

March 13, 2017

## **Frequently Asked Questions for**

### **DFARS 252.246-7008 SOURCES OF ELECTRONIC PARTS (OCT 2016)**

1) What are the tiers/categories of suppliers of electronic parts as it pertains to DFARS 252.246-7008?

Response: The statute and this regulation provide for a tiered approach for sources of electronic parts.

- Category 1: Electronic parts that are in production or currently available in stock. The contractor shall obtain such parts from the original manufacturer, their authorized suppliers, or from suppliers that obtain such parts exclusively from the original manufacturers of the parts or their authorized dealers.
- Category 2: Electronic parts that are not in production and not currently available in stock. The contractor shall obtain such parts from suppliers identified by the contractor as contractor-approved suppliers, subject to certain conditions.
- Category 3: Electronic parts that are not in production and not available from any of the above sources; electronic parts from a subcontractor (other than the original manufacturer) that refuses to accept flowdown of DFARS 252.246–7008; or electronic parts that the contractor or subcontractor cannot confirm are new or that the electronic parts have not been comingled in supplier new production or stock with used, refurbished, reclaimed, or returned parts. The contractor may buy such electronic parts subject to certain conditions.

2) Does 252.246–7008 apply to small businesses?

Response: Yes, It applies to all DoD contractors and subcontractors, including small businesses, when obtaining electronic parts under a DoD contract. Section 818 is clear that DoD contractors and subcontractors at all tiers are responsible for detecting and avoiding counterfeit electronic parts.

3) Does 252.246–7008 apply to the acquisition of commercial items, including commercially available off-the-shelf (COTS) items?

Response: Yes, it applies to the acquisition of commercial items, including COTS items. The Director of Defense Procurement and Acquisition Policy has determined that it is not in the best interest of the Government to exempt commercial items, including COTS items, from the applicability of this rule.

4) Doesn't the Federal Acquisition Streamlining Act exempt commercial items?

Response: The provisions of the Federal Acquisition Streamlining Act with regard to inapplicability of some laws to the acquisition of commercial items, including COTS items, are codified at 41 U.S.C. 1906 and 1907, respectively. A covered provision of law is inapplicable to the acquisition of commercial items, including COTS items, unless the appropriate officials make a written determination that it would not be in the best interest of the Government to exempt acquisitions of commercial items from the applicability of the covered law. The Director of Defense Procurement and Acquisition Policy has determined that it would not be in the best interest of the Government to exempt acquisitions of commercial items, including COTS items, from the provision of law relating to detection and avoidance of counterfeit parts. Therefore, DFARS 252.246–7008 applies to commercial items, including COTS items.

5) Does DFARS 252.246–7008 apply to subcontractors?

Response: Yes, It applies to all DoD contractors and subcontractors when obtaining electronic parts under a DoD contract. Section 818 is clear that DoD contractors and subcontractors at all tiers are responsible for detecting and avoiding counterfeit electronic parts.

6) Isn't the requirement to flow down 252.246–7008 to subcontracts in conflict with DFARS 252.244–7000, Subcontracts for Commercial Items?

Response: The flowdown to subcontracts for commercial items is not in conflict with DFARS clause 252.244–7000, Subcontracts for Commercial Items. DFARS 252.244–7000 states that the contractor is not required to flow down the terms of any DFARS clause in a subcontract for commercial items unless so specified in the particular clause. The fact that the new clause in this rule (252.246–7008), as well as the preexisting clause 252.246–7007, specify such flowdown to subcontracts for commercial items that are for electronic parts or assemblies containing electronic parts is, therefore, in conformance with DFARS 252.244–7000.

7) What should we do if we subcontract to COTS electronic assembly producers and their authorized dealers and they won't accept the flowdown of 252.246-7008?

Response: If the COTS subcontractor will not accept the flowdown of the clause, 252.246-7008 identifies the steps to take, including: notification to the contracting officer; contractor inspection, testing, and authentication of the part; and the requirement to make documentation of such inspection, testing, and authentication available to the Government upon request.

8) Does the flowdown to subcontracts apply to the original manufacturer?

Response: No, the flowdown requirement of the clause at 252.246–7008 excludes the requirements to flow the clause down to the original manufacturer of the electronic part.

9) Does 252.246-7008 apply to COTS medical devices? The FDA regulates them, so shouldn't you leave it to the FDA to manage those items?

Response: Yes, the clause applies to COTS medical device. While DoD recognizes the FDA's authority over drugs and medical devices, DoD has a responsibility to protect the warfighter by ensuring that we are utilizing electronic products that are not counterfeit or contain counterfeit parts and COTS medical devices were not exempted from the rule.

10) What if there is a part that is in production with a long lead time but not in stock? Can we go to other than a Category 1 source?

Response: If the part is in production, it must be bought from a Category 1 supplier, whether or not it is currently available or unavailable in stock. Even if there is a demonstrated, immediate need for a part in production with a lead time, contractors do not have the option to seek the part from other than a Category 1 source.

11) Are we required to use only the DoD-Adopted industry standards for identifying and approving "contractor-approved suppliers?" What are those standards?

Response: DFARS 252.246-7008 (b)(2)(i) states: "For identifying and approving such contractor-approved suppliers, the Contractor uses established counterfeit prevention industry standards and processes (including inspection, testing, and authentication), such as the DoD-adopted standards at <https://assist.dla.mil>" This language does not specifically require the use of DoD-adopted standards, but identifies them as an example. The following industry standards are currently DoD adopted and could be used to satisfy contractual requirements: ISO 9001, AS9100, AS5553A, AS6462, AS6081, AS6174A.

12) Do we have to validate U.S. Government sources such as the Defense Logistics Agency and the Federal Supply Schedule are trusted suppliers?

Response: Contractors or subcontractors who purchase directly from another vendor (such as the Federal Supply Schedule or from suppliers accredited by the Defense Microelectronics Activity), or requisition electronic parts from the Government inventory/stock under the authority of DFARS 252.251-7000, Ordering from Government Supply Sources, are still required to comply with the requirements of DFARS 252.246-7008(b) and (c). However, in accordance with DFARS 246.870-2(a)(3)(iii)(B) and 252.246-7008(d)(3)(ii), if the contractor or subcontractor requisitions electronic parts from the Government, the Government will be responsible for the authenticity of the parts. If any such part is subsequently found to be counterfeit or suspect counterfeit, the Government will promptly replace such part at no charge and will consider an adjustment in the contract schedule to the extent that replacement of the counterfeit or suspect counterfeit electronic parts caused a delay in performance.

13) What happens when a contractor can't establish traceability for electronic parts. It may be very hard to trace back a lot of the electronic parts to the original manufacturer or authorized dealer.

Response: If a contractor cannot establish traceability from the original manufacturer for a specific part, that contractor is responsible for inspection, testing, and authentication, in accordance with existing industry standards.

14) How, when, or to whom are subcontractors supposed to provide the required notification of intent to buy electronic parts from Category 3 suppliers?

Response: Since the clause flows down to all tiers, subcontractors will provide the required notification up the chain to the prime contractor when they decide to buy parts from a Category 3 supplier.

15) What does the notice to the contracting officer need to contain and where in the chain of custody is the notice to originate?

Response: There is no requirement for content of the notice beyond the common sense facts necessary to convey the circumstances to the contracting officer—what part is being bought, from whom, and why. The notice originates with whatever entity (prime contractor or subcontractor) is making the purchase, and is passed up to the contracting officer through the intervening subcontract tiers and the prime contractor. Documentation of inspection, testing, and authentication of such electronic parts is only required to be furnished to the Government upon request.

16) The rule requires notifying the contracting officer when they intend to buy electronic parts from Category 3 suppliers. Is the contracting officer's approval required? Do we have to wait until we get approval?

Response: The rule does not require approval for use of Category 3 sources.

17) Are the costs associated with any new supply chain security measures allowable? Who will bear the added costs of implementing serialized traceability or of the non-recurring engineering associated with utilizing alternate parts or of the testing necessary to establish authenticity?

Response: The implementation costs associated with compliance with DFARS 252.246–7008 are not unlike any other costs anticipated to be incurred by the contractor or subcontractor to perform the requirements of a contract. Whether a cost is allowable and allocable is generally governed by FAR part 31. Unless a cost is explicitly unallowable, whether a cost is allowable depends on factors such as reasonableness, allocability, CAS standards (and approved disclosure statements), if applicable, otherwise, generally accepted accounting principles and practices appropriate to the particular circumstances, and the terms of the contract. It is unnecessary to address the allowability of costs incurred under every contract requirement. In accordance with FAR 31.201–4, a cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship. Subject to these conditions a cost is allocable to a Government contract if it is (a) incurred specifically for the

contract; (b) benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or (c) is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.