Dear Ms. Flowers:

On behalf of the American Bar Association ("ABA") Section of Public Contract Law ("Section"), I am submitting comments on the Proposed Rule cited above. 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.  

1 Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Heather K. Weiner, member 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


As DoD rightly recognizes, important issues still remain to be addressed “because of the complexities relating to use of trusted suppliers by DoD and the requirement of Section 818, paragraph (c)(3)(C), to establish qualification requirements consistent with 10 U.S.C. 2319.” 80 Fed. Reg. at 56940. DoD states that additional aspects of Section 818 will be addressed in this Proposed Rule and in a separate DFARS Case 2015–D020, “DoD Use of Trusted Suppliers for Electronic Parts.” The Section urges DoD to ensure that these serious issues are addressed in a way that can be understood and appropriately implemented by the Government, the contractor community, and industry’s lower-tier subcontractors in the covered supply chain.

II. COMMENTS

A. The Section Applauds Certain Proposed Changes to the Existing Regulations.

The Section believes it is important that DoD continue taking into account the risk-based nature of any system that seeks to prevent and detect counterfeit electronic parts. As electronic parts are ubiquitous and have myriad uses, testing of all parts, components, and systems is and will remain impractical. The Section appreciates the Defense Acquisition Regulations (“DAR”) Council’s recognition that contractors cannot prevent and detect all counterfeit electronic parts, and so instead must establish and maintain appropriate systems, including a risk-based system aimed at tracing electronic parts from the original manufacturer to product acceptance by the Government.

We believe the recognition that such systems are to be risk-based will permit contractors the discretion needed to determine—through their own due diligence and based on their particular industries, sources, and activities—how best to deploy resources to secure their supply chains against the risk of counterfeit electronic parts. This discretion will allow contractors to define and establish systems that are economically feasible and commensurate with the contractor’s particular level and type of risks. This discretion also will allow a contractor to innovate so as to develop newer, better, and more affordable methods of detecting and avoiding counterfeit electronic parts.

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3 A risk-based approach is consistent with, for example, the guidance provided to DoD components in DCMA INST 1205, Counterfeit Mitigation (July 6, 2015), at 13-14.
We further agree with the Proposed Rule’s clarification that the term “trusted supplier” ought not be limited to only original manufacturers and authorized dealers, but also may include vetted suppliers that obtain the electronic parts exclusively from their original manufacturers or authorized dealers. *Id.* at 56940. By acknowledging that contractors can identify other suppliers as “trusted” if they first qualify the supplier using industry standards and processes for counterfeit prevention, *id.*, the Proposed Rule allows for electronic parts, particularly parts for mature platforms near the end of their life-cycles, to be procured after the original manufacturers and immediate authorized dealers and distributors have ceased to manufacture and supply the parts.

Finally, the Section agrees with removing references to “embedded software” and “firmware” from the definition of “electronic part.” As pointed out in the rulemaking, DoD confirms that issues raised at the public meeting on the initial implementation of Section 818 included a request for removal of “embedded software or firmware” from the proposed definition of “electronic part.” *Id.* We believe this revision aligns the term’s definition with the underlying substance of the material covered by the regulation. It is difficult, if not impossible, for a contractor to address such elements when an express standard or protocol has not yet been adopted.

**B. The Section Recommends Revisions to Harmonize the Proposed Rule with Its Underlying Statutory Directives.**

The Section encourages the DAR Council to revisit the Proposed Rule’s scope as follows:

1. **Proposed DFARS 252.246-70XX Appears to Exceed Congress’s Expectations for Regulatory Coverage.**

   The Proposed Rule would require DoD to insert a new clause, DFARS 252.246–70XX, Sources of Electronic Parts, whenever procuring (1) electronic parts; (2) end items, components, parts, or assemblies containing electronic parts; or (3) services, if the contractor will supply electronic parts or components, parts, or assemblies containing electronic parts as part of the service. *Id.* Unlike the current clause, DFARS 252.246–7007, Contractor Counterfeit Electronic Part Detection and Avoidance System, the proposed clause is not limited to contractors subject to the Cost Accounting Standards (“CAS”). The proposed clause thus will apply to small business and commercial-item procurements not covered by CAS. The Section recommends that the DAR Council narrow the proposed clause’s application to exclude small businesses and commercial-item contractors in a manner consistent with the prescriptions of Section 818(e), which limited the counterfeit-parts requirements to only CAS-covered contractors.

   While the Section recognizes the need to prevent the introduction of counterfeit electronic parts into the government supply chain from as many sources as possible, many small businesses lack the infrastructure and experience to implement the Proposed Rule’s requirements, and it will be impractical for many commercial-item contractors to establish special systems to accommodate these requirements. The Section believes this proposed expansion of coverage to commercial-item contractors could result in reduced
sources and increased costs for those contractors that agree to contract with the Government. The Section urges the Government to consider the likely consequences of this expansion.

Indeed, this expansion runs counter to clearly stated federal law. The Federal Acquisition Streamlining Act of 1994 ("FASA"), Pub. L. No. 103-355, and the Federal Acquisition Reform Act of 1996 ("FARA") (part of the Clinger-Cohen Act), Pub. L. No. 104-106, overhauled government contracting by expressing a preference for purchasing commercial items. To implement this preference, Congress streamlined the regulatory framework for commercial-item acquisitions by reducing regulatory requirements for those acquisitions. With the reduction of these barriers to entry, Congress believed that more commercial contractors would participate in government contracting, leading to increased competition, lower prices, and increased access to commercial innovations for the Government.

In this regard, FASA Section 8002 mandates that contracts for commercial items include only those clauses “that are required to implement provisions of law or executive orders applicable to acquisitions of commercial items” or “that are determined to be consistent with customary commercial practice” to the maximum extent practicable. The FAR in turn includes similar requirements. See FAR 12.301(a).

The Proposed Rule provides that the Administrator for Federal Procurement Policy has the authority to determine that it is in the best interest of the Government to apply the Proposed Rule to the acquisition of commercially available off the shelf ("COTS") items. 80 Fed. Reg. at 56941. DoD intends to seek this determination because “electronic parts are generally COTS items, and studies have shown that a large proportion of proven counterfeit parts were purchased as commercial items, including COTS items.” Id. The Proposed Rule further explains: “An exception for contracts for the acquisition of commercial items, including COTS items, would severely decrease the intended effect of the statute and increase the risk of receiving counterfeit parts, which may present a significant mission, security, or safety hazard.” Id.

However, the blanket application of the Proposed Rule to all commercial-item contracts for all procurements, including those not at risk of mission, security, or safety hazard, can (and likely will) have a chilling effect on participation by commercial-item contractors and reduce the availability of commercially priced items in the government marketplace. Indeed, Proposed DFARS 252.246–70XX imposes burdens on commercial contractors not found in the current regulations:

- Under the definition of “trusted supplier” in Proposed DFARS 252.246–70XX(a) when a contractor does not purchase from the original equipment manufacturer ("OEM"), an authorized dealer, or a supplier obtaining parts exclusively from the OEM, the supplier must purchase from a “trustworthy” supplier using “DoD-adopted counterfeit prevention industry standards and processes, including testing.” Id. at 56944. This provision could require a different analysis and different testing than a commercial-item supplier undergoes using its current
quality-control system, such as one required by other industry standards like ISO 9001, thereby increasing expense for the commercial-item contractor.

- Proposed DFARS 252.246-70XX(c) requires commercial contractors to implement a risk-based traceability process that tracks electronic parts from the original source to the Government.

For commercial-item suppliers, especially COTS suppliers, these requirements apply to all commercial-item (and COTS) products sold regardless of the volume of sales—meaning a covered supplier will have to comply whether 50%, or only 1%, of the supplier’s sales are made for DoD end use. The additional system requirements and overhead costs required to implement the requirements in the Proposed Rule will likely deter some COTS contractors from selling in the federal marketplace. Although the Section agrees that such controls may be necessary for procurements to which electronic parts truly present critical or significant mission, security, or safety hazards for DoD, the Section recommends that the DAR Council consider limiting this initial expansion to commercial-item suppliers involved in those types of procurements.

2. *The Proposed Rule Appears to Shift all the Risk to Contractors Regarding Selection of Trusted Suppliers, Contrary to Congress’s Intent.*

Section 818(a), as amended, instructs DoD to implement regulations that require DoD and its contractors and subcontractors to obtain electronic parts from trusted suppliers. In addition, Section 818(c)(3)(D) authorizes contractors and subcontractors to identify their own trusted suppliers under certain conditions. Read together, these provisions indicate that Congress intended for DoD and contractors to share the risk associated with determining which suppliers can be considered “trusted suppliers.” The Proposed Rule appears to shift the determination and risk of which suppliers to trust entirely to the contractor community. See, e.g., Proposed DFARS 246.870-2(a)(ii). In so doing, the DAR Council appears to have diverged from statutory intent.

Moreover, the Proposed Rule does not provide detailed guidance to contractors on the factors to consider in identifying trusted suppliers. Such guidance should factor in existing industry standards that are well developed in this area, such as Society of Automotive Engineers standard AS6081, Fraudulent/Counterfeit Electronic Parts: Avoidance, Detection, Mitigation, and Disposition – Distributors Counterfeit Electronic Parts; Avoidance Protocol, Distributors; or AS5553 Rev. A, Fraudulent/Counterfeit Electronic Parts; Avoidance, Detection, Mitigation, and Disposition, so that significant resources that have already been expended by the commercial marketplace can be appropriately leveraged. Without such guidance, it is unclear what will constitute an acceptable trusted supplier program. This concern is particularly salient because DoD has not yet exercised its statutory authority to identify additional trusted suppliers for contractors and subcontractors to use. In effect, DoD has put the cart before the horse.

The Section encourages DoD to, at a minimum, clarify in DFARS 246.870-2 that the qualification requirements established by DoD under DFARS Case 2015-D020 may
be used by contractors when implementing their trusted-supplier program as required by the proposed clause DFARS 252.246–70XX, Sources of Electronic Parts.\(^4\)

The Section also recommends that the Proposed Rule be revised to eliminate redundant validation of suppliers. Contractors should be permitted to rely on the Government’s assessment that an entity is a trusted supplier in certain circumstances. But as drafted, the Proposed Rule would require contractors and subcontractors to comply with DFARS 246.870-2(a)(i) or (a)(ii) if they acquire electronic parts through government purchasing programs, such as the Federal Supply Schedule, or directly from the Government. This requirement should be removed.\(^5\)

Similarly, the Section recommends that the Proposed Rule be revised to state that contractors and subcontractors can use electronic parts or assemblies containing electronic parts obtained from the Defense Logistics Agency (“DLA”) and similar agencies without further validating that agency’s sources of supply. Because, generally, a government agency will not meet the criteria set forth in DFARS 246.870-2(a)(i), under the Proposed Rule contractors and subcontractors would be required to validate the government agency as a trusted supplier under their purchasing systems in accordance with DFARS 246.870-2(a)(ii). This requirement would subject agencies, such as DLA, to review, survey, and audit by contractors and subcontractors in accordance with the industry standards. To allow for a reasonable approach to purchases from government supply sources, including direct purchases from government agencies, the Section recommends specifying that the U.S. Government is a trusted supplier.

Further, as drafted, it is unclear whether, under the Proposed Rule, contractors must require their federal suppliers to meet industry standards different from those that the contractor requires from its other sources of supply. Although the Proposed Rule recognizes that there are “DoD-adopted counterfeit prevention industry standards and processes,” the Proposed Rule imposes on contractors the obligation to inspect, test, and authenticate potential suppliers “in accordance with existing applicable industry standards.” 80 Fed. Reg. at 56941. To avoid ambiguity, the various parts of the Rule should be harmonized to define which industry standards DoD has in mind and to provide guidance to industry on selecting and using industry standards.

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\(^4\) DoD has opened a DFARS Case 2015-D020 to address its own trusted suppliers for DoD procurements, but as of the submission of this letter, DoD had not yet proposed any rule under it. See http://www.acq.osd.mil/dpap/dars/opencases/dfarscasenum/dfars.pdf.

\(^5\) The Section recommends removing this duplicative verification even if the DAR Council also limits the extent to which the Proposed Rule applies to commercial-item contractors, as recommended above.
C. The Section Recommends Revising or Clarifying Terms Related to the Availability and Sourcing of Electronic Parts.

1. The Section Recommends More Details Concerning Electronic Parts That Are Not in Production and Not in Stock.

The Proposed Rule states that contractors may purchase from sources other than the original manufacturer (“OM”) or authorized dealers when the parts “are not in production or not currently available.” 80 Fed. Reg. at 56943. It is not clear, however, when this option is triggered. There are numerous possibilities, such as the following:

- Parts might be “unavailable” when they exceed a certain multiple of standard pricing.
- Parts might be “unavailable” if they cannot be received within an acceptable lead time.
- Parts might be unavailable and out of production if the OM and no other foundry make the part.
- Parts might be unavailable and out of production because the original component manufacturer is no longer producing an electronic part yet has the ability to re-start production given appropriate lead time.
- Parts that seem unavailable because they are not in production could conceivably be available from a trusted foundry.
- Parts also might change in availability—would a contractor be required to switch between sources of supply if a product later becomes available from the OM or authorized dealer?

Fundamentally, the Proposed Rule is a risk-based system. In accordance with that principle, the most effective means of implementation would be to allow the contractor to decide when to purchase from other trusted sources (as already defined by the Proposed Rule) without a strict availability analysis for OM sources. The Section recommends removing the triggering mechanism that use of an “other” trusted source requires that the parts be “not in production or not currently available.” As an alternative, the Section recommends adding more details to the terms to address, at a minimum, the circumstances identified above.

2. The Section Recommends Clarifying the Term “Trusted Suppliers.”

When the DAR Council promulgated the May 6, 2014 final rule, it did not define “trusted supplier” and indicated that there would be “further implementation with regard to implementation of trusted suppliers under DFARS Case 2014-D005.” 79 Fed Reg. 26092, 26095 (May 6, 2014). Although the Section believes that, before this proposed definition, it was understood that OMs, sources with the express written authority of the OM (or current design activity), and suppliers that obtain parts exclusively from these sources would qualify as trusted suppliers (see DFARS 252.246-7007(c)(5)), it was
unclear how contractors were to comply with the direction to use “suppliers that meet applicable counterfeit detection and avoidance system criteria” in those instances when parts are not available from any of the above preferred sources. See DFARS 252.246-7007(c)(5).

The Proposed Rule now adds a definition providing that a “trusted supplier” is one that is “(1) the original manufacturer of a part; (2) an authorized dealer for the part; (3) a supplier that obtains the part exclusively from the original component manufacturer of the part or an authorized dealer; or (4) a supplier that a contractor or subcontractor has identified as a trustworthy supplier, using DoD-adopted counterfeit prevention industry standards and processes, including testing.” 80 Fed. Reg. at 56943-44 (proposed DFARS 246.870-1, revised 252.247-7007, and proposed 252.264-70XX).

This proposed addition is still ambiguous because contractors do not have visibility into the “DoD-adopted counterfeit prevention industry standards and processes” that the DAR Council states are to be considered. Will this be done at the contract level, or will there be broader standards that are chosen to apply to all DoD procurements? Although industry standards are often specified in the context of particular procurements, contractors’ counterfeit-electronic-parts detection-and-avoidance systems will have broader applicability than a single contract. Indeed, it would be extremely disruptive if contractors were subject to differing “industry standards” for qualifying trusted suppliers from procurement to procurement. Contractors must focus their efforts on standards that have broader potential applicability.

Contractors would benefit from a specific reference to the “DoD-adopted standards and processes” with which they will be required to comply. The Section encourages DoD to provide notice and an opportunity for interested parties to comment on the suitability of DoD’s selected standards. We also encourage DoD to identify safe harbors or other protections for contractors that have presently adopted (or begun adopting) industry standards and processes different from those that DoD ultimately adopts.

3. The Section Recommends Clarifying Traceability Requirements.

The Proposed Rule inserts a new requirement that if the contractor cannot establish traceability from the OM for a specific part, the contractor must complete a risk-based evaluation of alternative parts or tests and inspections commensurate with the risk. “Determination of risk shall be based on the assessed probability of receiving a counterfeit electronic part; the probability that the inspection or test selected will detect a counterfeit electronic part; and the potential negative consequences of a counterfeit electronic part being installed (e.g., human safety, mission success) where such consequences are made known to the Contractor.” 80 Fed. Reg. at 56944. The Section is concerned that traceability will be difficult to establish for parts used in defense systems. Increasingly, electronic parts and systems have short periods of production. It is well known that defense systems typically extend for longer periods of time than the typical period in which electronic parts for such systems may be in production by the OM or
OEM. Moreover, when systems are already out of production, it may be difficult if not impossible to trace the origin of the part back to the OM.

Given this state of the market, the Proposed Rule may force most contractors and subcontractors to assess the risks and benefits of using parts that cannot be traced back to the OM. The Section suggests that given the likelihood that very large numbers of electronic parts cannot be traced back to the OM, OEM, or authorized dealer, the DAR Council provide more explanation as to the required “determination of risk” assessments that contractors, and their supply chains, will need to undertake.

D. The Section Has Concerns about the Proposed Requirements for Notifications Regarding Non-Trusted Suppliers.

The Proposed Rule adds a new notification requirement when contractors are not buying from an OM, authorized dealer, or trusted supplier. In such circumstances, the contractor is required to notify the contracting officer. Id. Although this notice is now required, the Proposed Rule does not appear to allow the contractor to share the risk with the Government that the source will ultimately supply counterfeit electronic parts, even if the contracting officer knowingly approves and accepts the contractor’s alternative source rather than requires product re-design or substitution.

In addition, the proposed DFARS 246.870-2 states that “if electronic parts are not available from trusted suppliers, the Government requires contractors and subcontractors to comply with the notification requirement of paragraph (c) of the clause at 252.246-70XX, Sources of Electronic Parts.” Id. at 56943. The reference to paragraph (c) in this sentence appears to be in error since there is no notification requirement in that paragraph. The Section believes that the DAR Council intended to refer to proposed DFARS 252.246-70XX(d)(1), and possibly (d)(2). Paragraph (d)(1) states that “if it is not possible to obtain an electronic part from a trusted supplier, as described in paragraph (b) of this clause, the Contractor shall notify the Contracting Officer.” The clause goes on to state that “if an entire lot of assemblies requires an obsolete component, the Contractor may submit one notification for the entire lot, providing identification of the assemblies containing the parts (e.g., serial numbers).” And paragraph (d)(2) would make the contractor responsible for inspection, testing, and authentication, in accordance with existing applicable industry standards, of electronic parts obtained from sources other than those described in paragraph (b) of the -70XX clause.

This notification requirement is very brief and leaves many questions unanswered.

First, the proposed notification requirement does not address what it means to be “not possible” to obtain an electronic part from a trusted supplier. That phrase could be interpreted to be limited to circumstances in which a trusted supplier does not physically possess or cannot physically obtain the part. Alternatively, it could be read to include the situation in which the part in question is available from a trusted supplier, but only at an unreasonably higher price compared to the price that would be charged by an other-than-trusted supplier (subject, of course, to the required testing and other authentication
requirements). Nor is the requirement clear on whether the term “not possible” would encompass a situation in which the part would be available from a trusted supplier, but only on a timetable that would pose a risk to the contract schedule. In such a case, the part would not be reasonably “available” when needed, but would still be technically “possible” to obtain from a trusted supplier.

The DAR Council should clarify whether it intends to preclude contractors and subcontractors from taking price and schedule impact into account in evaluating the relative risks of purchasing a particular part from a trusted supplier versus an other-than-trusted supplier. In the alternative, the contractor or subcontractor could provide such clarifying information with the notice so that the contracting officer understands why the acquisition was “not possible” in a particular context.

Second, the proposed notification requirement does not address whether the contractor or subcontractor is free to purchase the part from an other-than-trusted supplier once the required notification has been given to the contracting officer, or whether the DAR Council contemplates that the contractor or subcontractor cannot proceed with the purchase until it has received some form of approval from the contracting officer. Section 818 of the NDAA required only that selection of “trusted suppliers” be subject to government “review and audit.”

If the DAR Council intends that the contractor or subcontractor is free to proceed once the notification has been given, contractors and contracting agencies would both be given comfort if the final rule confirmed that intention. If not, then the DAR Council should consider addressing the types of information that contractors or subcontractors should include in their notifications in order to secure the agency’s approval. For example, should the notification requirement include information regarding the inspection, testing, and authentication requirements that the contractor or subcontractor is required to use under paragraph (d)(2)? Should it include traceability documentation? Other due diligence on the proposed other-than-trusted supplier? In addition, the DAR Council should address whether, and the extent to which, an agency’s approval following a required notification would act as a safe harbor for any counterfeit problems that were subsequently encountered with the parts that had been approved. Moreover, if the contractor cannot proceed without contracting officer approval, then the Proposed Rule should address how contractors would be compensated for changes, delays, and other impacts that might arise from such an approval and/or rejection.

Third, the proposed notification is expressly made applicable to subcontractors, but it does not address how, when, or to whom subcontractors are supposed to provide the required notification. For example, the clause could be flowed down in a manner that results in notification from subcontractor, up through the supply chain to the ultimate

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6 FY 2012 NDAA, Sec. 818(c)(3)(D) (“authorize Department contractors and subcontractors to identify and use additional trusted suppliers, provided that—(i) the standards and processes for identifying such trusted suppliers comply with established industry standards; (ii) the contractor or subcontractor assumes responsibility for the authenticity of parts provided by such suppliers as provided in paragraph (2); and (iii) the selection of such trusted suppliers is subject to review and audit by appropriate Department officials”).
prime contractor or contracting officer. Alternatively, it could mean that notification
could be flowed down so as to have the notification requirement run directly from the
subcontractor, at any tier, to the contracting officer. In this latter case, the prime and
higher subcontractors might not be aware of the subcontractor’s reports on use of an
other-than-trusted supplier and the items at risk. The Section notes that reporting should
ensure that the prime and impacted higher-tier subcontractors are made aware of the
lower-tier subcontractor’s using such a source so that they can make appropriate risk-
based decisions on continuing to use the subcontractor and/or taking appropriate steps to
mitigate the risks posed by such sourcing.

Similarly, it is unclear whether the DAR Council intends for the contracting
officer to be subjected to potential multiple notifications from subcontractors at every tier
on one part or one group of parts. On the other hand, it is unclear whether the purpose
underlying the notification requirement would adequately be served by having the
subcontractor notify only the prime or higher-tier subcontractor. Accordingly, the final
regulation should provide some guidance to contractors and subcontractors regarding
how exactly the notification process is intended to work.

Finally, the Proposed Rule appears to require notifications to be given on a lot-by-
lot basis, and to only one contracting officer, even though multiple contracts could be
affected by the difficulties encountered in obtaining a particular obsolete part from a
trusted supplier. 80 Fed. Reg. at 56944. The Proposed Rule would benefit from defining
what would constitute a “lot” and defining the circumstances in which contractors and
subcontractors could provide notifications for greater than one lot, up to and including the
entire period of performance of the contract or subcontract.

E. Additional Terms Would Benefit from Clarification.

The Proposed Rule also defines “authorized dealer,” “contract electronics
manufacturer,” “original component manufacturer,” “original equipment manufacturer,”
and “original manufacturer.” These definitions largely provide additional clarity. But in
certain situations, the definitions provided do not resolve existing ambiguities in various
applications. For example, the term “original manufacturer” means the contract
electronics manufacturer, the original component manufacturer, or the original equipment
manufacturer. The Proposed Rule provides that an “authorized dealer” is to be
considered a trusted supplier for parts still in production or currently available in stock.
Id. at 56943. This is a supplier that has a contractual arrangement with the original or
aftermarket manufacturer or design activity and that is permitted to buy, stock, re-
package, sell, and distribute their product lines. The Section agrees that an authorized
dealer has indicia that it has the right to sell authorized parts. But the Section questions
whether a dealer’s having a contract with the manufacturer or design activity sufficiently
guards against counterfeit parts. The Section encourages the DAR Council to consider
whether it intends for additional criteria to apply to authorized dealers.

Whether a purchase is from an original manufacturer, OEM, or authorized dealer,
the Section believes that each level of supply chain carries some risk of counterfeits—in
supplies purchasing, manufacturing, integration, testing, packaging, and delivery of
electronic parts.\textsuperscript{7} These types of entities, as subcontractors down the supply chain, should also be responsible for vetting and ensuring their own supply chains as part of their processes.

\textbf{F. In Response to the DAR Council’s Questions, the Section Expresses Concern about the Necessity, Utility, and Burdens of the Information Collection Prescribed by the Proposed Rule.}

The Section provides responses to two of the DAR Council’s requests for input in the Proposed Rule: (1) whether collection of the identified information is necessary and will have practical utility, and (2) whether the DAR Council’s estimate of reporting burden is accurate. \textit{Id.} at 56942.\textsuperscript{8}

For the first question, the Section is concerned about significantly expanding contractors’ tracking, collection, and reporting obligations. Many contractors will find it difficult to obtain this type of information from their subcontractors, which may not have this information readily available. These subcontractors will have to collect this information from multiple departments and systems and then perform some type of consolidation. Moreover, subcontractors that can consolidate this information will still be reluctant to share this information up the supply chain because it constitutes one of a company’s crown jewels—its key sources for supplies and services.

Even if subcontractors can and will provide this information readily, there will be serious and significant concerns about security and protection of that information. This kind of information could make higher-tier contractors’ and the Government’s systems even more desirable targets for cybersecurity attacks and other corporate espionage because they will consolidate information on several links in the supply chain. From another angle, the Proposed Rule has no provision to address classified contracts and subcontracts. Tracking and sharing these types of data may be contrary to national-security restrictions on data relating to classified or controlled matters. The Section encourages the DAR Council to consider these points and reconsider whether it is necessary to collect all this data at all tiers and to pass the data up through the supply chain to the Government, all before any reportable instance of counterfeit or suspect counterfeit electronic parts.

Further, with regard to the first question DoD asked, the Proposed Rule may require contractors and subcontractors to provide data that the Government can already

\textsuperscript{7} Under DFARS 252.246–7007(c)(5), contractors must prioritize “[u]se of suppliers that are the original manufacturer, or sources with the express written authority of the original manufacturer or current design activity, including an authorized aftermarket manufacturer or suppliers that obtain parts exclusively from one or more of these sources.” The rule expresses a preference for one of these sources due to their traceability (and then provides guidance concerning what to do when parts are not available from those sources). Under the Proposed Rule, original equipment manufacturers, by purchasing parts from elsewhere, may be introducing additional risk into this up until now “closed” system.

\textsuperscript{8} The Section will separately provide these comments to the points of contact designated in the Proposed Rule for receipt of this specific information.
access. DoD has access to databases of thousands of suppliers that provide parts to its acquisition system. The handful of additional suppliers that may be identified through the Proposed Rule’s reporting mechanism versus others (e.g., SAM and dibnet) is redundant and will not provide much return on investment.

For the second question, the Section does not believe that the Government’s estimated collection time and costs capture all that contractors must do to comply. The Section does not think it is realistic to expect that contractors will need only one hour to prepare a response, through a mid-level executive, to a collection/reporting requirement, for an industry-wide total of 1,000 hours per year. This estimate appears to assume that all information is already in a database or otherwise easily accessible and that a single person at a single facility will be capable of performing and generating such a check and report. Any reports will need to be the subject of collection and review at multiple locations, with multiple personnel at multiple levels that engage in purchasing, manufacturing, finance, subcontracting, and other corporate entities. This process would then repeat at the higher-tier contractor entities that would be provided this information for ultimate reporting to the Government, which would in turn need to devote time and resources to receiving, organizing, and analyzing this information.

In addition, the DAR Council appears to underestimate the frequency of reporting. The published estimates suggest that the annual burden will affect covered contractors only once per year. See id. at 56942. But Proposed DFARS 252.246-70XX(c)(2) provides that contractors must notify their contracting officers when they cannot obtain covered parts from a trusted supplier in each instance, or at least on a “lot” basis.9 That provision makes reporting requirements event-driven, potentially arising on multiple occasions during any given year. The Proposed Rule thus will likely require contractors and subcontractors at all tiers to report much more often than annually.

Finally, the number of respondents appears to be underestimated. The Federal Register notice indicates that 33,000 small entities will be covered by this rule in addition to those large, CAS-covered businesses already covered by the existing regulatory framework. Id. at 56941. Thus, the Proposed Rule’s estimate of only 1,000 total respondents, approximately 3% of those eligible to report, does not appear to be sufficient. The Section encourages the DAR Council to reevaluate these burdens and how they might warrant revising the Proposed Rule so as not to be unduly burdensome on the industry and Government alike.

III. CONCLUSION

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

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9 Proposed DFARS 252.246-70XX(d)(1) (“Non-trusted suppliers. If it is not possible to obtain an electronic part from a trusted supplier, as described in paragraph (b) of this clause, the Contractor shall notify the contracting officer. If an entire lot of assemblies require an obsolete component, the Contractor may submit one notification for the entire lot, providing identification of the assemblies containing the parts (e.g., serial numbers).” See 80 Fed. Reg. at 56944.
Sincerely,

David G. Ehrhart  
Chair, Section of Public Contract Law

cc:  
James A. Hughes  
Aaron P. Silberman  
Kara M. Sacilotto  
Council Members, Section of Public Contract Law  
Chairs and Vice Chairs, Acquisition Reform and Emerging Issues Committee  
Chair, Task Force on Counterfeit Parts  
Craig Smith  
Samantha S. Lee