fed. Reg. at 50680. To implement this requirement, DoD has proposed to amend DFARS 231.205-71(b) and DFARS 252.246-7008(b)(2) to provide for approval by the contracting officer or a designee as described in this letter. The Section recommends that the Proposed Rule be revised to clarify, with as much detail as possible, the criteria and timing associated with the Government’s review, audit, and approval process.

II. COMMENTS

A. The Section Encourages Implementation of this Regulation that Focuses on Unapproved and Unaudited Purchasing Systems.

Section 885(b) and the Proposed Rule both generally address the risks present when a contractor cannot obtain electronic parts from the original equipment manufacturer (“OEM”) or authorized resellers. An existing clause, DFARS 252.246-7008(b)(2), has permitted covered contractors to purchase electronic parts from a contractor-approved supplier. Under the Proposed Rule, the Government will retain the right to review, audit, and approve the contractor-approved supplier. But the proposed rule does not identify the criteria for deciding when to review, audit, and approve suppliers that have been approved by the contractor. The Section recommends that DoD clarify that any such governmental review, audit, and approval will be based on appropriate industry standards, practices, or processes for the relevant supply chain and will not impose on contractors additional requirements based on internal DoD standards for identifying trusted electronic-parts suppliers. This clarification will ensure that the sub-paragraphs of this regulation are consistently interpreted and applied.

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3 See, e.g., DFARS Case 2015-D020, DoD Use of Trusted Suppliers for Electronic Parts, proposed rule forthcoming.

4 This latter point would be consistent with DoD’s assertion that the Proposed Rule “does not impose any reporting, recordkeeping, or other compliance requirements other than being subject to approval by DoD if the contractor or subcontractor identifies a contractor-approved supplier of electronic parts.” 81 Fed. Reg. at 50681.
Further, the Section recommends clarifying the Proposed Rule to provide that if a contractor has an approved purchasing system before DoD publishes the ensuing final rule, the prior approval shall remain in effect until the next review of the contractor’s purchasing system. Because the stated purpose of this rule is only to formalize the existing right of the contracting officer to perform an additional review or approval of a contractor-approved supplier, finalizing the Proposed Rule should not, in effect, invalidate an existing finding that the contractor has an approved system for identifying “contractor approved suppliers,” both in the specific context of the counterfeit electronic parts “safe harbor” provision, and in the more general context of managing supply chains.


Proposed DFARS 252.246-7008(b) focuses on DoD contractors’ selection of electronic-parts suppliers to prevent counterfeit electronic parts from entering the defense supply chain. The Government’s reviews and audits under this provision should similarly focus on counterfeit prevention. Because separate regulations address contractor purchasing-system criteria, the Section recommends that the audits conducted under Proposed DFARS 252.246-7008(b)(2)(iii) be limited to confirming that the contractor’s process for selecting suppliers satisfies industry standards and processes for counterfeit prevention.


DoD has not published a program for auditing contractor-approved suppliers. If, as a result, the Government cannot audit any contractor-approved supplier systems, contractors should be allowed to purchase under their contractor-approved supplier system provided that their systems are based on established industry standards and processes for counterfeit prevention. The Section recommends that DoD accept these third-party certifications as supporting approval of a trusted-supplier system until DoD has implemented its own program for auditing trusted-supplier systems.

As an alternative, the Section recommends that DoD adopt a timeframe for the contracting officer (or designee) to review, audit, and approve a contractor’s approved suppliers. Contractors often purchase electronic parts through “lot buys” large enough to satisfy requirements for ongoing and new efforts, with these higher purchase volumes allowing for economies of scale. If DoD might later question these purchasing practices, contractors might stop using them, or at least use them less often, thereby adding cost and inefficiency to the defense supply chain—cost and inefficiency ultimately borne by DoD. Further, a DoD delay in review, audit, and approval of contractor-approved suppliers could result in lost time and budget impacts if contractors proceed with these purchases but DoD subsequently disapproves one or more selected suppliers.
To resolve this uncertainty, DoD should establish schedules for these reviews and audits. The schedules would provide for a contractor to identify an approved supplier and for DoD to notify the contractor if it would disapprove the supplier before significant costs and time have been expended. If DoD cannot complete a review and audit under the published schedule, but subsequently notifies a contractor that it will not approve a contractor’s trusted supplier, then the contractor should be entitled to compensation for the additional costs of any inventory already purchased from that particular supplier. For example, for new awards, contracting officers should have thirty days following the award to raise concerns identified during proposal evaluation or at contract award, as opposed to allowing open-ended review periods.

To implement the Proposed Rule and address the above concerns, the Section proposes the following clarification to the proposed revision of DFARS 252.246-7008(b)(2)(iii):

If the Contractor has an approved purchasing system, the Contractor may proceed with the acquisition and use of electronic parts from a contractor-approved supplier. If the Contractor does not have an approved purchasing system, (a) the Contractor’s selection of such contractor-approved supplier is subject to review, audit, and approval by the Contracting Officer within the first 30 days following notice of award, and (b) unless otherwise notified by DoD, the Contractor may purchase electronic parts from a contractor-approved supplier using established industry standards and processes for counterfeit prevention. If DoD cannot complete the review and audit in accordance with this 30-day period or an alternative schedule established by mutual agreement of the parties under the contract, the contractor will be entitled to an equitable adjustment for the costs of inventory purchased before being notified that DoD will not approve one or more contractor-approved suppliers.

D. Applying the Proposed Rule to Subcontractors at Every Tier May Be Difficult to Implement.

Proposed DFARS 252.246-7008(e) requires flowing down the clause’s entire substance in subcontracts, including subcontracts for commercial items. DoD may not have the resources to review, audit, and approve the counterfeit-prevention selection process implemented by each entity in the supply chain for a given program. The Section accordingly recommends that DoD adopt a more limited or flexible approach to flowdown of the revised clause.
III. CONCLUSION

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

James A. Hughes
Chair, Section of Public Contract Law

cc:
Aaron P. Silberman
Kara M. Sacilotto
Linda Maramba
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Council Members, Section of Public Contract Law
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