September 10, 2014

VIA REGULATORY PORTAL AND FACSIMILE

General Services Administration
Regulatory Secretariat (MVCB)
Attention: Hada Flowers
1800 F Street NW., 2nd Floor
Washington, DC 20405


Dear Ms. Flowers:

On behalf of the Section of Public Contract Law (“Section”) of the American Bar Association (“ABA”), I am submitting comments on the above-referenced FAR Case and proposed rule, FAR Case 2013-002, Expanded Reporting of Nonconforming Supplies, 79 Fed. Reg. 33164 (June 10, 2014), as amended, 79 Fed. Reg. 46748 (Aug. 11, 2014) (the “Proposed Rule”). The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees contain 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.1

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, 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 Acquisition Reform & Emerging Issues.
I. Introduction

On June 10, 2014, the Federal Acquisition Regulation Council (the “FAR Council”) provided notice and requested comment on the Proposed Rule. In issuing the Proposed Rule, the FAR Council rule acknowledged that its actions exceed the current statutory mandate for regulations requiring contractors to report counterfeit electronic parts:

[The FAR Council is] proposing to revise the FAR to expand Government and contractor requirements for reporting of nonconforming items in partial implementation of section 818 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2012 and implement requirements of the Office of Federal Procurement Policy (OFPP) Policy Letter 91–3, entitled “Reporting Nonconforming Products,” dated April 9, 1991. While section 818 applied only to DoD, only to electronic products, and only to contractors covered by the Cost Accounting Standards (CAS), the FAR Council concluded that the principles expressed in section 818 should be applied beyond DoD, should not be limited to electronic products, and should not be limited to CAS-covered contractors. Similarly, although OFPP Policy Letter 91–3 requires agencies to report to the Government-Industry Data Exchange Program (GIDEP), the FAR Council determined that reporting would be much more timely and effective if contractors were to make the reports directly to GIDEP.


The Section thanks the FAR Council for granting its request for additional time to submit comments on this Proposed Rule. 79 Fed. Reg. 46748 (August 11, 2014). The Section believes this is an important rule and that expands the statutory directive and that will likely have a significant impact on the federal supply chain, including the Government, its contractors, and its subcontractors. Accordingly, the Section appreciates that the FAR and Defense Acquisition Regulation Councils will proceed with deliberation and with full input from all interested stakeholders before finalizing the scope and content of this Proposed Rule.

II. Background

The Section acknowledges that counterfeit parts and nonconforming parts may pose real threats to the federal supply chain, but the Section is concerned that the Proposed Rule may reach too far in addressing these threats. In issuing the Proposed Rule, the FAR Council advised, “The changes proposed by this rule will help mitigate the growing threat that counterfeit items pose when used in systems vital to an agency’s mission . . . by ensuring that contractors report suspect items to a widely available database.” 79 Fed. Reg. at 33164. While we understand that the reporting rule on counterfeit electronic parts was prompted by FY 2012 NDAA §
818 and also by concerns raised in a congressional hearing on counterfeit electronic parts in the defense supply chain, we are unclear as to the motivation of the FAR Council in expanding the scope beyond the statutory mandate. The Section was unable to identify, for example, recent findings or authority to support the proposed expansion of reporting requirements for “nonconforming items” that are not counterfeit or suspect counterfeit parts, and it is unclear what specific threats the expanded scope of the Proposed Rule intends to address. In reviewing OFPP Policy Letter 91–3, it is not evident to the Section why there is a need to go beyond the existing rules and practices regarding nonconformances that are not counterfeits or suspected counterfeits.

While the FAR Council relies on the existence of contractor inspection systems under FAR Part 46 as mitigating the compliance burdens that will be imposed by the Proposed Rule, the Section notes here and more fully in the reporting section of these comments that there is no uniform inspection system required by FAR Part 46 for commercial and non-commercial contractors and subcontractors. For example, unlike under the Proposed Rule, the existing FAR Part 46 rules do not require contractors to report nonconforming parts identified and corrected before delivery to the Government. Thus, the Proposed Rule significantly expands reporting requirements for contractors and subcontractors, especially commercial, small, and other-than-small businesses that to date have not been required to report to GIDEP or to perform the kinds of requirements that apply to higher-level contract quality requirements. It is likely the Proposed Rule will require changes in reporting even for contractors and subcontractors that have systems and experience reporting pursuant to FAR Part 46. These compliance and reporting costs will likely prove to be significant costs, and the Section is concerned that some substantial share of these costs may be incurred (and factored into pricing) without achieving a corresponding increase in protection to the ultimate government customers.

III. The Proposed Rule’s Definitions of Several Key Terms Are Confusing and Overly Broad.

The Section has concerns about several terms in the Proposed Rule, most notably in the clause proposed for FAR 52.246-XX. As a preliminary matter, the Proposed Rule changes the scope of GIDEP. The Proposed Rule suggests that OFPP Policy Letter 91-3 requires only federal agencies to report to GIDEP (see 79 Fed. Reg. at 33164), but many contractors have submitted reports to GIDEP over the years. Currently, GIDEP provides for Government and registered contractor reporting and only the Government and registered contractors can access GIDEP. The Proposed Rule would require registration and reporting by virtually all contractors and subcontractors, however, a process that the current configuration of GIDEP does not permit. Thus, until GIDEP is updated and we know what GIDEP can and will support, we can only provide examples of our concerns about the practical application of the Proposed Rule and limited recommendations on
changes to the definitions. Once GIDEP is revised, we would expect to be able to provide more specific comments and recommendations.

A. Recommend Deletion of “Common Item” Definition

The definition of “common item” in the proposed implementing FAR clause is overbroad. The Proposed Rule purports to limit the reporting burden on contractors in part by limiting reports of “major or critical nonconformance[s]” to only those circumstances involving “common items.” 79 Fed. Reg. at 33168. The proposed clause FAR 52.246-XX defines a “common item” as “an item that has multiple applications versus a single or peculiar application.” The proposed clause further states that “[c]ommon items include, for example, raw or processed materials, parts, components, subassemblies, and finished assemblies that are commonly available products (such as non-developmental items, off-the-shelf items, National Stock Number items, or commercial catalog items).” Id. This definition is extremely broad; indeed, it is difficult to imagine any item (other than a one-of-a-kind part) that would not be a “common item.” If that is the case, it is difficult to understand how the “common item” definition would make reporting nonconforming items more effective or less onerous. We understand that the proposed definition is intended to be a limiting factor, but it is so broad that it does not establish any practical limitation. Accordingly, we recommend deleting the “common item” provision and a narrowing of the definitions of what the Council seeks to have reported as explained below.

B. Recommend Clarification of “Quality Escape” Definition

The proposed clause’s definition of “quality escape” is similarly broad and confusing. The proposed clause defines “quality escape” as “a situation in which a supplier’s internal quality control system fails to identify and contain a nonconforming condition.” Id. We interpret this to be an intended limitation of what the Council intends contractors and subcontractors to report. However, this definition is ambiguous in several respects. First, it is unclear whether the mere existence of an uncontained nonconforming condition rises to the level of a “failure” of the supplier’s quality-control system. Second, the scope of the term “contain” is unclear. For example, a supplier’s quality-control system could arguably fail to “contain” a nonconforming condition, even if the supplier never delivered a finished product with the nonconforming condition, so long as the condition went undetected through various stages of production. Finally, the identity of the relevant “supplier” is unclear when applied to a nonconforming condition in a product delivered by a subcontractor to a contractor that the higher-tier contractor then detects and dispositions. If the subcontractor is the “supplier” for purposes of the definition, then a “quality escape” has occurred even though no nonconforming product has been delivered to the Government (or perhaps even to a prime contractor).

The Section proposes that the Council modify the definition of “quality escape” to more specifically identify when a nonconformance constitutes a “quality
escape” that would rise to the level of being a reportable event. Further, the Section proposes that a “quality escape” be limited to the situation in which an organization determines that it has delivered a nonconforming item to a customer and that the Proposed Rule be clarified such that the reporting obligation is imposed upon only to the organization that delivered the nonconforming item to the customer, and not the entity or entities that received the nonconforming item. Placing the reporting obligation on the organization that experienced the quality escape serves multiple purposes: it ensures that if there are multiple escapes that they are reported, and it prevents possible confusion as the number, scope and source of the “quality escapes” that might otherwise arise from duplicative reporting of the supplier and its affected customer(s).

C. “Major,” “Minor,” and “Critical” “Nonconformance”

The concept of “nonconformance” is an inherently broad one; it can encompass any deviation from the contract requirements or specifications, even deviations that do not affect the form, fit, or function of a part. For instance, a part’s country of origin could be a “nonconformance” if the part is subject to a domestic-sourcing requirement, such as the DFARS specialty-metals rule. The FAR Council proposes to apply this rule to every supplier in the supply chain of every government contractor, even if the supplier is a commercial-item supplier several tiers removed from the prime contractor. If the FAR Council intends for the rule to reach so broadly, then it should carefully consider level of detail in definitions of “common item,” “critical nonconformance,” and “major nonconformance” necessary to permit such commercial contractors to make informed decisions about whether a GIDEP reporting obligation is triggered or not. The utility of the GIDEP reporting requirement will be undercut if suppliers begin over-reporting out of an abundance of caution, flooding the system with reports that the Government did not intend the rule to reach.

The discussion accompanying the Proposed Rule characterizes the terms “major nonconformance” and “critical nonconformance” as “familiar to the quality assurance and contracting workforces,” because those terms “have been in use for decades.” 79 Fed. Reg. at 33164. Government representatives made similar statements at the June 16, 2014 open meeting about suppliers’ presumed “familiarity” with the key definitions in the Proposed Rule, on the basis that the Proposed Rule relies on existing definitions from FAR Part 46. It may be fair to assume familiarity with those FAR Part 46 definitions for companies that focus on government contracting and therefore structure their quality-assurance systems around FAR-based principles. It is less clear, however, that the FAR Part 46 definitions and terminology are familiar to the vast array of commercial suppliers to which the FAR Council proposes to extend this rule. As discussed below, commercial contractors under FAR Part 12 are expected to rely upon their commercial quality-assurance systems consistent with their commercial practices. To the extent the Council’s consideration of the impact of the Proposed Rule is based on an assumption that the key terms in the rule are already familiar to the
universe of companies who will be subject to the rule, the Council should carefully reexamine that assumption in light of the proposal to extend the reach of the rule to purely commercial suppliers who may be unfamiliar with the FAR quality assurance requirements, with GIDEP, or with any of the other Government-unique requirements that the Proposed Rule would impose on them.

As one example, the proposed definition of “major nonconformance” includes language that could be read to reach run-of-the-mill warranty issues. The proposed definition would designate as “major” a nonconformance that “materially reduce[s] the usability of the supplies or services for their intended purpose.” Without further guidance, commercial suppliers could interpret this language as effectively encompassing “warranty of merchantability” issues, triggering a reporting obligation for practically any warranty issue that arises. Indeed, such a broad reading would likely be consistent with how the Defense Contract Management Agency (“DCMA”) has defined “major nonconformance” in its “Nonconforming Material Surveillance Guide.” In that Guide, DCMA defines a “major nonconformance” as a “nonconformance consisting of a departure involving: performance; health; interchangeability, reliability, survivability, maintainability, durability of items or repaired parts; effective use or operation; weight or appearance (when a factor); departure of a requirement classified as major.” Moreover, the DCMA Guide indicates that even when no single “major nonconformance” exists, “[m]ultiple minor nonconformances, when considered collectively, may raise the category to a critical or major nonconformance.” The interpretive gloss applied by DCMA to the “familiar” Part 46 definition of “major nonconformance” shows that at least one government entity views the definition as encompassing a number of broad and imprecise concepts (i.e., “effective use or operation,” “durability,” “performance”) that could reach virtually any departure from specification requirements.

The FAR Council has proposed to extend this expanded reporting requirement beyond the statutory mandate for reporting counterfeit parts, to encompass reporting “nonconforming items.” If the FAR Council proceeds with this extension, then the Section believes that it is incumbent upon the FAR Council to identify what types of “nonconformances” are of such significant concern as to warrant imposition of this reporting obligation on every supplier at any tier in the government supply chain. Without sufficient clarity regarding what constitutes a “major” nonconformance, there is risk that suppliers will err on the side of over-reporting, which would likely make it more difficult for the Government (and government contractors/suppliers) to focus on the reports of the types of nonconformances that originally motivated the Proposed Rule.

Because of the concern about the overbroad nature of the terms identified above, the Section proposes that the reporting obligation be limited to “critical” nonconformances only. Even with this limitation, the Section submits that it is not clear whether a lower-tier supplier would have sufficient information about the intended use of a part to be able to determine whether a nonconformance is “critical.” The Section is concerned that if these terms are left unaddressed, not
only will it create confusion for contractors as to what to report, but it will also create more work and confusion for the acquisition workforce without producing a tangible benefit to the Government.

IV. Basing the Reporting Requirement on Nonconforming “Common Items” and “Quality Escapes” Is Problematic.

The proposed reporting requirements contained in the “Reporting Nonconforming Items” clause (52.246-XX) are complex and would be difficult to administer. This complexity and difficulty results from several factors: (A) the requirement to report nonconforming items based on the existence of a “common item” and a “quality escape”; (B) the inconsistencies between existing reporting requirements for nonconforming items and the reporting requirements imposed by the proposed clause; and (C) the flowdown requirements imposed by the proposed clause. We address each of these factors in turn.

A. The Proposed Reporting Regime for Nonconforming Items Should Be Limited Initially to Only Counterfeit and Suspect Counterfeit Parts.

Proposed clause 52.246-XX requires contractors and subcontractors to report to GIDEP whenever they become aware that an item purchased by or for the contractor for the Government contains a major or critical nonconformance that is a “common item” and that “[c]onstitutes a quality escape that has resulted in the release of like nonconforming items to more than one customer.” 79 Fed. Reg. at 33168. Although many contractors have quality systems that identify and dispose of nonconforming products, those systems do not always (or even typically) identify whether the product found to be nonconforming is a “common item” or whether a quality escape involving that product resulted in the release of “like nonconforming items” to more than one customer. Thus, contractors subject to the proposed clause may need to significantly change many, if not most, of their quality-assurance systems.

Some of these resulting changes could actually impede or delay the reporting of nonconforming items to GIDEP. For example, under the Proposed Rule, if a contractor were to determine that it supplied a part to the Government with a major or critical nonconformance, before making any reports, the contractor would still have to investigate whether that part (1) was a common item and (2) constituted a quality escape that involved the release of like nonconforming parts to other customers. In addition to concerns about definitions of these two terms, it is unclear what benefit the Government expects to derive from forcing the contractor to undertake this potentially complex and possibly lengthy analysis, which could conceivably delay the reporting of the nonconforming part beyond the 60-day period imposed by the proposed clause.

The Proposed Rule causes concern that the implementation of these broad definitions could lead to delays in the Government’s ability to receive needed supplies and the reports of nonconformances. A phased-in approach, initially
limited to reporting of counterfeit and suspect counterfeit parts, would allow contractors a better opportunity to establish systems to review reports in GIDEP and to report on these kinds of parts on a timely basis. The quality of the reports in such cases is likely to be more useful to the Government customer. We recommend that the rule be initially limited to the reporting requirements of counterfeit and suspect counterfeit parts, and only later expanded once the processes for implementing such systems are established and functioning.

**B. The Proposed Reporting Regime for Nonconforming Items Should Be Tailored To Be Consistent with Existing Reporting Requirements and Contractor Practices.**

Contractors and subcontractors are already subject to a variety of contractually based requirements to report certain nonconformances or quality escapes to their customers, including the Government. These requirements are often tailored to fit the size and complexity of a contractor’s or subcontractor’s operations, facilities, and quality-assurance program. For example, FAR 52.246-11, Higher-Level Contract Quality Requirement, permits a contracting officer to apply any of several industry quality-assurance standards or, under certain circumstances, the contractor’s or subcontractor’s own quality-assurance system. Further, FAR Part 46 provides that for commercial items, contractors should rely on their own quality-assurance systems instead of undertaking to satisfy government-unique quality-assurance requirements, so as to be consistent with customary commercial practices (FAR 46.102(f)) and to maintain wide competition (FAR 46.201).

In contrast, proposed FAR 52.246-XX would impose a one-size-fits-all government-unique reporting requirement on all contractors and subcontractors for certain kinds of nonconformances, possibly requiring contractors and subcontractors to create parallel (and duplicative) quality-assurance systems solely for reporting nonconformances to GIDEP. Under such a scenario, commercial-item providers could be forced to add a quality-assurance system that is inconsistent with their existing commercial systems and industry’s commercial practices. Particularly because the proposed clause must be flowed down to all tiers, the imposition of these government-unique requirements could prompt existing and potential contractors (particularly commercial-item contractors) to avoid doing business in the federal market or selling their commercial products for use in the federal supply chain. The Section recommends that the Council review the Proposed Rule and reconcile it with the existing FAR 52.246-11 clause and other FAR Part 46 clauses.

**C. The Flow Down Requirements of the Proposed Clause Should Be Limited to Subcontractors That Accept CAS-Covered Contracts and Subcontracts, Consistent With FY 2012 NDAA Section 818.**

Proposed FAR 52.246-XX states that “[t]he Contractor shall include the substance of this clause, including this paragraph (e), in all subcontracts for
supplies, or services that include supplies, at any tier.” The indefinite meaning of the phrase “substance of this clause” threatens to introduce enormous complexity into already difficult negotiations between higher-tier and lower-tier contractors regarding the scope of reporting obligations that such lower-tier subcontractors are required to assume. Higher-tier contractors could justifiably insist on imposing quality-control and reporting requirements that go well beyond those specified in the proposed clause to ensure that they fulfill their own obligations under the clause.

Indeed, there has been significant debate over the ability of small businesses to protect their intellectual property in response to prime contractors who negotiate onerous terms, and adding negotiations over quality assurance may further distort the playing field to hurt small businesses attempting to retain a degree of control in their operations when negotiating with prime contractors. Conversely, lower-tier subcontractors, particularly commercial-item contractors and small-business entities, may assert that they do not have (and cannot afford to have) the sophisticated internal control systems necessary to detect and categorize the types of nonconforming conditions that require reporting to GIDEP.° Neither the proposed clause nor the proposed regulation offers any guidance for resolving such conflicts.

Further complicating the flowdown of the reporting requirement for lower-tier commercial-item suppliers is the fact that many commercial-item suppliers manufacture their products on a multi-customer lot-type basis. They do not buy items separately for each prime contract their parts ultimately support. As a result, when a nonconformance manifests itself, the supplier will not know whether the part has been used on government contracts, much less the identity of the prime contracts affected. Contractors’ caution could lead to unnecessary reporting, which would further burden the reporting system contemplated by the rule. Accordingly, the Section recommends that the application of the Proposed Rule be limited to contractors that accept CAS-covered contracts and subcontracts consistent with Section 818 and exclude or exempt commercial-item contractors and subcontractors from the requirement consistent with the Federal Acquisition Streamlining Act (“FASA”) § 8000 et seq. There is a concern that commercial-item suppliers will either refuse to accept reporting requirements or refuse to sell their products for delivery under government contracts if the Proposed Rule is implemented in its current form. Thus, if the Council does not want to exempt these commercial-item suppliers, the Section recommends that the Council further study how this rule could be

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° If commercial suppliers decide to continue conducting business in the federal market sector, then the all-tiers flowdown requirement also could lead to increased prices for their commercial items to compensate for compliance efforts needed to comply with the new rules, including the possibility that commercial contractors will have to create a separate supply chain system for federal market sector sales. In such case, the Government could lose the pricing benefits associated with the purchase of commercial items, as well as result in delays while companies add their products to the separate supply chain system for the federal market.
implemented to ensure that its needs are met without jeopardizing its access to the commercial-item supplies in the federal supply chain. For example, the Council might establish a working group comprising Government and industry representatives, including commercial-item suppliers, to ascertain how this rule might be applied to these commercial-item suppliers.

V. GIDEP Reporting Concerns

A. Expansion of GIDEP Reporting Beyond that Required by Section 818 of the 2012 NDAA Should Be Deferred at This Point.

There is significant research identifying the problems and risks of counterfeit electronic-parts infiltration into the defense supply chain. The Proposed Rule serves an important function in mitigating this risk through use of the GIDEP system to help prevent the Government and other contractors from falling victim to counterfeit parts.

Nevertheless, the Section is concerned that the Proposed Rule may go too far by also mandating GIDEP reporting of quality issues that do not raise counterfeit electronic-part concerns, without adequately examining whether GIDEP can accommodate such a far-reaching expansion of the reporting requirement, or whether the benefits of such a broad expansion justify the additional burdens and costs it will impose, not just on industry, but on the Government as well. Although the rule purports to assist with implementing Section 818, that section addresses only the problem of counterfeit or suspect counterfeit electronic parts—not other types of quality issues. The Section recommends deferring the portion of the Proposed Rule that would expand the reporting obligation to these other, non-counterfeit quality issues pending further development of the record on whether the benefits of such an expansion would outweigh its substantial burdens and costs.


For a number of reasons, the Proposed Rule’s imposition of additional contractor costs and burdens associated with expanded reporting of quality issues is unwarranted. First, contractors are required by contract and FAR 46.105 to deliver conforming material to the Government. Second, contractors are already required to report nonconformances before shipment. Third, there are limited circumstances under FAR 46.407 in which nonconforming supplies may be accepted by the Government, but each of these requires government notification and approval at the contracting officer level, where a realistic assessment of the impact of the nonconformity on the affected contract, and potential need for further dissemination through GIDEP reporting, can be made. In short, a reporting duty already exists if a contractor seeks to ship (or learns it has already shipped) nonconforming material to the Government.
Further, both civilian and defense agencies monitor contractors, as applicable, to ensure they have detailed protocols for effectively managing nonconformance concerns.4

By contrast, it is not clear that requiring contractors at all tiers to report nonconformances through GIDEP has the same utility. Although the Proposed Rule is limited to situations in which more than one customer may be affected, there is no evidence provided to establish that contractors are neglecting their duty to directly inform all customers when they learn of nonconformance issues. Certainly direct communications with the appropriate government personnel are a more effective means to notify impacted customers than a broadcast notification issued through GIDEP, even if more than one customer is affected. And such direct reports enable in the Government to further report to the public or through GIDEP if the Government determines that expanded reporting is needed.

Expanding GIDEP reporting to include quality issues associated with electronic parts could also reduce the overall effectiveness of the GIDEP system for combating counterfeit-part proliferation. The Section recommends that the Proposed Rule adopt a similar approach by deleting the requirement for contractor reporting of nonconformances into GIDEP and, instead, continuing the process of deferring to the contracting officer to make the determination regarding which nonconformances should be reported to GIDEP based on an evaluation of the root cause of the underlying failure(s).5

Given the limited legislative requirement and the alternative reporting approach currently adopted by defense and civilian agencies, the Section recommends that the Proposed Rule be revised to mandate reporting only of counterfeit or suspect counterfeit electronic parts. The Section recommends deferring the portion of the Proposed Rule that would expand the reporting obligation to these other, non-counterfeit quality issues pending further development of the record on whether the benefits of such an expansion would outweigh its substantial burdens and costs.

A. The Proposed Rule Poses Other Logistical and Pragmatic Concerns.

Although the Section agrees with the FAR Council that there is value in reporting counterfeit part concerns to broader industry, there are a number of

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4 For example, DCMA Instruction 226-21 describes where and how DCMA quality personnel are required to ensure that defense contractors have established systems for: (1) disposition of nonconforming material, (2) identification of root causes for the nonconformance, (3) nonconformance reduction plans, and (4) nonconformance review boards when required by contracts. Those contractor systems typically include provision for flowdown of applicable requirements. In the civilian agency context, NASA, for example, has policy directive NPD 8730.5B, NASA Quality Assurance Program Policy (Revalidated 6/29/11 - Updated with Change 2 5/15/13), implementing its quality assurance-program. As a result of these kinds of rules and directives, agencies are able to tailor their quality requirement needs to the areas they have identified as posing significant risk(s).
logistical and pragmatic concerns that need to be addressed before use of the GIDEP system as the mandatory reporting vehicle becomes a regulatory requirement.

There are some obvious advantages to the use of the GIDEP system to report counterfeit electronic-part concerns: there is an established communication infrastructure, many members of the government and contractor community are already GIDEP participating members, and there is already some practice in using GIDEP as a channel for reporting suspect counterfeit electronic parts.

But mandating usage of GIDEP, however, raises complications. First, not all contractors and subcontractors doing business with the U.S. Government can or do participate in GIDEP. While it is possible for some new members to join, only U.S. and Canadian companies may participate in the GIDEP system. This limitation exists in part because the system contains export-controlled data which cannot be shared with companies outside the U.S. or Canada. Given that many contractors in the federal supply chain are based in other countries, the Proposed Rule may have the unintended effect of excluding non-U.S. and non-Canadian companies from competing for and conducting business with the U.S. Government because they cannot accept the proposed contract clause given the restrictions on accessing and using the GIDEP system. Moreover, to the extent the proposed GIDEP reporting (and screening) requirement of the Proposed Rule will be required to be flowed down to every supplier at every tier (as the Proposed Rule indicates), the flowdown requirement, coupled with the restricted eligibility for GIDEP participation, could effectively preclude use of suppliers located outside the U.S. or Canada at any level of the government-contract supply chain. The Section recommends that the FAR Council delay implementation of the Proposed Rule or make GIDEP participation voluntary until this access issue can be resolved and consider an additional round of rulemaking once access to GIDEP is more broadly available.  

Second, GIDEP currently imposes a number of loosely defined participation requirements. If contractors must become GIDEP participants by virtue of federal regulation, participation requirements—such as the transmission of impact reports—will have to be re-evaluated in light of their mandatory nature for cost, burden, and reasonableness, as it is likely that these types of costs will be passed on to the higher-tier contractors and ultimately the Government. The Section recommends additional study of the proposed expansion to determine whether this expansion addresses the Government’s true concerns and whether the benefits to be gained justify these increased costs.

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6 In the approximately three years since passage of Section 818 and actions by the FAR and DFARS Councils to develop and issue implementing counterfeit electronic-parts regulations, this Section, members of industry, and other members of the public have submitted comments raising the need to revise GIDEP to enable reporting of matters relating to non-U.S. and non-Canadian companies who do not presently have access to the system. We suggest that the FAR Council address this issue before any final rule is implemented.
Third, guidance should be developed that identifies whether the Government agency or the prime contractor, or its subcontractor, is the party primarily responsible for transmission of notifications through the GIDEP database. As currently structured, the Proposed Rule appears to contemplate duplicative reporting by all parties in the chain of custody once a counterfeit part or nonconformance problem is identified. It is not clear that repeated notifications of the same issue in the GIDEP system—in addition to the direct customer notifications already required by contract—adds any value to offset the significant additional burden.

Fourth, the Proposed Rule requires reporting information as required in the GIDEP reporting form. There is no guidance, however, on what information is to be provided to the contracting officer. Would the GIDEP form suffice? Would submission of the GIDEP notification to the contracting officer be sufficient to trigger the rule’s safe-harbor provisions with regard to civil liability?

Fifth, the Section is concerned that the limited scope of civil immunity for GIDEP reporting under the Proposed Rule is inadequate to address the concerns Congress noted, in the counterfeit-parts context, about disincentives for contractor reporting into GIDEP. In short, the scope of civil immunity ought be coextensive with the scope of the mandatory GIDEP reporting requirement. The FY 2012 NDAA and the Proposed Rule recognize the need for contractors to be immune from civil liability for reporting counterfeit-part concerns associated with DoD electronic components into GIDEP. This immunity is provided to eliminate risks to contractors reporting in good faith and to incentivize proper reporting. The same civil immunity associated with reporting suspect or actual electronic counterfeits, should be afforded contractors and subcontractors for reporting under an expanded Proposed Rule.

The Section recommends that the Council align these elements of the rulemaking by either (1) limiting the reporting obligations to counterfeit and suspect counterfeit electronic parts associated with DoD contracts, with the civil immunity available for complying with such reporting obligations; or (2) if the final rule expands reporting obligations beyond the original scope of Section 818, expanding the scope of corresponding civil immunity. Absent such immunity, there is a disincentive for contractors and their subcontractors to classify issues as potentially counterfeit-parts concerns or major or critical nonconformities, when they are afforded the discretion to classify them as nonconformances minor in nature under an applicable quality system, to limit their risk of exposure to third-party libel and defamation actions. If the FAR Council believes that it cannot extend the GIDEP civil immunity protections of section 818 to make immunity co-extensive with the expanded scope of this Proposed Rule without congressional action, then that position strongly counsels against the FAR Council’s expansion of the proposed reporting rule to include non-electronic items and non-DoD contracts at this time.
VI. **The FAR Council Should Revisit Acquisition Planning Requirements.**

The Proposed Rule would amend FAR 7.105’s provisions on content of a written acquisition plan at (b)(19). 79 Fed. Reg. at 33167. The Proposed Rule changes the requirements for planning for contract administration during the acquisition-planning process by adding more requirements. The current acquisition-plan requirements in FAR 7.105 include two sub-elements—acquisition background and objectives and plan of action—which together include 30 subtasks. The Proposed Rule greatly expands the requirements of one of the subtasks, FAR 7.105(b)(19), to include the requirement that:

In contracts for supplies or service contracts that include supplies, describe the risk-based Government quality assurance measures in place to identify and control major and critical nonconformances (see 46.101) including the use of the Government-Industry Data Exchange Program (GIDEP). Such measures may include, but are not limited to, higher-level quality standards.

There are multiple quality standards in various sectors of the marketplace, and in still others, there are no “standards” at all. If this rule were to apply only to “major systems,” it might be possible to identify the standards in the various industry sectors involved, but this would require a number of levels of expertise that individual acquisition shops may not possess. See 79 Fed. Reg. at 33167. Furthermore, such a proposed change to the acquisition plan is likely to be ineffective without significant resources devoted to explaining the reasoning behind the change and training on appropriate types of measures to be addressed. While ideally the Government should be engaging in this sort of analysis before pursuing a new acquisition, given funding and associated personnel constraints, we foresee that the Government will face challenges in implementation.

VII. **The Proposed Rule Is Overly Burdensome for Commercial Item Providers.**

First, the Section is concerned that the application of the Proposed Rule, in its entirety, may prove to be contrary to federal law, as well as overly burdensome to commercial-item contractors. The expansion of the Proposed Rule to include nonconforming parts is an expansion beyond the express language of Section 818. Moreover, the expansion to apply the regulation to commercial-item contractors is inconsistent with the FASA and FAR Part 12. FAR Part 12 makes clear that contracts for commercial items should include limited FAR clauses, only those: 1) required to implement provisions of law or executive orders applicable to the acquisition of commercial items; or 2) determined to be consistent with customary commercial practice. FAR 12.301(a). Neither of these conditions are met. Section 818 applies only to electronic products purchased by DoD by contractors subject to CAS. The Proposed Rule expands this provision beyond electronic products, beyond DoD, and to all contractors, including commercial-item contractors. Accordingly, the reporting requirements associated with nonconforming parts are
not required by law or executive orders and should not be extended to commercial-item contractors.

Second, as drafted, the Proposed Rule makes the flowdown of the new clause in commercial-item subcontracts awarded under non-commercial-item prime contracts mandatory, but it does not address commercial-item subcontracts awarded under commercial-item prime contracts. The Proposed Rule would modify FAR 52.212-4 and FAR 52.244-6 to require flowing down the new FAR clause 52.246-XX; yet, the Proposed Rule does not address requirements under commercial-item procurement subcontracting. Accordingly, if the Council does not exclude commercial-item contractors from the scope of the Proposed Rule’s reporting requirements, then the Section recommends that the FAR Council clarify its intent regarding whether the Proposed Rule is intended to require flowing down FAR 52.246-XX to commercial-item subcontracts awarded under commercial-item prime contracts, and, if so, the Section suggests the FAR Council propose corresponding amendments to FAR 52.212-5(e).

VIII. The Costs and Impacts of Requirement to Report are Underestimated.

The Section submits that the FAR Council’s analysis of the costs and impacts of the Proposed Rule are greatly underestimated. For example, the Council states that a small business “could be impacted to at least some extent.” 79 Fed. Reg. at 33166. A small business most assuredly will be impacted by this Proposed Rule, even if it never identifies a suspect or actual counterfeit part or nonconformance that must be reported. The Proposed Rule requires contractors and their subcontractors to 1) put in place a system for ongoing review of GIDEP, audit, investigation, and reporting; and 2) to investigate and then to report to GIDEP and the contracting officer when they determine an item is a suspect or actual counterfeit part or contains a nonconformance that is “major” or “critical,” a “common item” and “quality escape.” Small businesses have limited resources—both in terms of personnel and financial resources—to establish systems necessary to engage in these kinds of continuous monitoring, auditing, investigating, and reporting activities. Yet under the Proposed Rule, they will be required as a prime contractor, or most likely as a subcontractor, to put in place significant systems to engage in ongoing review and, when needed, investigation and possible reporting, not based on their size and activities, but based on whether they are involved with supplies (even as a service provider) or in the manufacturing process and they uncover or another entity reports a nonconformity or suspect or actual counterfeit part or nonconformity.

Further, the FAR Council’s estimated three-hour reporting burden for this collection of information greatly underestimates the time and expense of identifying, investigating and reporting on any incident, whether it be done by a small business, other-than-small business, or CAS-covered contractor or subcontractor. Procedures need to be followed, individuals with expertise need to be consulted, tests need to be performed, and reports (even if only internal ones) to memorialize findings of the review need to be prepared and filed.
Similarly, the FAR Council’s computation of the number and hours of reporting appears flawed. The Council bases its computation on the fact that, in the past, 12 percent of the GIDEP’s currently registered entities report on counterfeit or suspect counterfeit items (1896). The use of the number of currently registered entities does not reflect the potentially tens of thousands of government contractors, subcontractors, and suppliers that will be impacted by the Proposed Rule and will need to register on GIDEP, directly if they are U.S. or Canadian entities or potentially indirectly if they are not.

Indeed, there are also concerns that reporting by contractors and subcontractors may include reporting of third-party items. This could lead to a scenario in which the entity whose item is reported as being or containing a counterfeit or suspect counterfeit part or reportable nonconformance, is effectively debarred or suspended from government contracting unless and until cleared. Since the Proposed Rule would require these GIDEP reports to be made available and reviewed by Government agencies, as well as contractors and subcontractors involved with any kind of item of supply across the government, it increases the risk that a GIDEP report could result in a *de facto* debarment or suspension of a contractor or subcontractor.

**IX. The Rules Should Address GIDEP Reporting Errors.**

Last, the Proposed Rule addresses requirements for the Government, contractors and their subcontractors to report into GIDEP and the contracting officer where they identify suspect or actual counterfeit items or nonconformances meeting the reporting requirements of the Proposed Rule. The Proposed Rules do not address the situation in which there is an intentional or unintentional inaccurate or improper report entered into GIDEP, however. Indeed, it would not be difficult to imagine a scenario in which an inaccurate or improper report might be entered into the system and thereby deprive the Government and its contractors—at least until they reached a preliminary conclusion—of a potential source of supply of critical or essential parts. The Section believes that the rule needs to address the removal or correction of an inaccurate or improper report.

**X. Conclusion**

The Section appreciates the opportunity to provide these comments on the Proposed Rule. The Section urges the FAR Council to engage in further public meetings and notice-and-comment on this Proposed Rule and methods for implementation of the actual requirements of the Government. The Section is available to provide additional information and assistance as you may require.
Sincerely,

Stuart B. Nibley  
Chair, Section of Public Contract Law

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