

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 2, 7, 12, 46, and 52**

[FAR Case 2013–002; Docket No. 2013–0002; Sequence No. 1]

RIN 9000–AM58

**Federal Acquisition Regulation;
Expanded Reporting of
Nonconforming Items**

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to require expanded reporting of nonconforming items.

DATES: Interested parties should submit written comments to the Regulatory Secretariat at one of the addressees shown below on or before August 11, 2014 to be considered in the formation of the final rule.

Public Meeting: A public meeting will be held on June 16, 2014, from 1:30 p.m. to 5:30 p.m., Eastern Standard Time at the National Aeronautics and Space Administration Headquarters Auditorium, 300 E Street SW., Washington, DC 20546. The visitor's entrance is on the West side of the building. A notice was published in the **Federal Register** at 79 FR 27871 on May 15, 2014 on the subject of expanded reporting of nonconforming items. See the May 15, 2014 **Federal Register** for details on registering and attending.

ADDRESSES: Submit comments in response to FAR Case 2013–002 by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for “FAR Case 2013–002”. Select the link “Comment Now” that corresponds with “FAR Case 2013–002.” Follow the instructions provided at the “Comment Now” screen. Please include your name, company name (if any), and “FAR Case 2013–002” on your attached document.

- *Fax:* 202–501–4067.

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

Instructions: Please submit comments only and cite FAR Case 2013–002, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Loeb, Procurement Analyst, at 202–501–0650, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAR Case 2013–002.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD, GSA, and NASA are 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 NDAA for FY 2012 (Pub. L. 112–81, enacted December 31, 2011) included section 818, entitled “Detection and Avoidance of Counterfeit Electronic Parts”. However, the problem of counterfeit and nonconforming parts extends far beyond electronic parts and can impact the mission of all Government agencies. OFPP recognized this more than 20 years ago when it published its Policy Letter 91–3, entitled “Reporting Nonconforming Products”. At that time, OFPP referenced FAR 46.407, noting that contracting officers ordinarily are required to reject nonconforming products “when the nonconformance adversely affects safety, health, reliability, durability, performance, interchangeability, or other contract objectives”. OFPP, in section 4 of Policy

Letter 91–3, specified that, “Information shall be exchanged among agencies about nonconforming products. The existing Government/Industry Data Exchange Program (GIDEP) operated by the Department of Defense will serve as the central data base for receiving and disseminating information about such products”.

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. The rule is intended to reduce the risk of counterfeit items entering the supply chain by ensuring that contractors report suspect items to a widely available database. Multiple credible sources of information demonstrate that counterfeit electronic parts are a severe and growing problem across the supply chain, including data reported by the Senate Armed Services Committee (SASC), a Department of Commerce (DoC) report entitled “Defense Industrial Base Assessment: Counterfeit Electronic Parts”, and the GIDEP.

The SASC reported in 2011 that it had identified 1,800 cases of counterfeiting, comprising roughly one million parts. The DoC reported in 2010 that 9,356 suspected cases of counterfeiting had been identified in the defense industrial supply chain in 2008, an almost three-fold increase since 2005. GIDEP data also supports an increase over the past decade in counterfeit components and assemblies used in the Government.

Counterfeit parts are most commonly identified during product testing due to part failure or significantly degraded performance. Parts that do not fail product testing and remain undetected pose severe reliability and safety risks. Catastrophic failure of safety or mission critical electronic parts can potentially result in loss of life or loss of significant mission capabilities.

The FAR, at 46.101, defines a “critical nonconformance” as a nonconformance that is likely to result in hazardous or unsafe conditions for individuals using, maintaining, or depending upon the supplies or services; or is likely to prevent performance of a vital agency mission. It defines a “major nonconformance” to mean a nonconformance, other than critical, that is likely to result in failure of the supplies or services, or to materially reduce the usability of the supplies or services for their intended purpose. The terms major nonconformance and critical nonconformance are familiar to the quality assurance and contracting workforces and have been in use for decades.

The proposed rule would build on the existing contractor inspection system

requirements, utilizing the existing terminology, and would add a requirement for contractors to report to the GIDEP database a counterfeit item, a suspect counterfeit item, or an item that contains a major or critical nonconformance that is a common item and that constitutes a quality escape, as defined in FAR 46.101, that has resulted in the release of like nonconforming items to more than one customer.

GIDEP has been in existence for over two decades and has a Web site at www.gidep.org. In that Web site, one can find the GIDEP reporting tools, including the reporting forms. The paperwork burden associated with completing and submitting the reporting forms is addressed thoroughly in the Paperwork Reduction Act section of this notice. In addition, the proposed rule includes new material under the “contract administration” topic of the contents of written acquisition plans (FAR 7.105(b)(19)). The acquisition plan should consider the risk-based quality assurance measures that are in place to identify and control major and critical nonconformances, e.g., higher-level quality standards or use of GIDEP.

II. Discussion and Analysis

Amendments to FAR subparts 7.1, 12.2, 12.3, 46.1, 46.2, 46.3, 46.4, and 52 are proposed by this rule. The proposed changes are summarized in the following paragraphs.

A. *Subpart 7.1, Acquisition Plans*: The requirements for contents of written acquisition plans are proposed to be amended, at FAR 7.105(b)(19), to describe the risk-based Government quality assurance measures needed to identify and control major and critical nonconformances (see FAR 46.101) including the use of the GIDEP. Higher-level quality standards are one example that may be used to address the risk of nonconformance.

B. *Subpart 12.2, Special Requirements for the Acquisition of Commercial Items*: This subpart is proposed to be amended to add a reference to FAR 12.208, Contract quality assurance, to alert contractors to the requirement to use GIDEP.

C. *Subpart 12.3, Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items*: This subpart is proposed to be amended at FAR 12.301(d)(5) to require the clause at FAR 52.246–XX, Reporting Nonconforming Items, be included in solicitations and contracts.

D. *Subpart 46.1, General*: Five new terms are defined at FAR 46.101:

1. *Common item*. Because the term is defined and used differently in part 46 than in part 31 (see FAR 31.205–42,

Termination costs), the definition at FAR 2.101 is proposed to be revised to exclude the definition in FAR 46.101 from the definition at FAR 2.101.

2. *Counterfeit item*.

3. *Design activity*.

4. *Quality escape*. This is a new concept for procurement personnel but is well-known by quality assurance experts. It is necessary to differentiate between items that must be reported to GIDEP and those that need not be reported to GIDEP.

5. *Suspect counterfeit item*.

E. *Subpart 46.1, General*: FAR 46.102, Policy, is proposed to be revised to alert contractors of the requirement to use GIDEP.

F. *Subpart 46.1, General*: FAR 46.105, Contractor responsibilities, would be revised to state that the contractor is responsible for using GIDEP for two purposes: (1) To report nonconforming items; and (2) to screen GIDEP reports to avoid the use of nonconforming items. The proposed changes show the linkage between supplier quality control and preventing quality escapes from being incorporated into the contractor's product. Inevitably, even the best quality control process will miss a percentage of nonconformances; this is the pivotal issue justifying mandatory GIDEP reporting.

In the proposed rule, several conditions must exist to mandate reporting an item to GIDEP: It must be a counterfeit or suspect counterfeit item; or contain a major or critical nonconformance that is a common item and constitutes a quality escape from a lower level subcontractor or supplier that resulted in the release of nonconforming items to more than one customer.

In addition, there are reporting requirements to the contracting officer. The circumstances requiring such reporting are different than those requiring reporting to GIDEP. The contracting officer does not need to be notified if the contractor identifies a major or critical nonconformance but corrects the problem prior to delivery. However, the contracting officer must be notified when a counterfeit or suspect counterfeit item is identified, without regard to whether the contractor intends to deliver the product containing the counterfeit or suspect counterfeit items. In such cases, the contracting officer will provide disposition instructions for the counterfeit or suspect counterfeit items in accordance with agency procedures. The contracting officer's disposition instructions may be informed by agency policy or investigative needs.

G. *Subpart 46.2, Contract Quality Requirements*: A new sentence in FAR 46.202–1, Contracts for commercial items, is proposed to alert contractors of the requirement to use GIDEP.

H. *Subpart 46.3, Contract Clauses*: A new section, FAR 46.317, Reporting nonconforming items, is proposed to prescribe the use of a new clause at FAR 52.246–XX, Reporting Nonconforming Items, in solicitations and contracts, for the acquisition of supplies, or services that include supplies when these items are—

- Delivered to the government;
- Acquired by the contractor for use in performing services, or;
- Furnished by the contractor for use by, or for the Government.

I. *Subpart 46.4, Government Contract Quality Assurance*: The current FAR includes section 46.407, Nonconforming supplies or services. This section would be amended to add paragraph (h) stating, in part, that the contracting officer shall provide disposition instructions for counterfeit or suspect counterfeit items in accordance with agency policy.

J. *Subpart 52.2, Texts of Provisions and Clauses*: A new clause would be added to require contractors to—

1. Perform the reporting requirements summarized in the bullets above with regard to GIDEP and the contracting officer;
2. Retain in its possession any items suspected or confirmed as counterfeit items;
3. Screen GIDEP reports in order to avoid the use and delivery of items that are counterfeit or suspect counterfeit items or contain a major or critical nonconformance; and
4. Include the substance of the clause in all subcontracts at any tier for supplies, or services that include supplies.

In accordance with the NDAA for FY 2012 (Pub. L. 112–81), if the contract is with the Department of Defense, the clause would state that the contractor or any subcontractor providing a written report as required under the clause will not be subject to civil liability on the basis of such reporting, provided that, the contractor or any subcontractor made a reasonable effort to determine that the end item, component, part, or material contained electronic parts (i.e., an integrated circuit, a discrete electronic component or a circuit assembly) that were counterfeit items or suspect counterfeit items.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory

alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

The change may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act 5 U.S.C. 601, *et seq.* The Initial Regulatory Flexibility Analysis (IRFA) is summarized as follows:

DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to require expanded reporting of nonconforming items. This action is proposed in implementation of Office of Federal Procurement Policy (OFPP) Policy Letter 91–3 and in partial implementation of the National Defense Authorization Act for Fiscal Year 2012, section 818, entitled “Detection and Avoidance of Counterfeit Electronic Parts.”

The requirements in the proposed rule have the potential to impact any entity, small or large, that does business with the Federal Government because the proposed rule would apply to purchases of items, including commercial items and commercial off-the-shelf items, and purchases under the simplified acquisition threshold. Therefore, any small business that contracts with a Federal agency could be impacted to at least some extent. Contractors do receive notifications from the GIDEP system which reduces the impact on small businesses. Contractors can enter a bill of goods into the system and GIDEP will alert them via email when a report has been submitted regarding an item on that list. The contractor will then have to log into GIDEP to review the report. Contractors can also log into the system and search reports by specific item or generally. Using data from the Federal Procurement Data System (FPDS), there were 107,178 such small entities in FY 2010, 97,569 in FY 2011, and 85,502 small entities in FY 2012 doing business with the Federal Government.

A contractor must report to the Government-Industry Data Exchange Program (GIDEP) at www.gidep.org when an item meets the following conditions under a Government contract:

1. The item is counterfeit or suspect counterfeit; or
2. Contains a major or critical nonconformance that:
 - a. Is a common item; and

b. Constitutes a quality escape that has resulted in the release of like nonconforming items to more than one customer.

All of the above terms are defined at FAR 46.101.

In addition, a contractor must report to the contracting officer under certain circumstances, which are different from those requiring the contractor to report to GIDEP, for example when a counterfeit or suspect counterfeit item is identified, without regard to whether the contractor intends to deliver the product containing the counterfeit or suspect counterfeit items. This is necessary so that the appropriate authorities, *e.g.*, the Department of Justice or the agency Inspector General, can follow up with the item's supplier.

The rule does not duplicate, overlap, or conflict with any other Federal rules. A number of alternatives were considered, as follows, but none were determined to meet the requirements of the statute and OFPP Policy Letter 91–3:

- Making the rule applicable only to DoD.
- Making the rule applicable only to electronic parts.
- Not applying the rule below the simplified acquisition threshold.
- Not applying the rule to purchases of commercial items or commercial off-the-shelf items.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DOD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (FAR Case 2013–002), in correspondence.

V. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies. The proposed rule contains information collection requirements. Accordingly, the Regulatory Secretariat has submitted a request for approval of a new information collection requirement concerning Expanded Reporting of Nonconforming Items to the Office of Management and Budget.

A. Public reporting burden for this collection of information is estimated to average 3 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The estimate is based on data revealed in the

U.S. Department of Commerce report and GIDEP data. In this report, 12 percent of companies and organizations participating in the survey contacted GIDEP to report incidents of counterfeit or suspect counterfeit. The number of contractors that are registered in GIDEP for FY 2012 totaled 1,896. If this represents only 12 percent of the potential companies and organizations reporting into GIDEP then the total number of possible companies and organizations that could be reporting is approximately 15,800.

The annual reporting burden estimated as follows:

Respondents: 15,800.

Responses per respondent: 30.

Total annual responses: 474,000.

Preparation hours per response: 3 hours.

Total response Burden Hours: 1,422,000.

B. Request for Comments Regarding Paperwork Burden.

Submit comments, including suggestions for reducing this burden, not later than August 11, 2014 to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Ms. Hada Flowers, 1800 F Street NW., Washington, DC 20405.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the FAR, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requesters may obtain a copy of the supporting statement from the General Services Administration, Regulatory Secretariat (MVCB), ATTN: Ms. Hada Flowers, 1800 F Street NW., Washington, DC 20405. Please cite OMB Control Number 9000–00XX, Expanded Reporting of Nonconforming Items, in all correspondence.

List of Subjects in 48 CFR Parts 2, 7, 12, 46, and 52

Government procurement.

Dated: June 3, 2014.

William Clark,

Acting Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA propose to amend 48 CFR parts 2, 7, 12, 46, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 7, 12, 46, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2) by revising the definition “Common item” to read as follows.

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

Common item means material that is common to the applicable Government contract and the contractor's other work, except that for use in part 46, see the definition in 46.101.

* * * * *

PART 7—ACQUISITION PLANNING

■ 3. Amend section 7.105 by revising paragraph (b)(19) to read as follows:

7.105 Contents of written acquisition plans.

* * * * *

(b) * * *

(19) *Contract administration.* Describe how the contract will be administered. In contracts for services, include how inspection and acceptance corresponding to the work statement's performance criteria will be enforced. 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.

* * * * *

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 4. Amend section 12.208 by adding a sentence to the end of the paragraph to read as follows:

12.208 Contract quality assurance.

* * * In supply contracts and service contracts that include supplies,

contractors shall be required to use the Government-Industry Data Exchange Program (GIDEP) (see 12.301(d)(4)).

■ 5. Amend section 12.301 by adding paragraph (d)(5) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(d) * * *

(5) Insert the clause at 52.246–XX, Reporting Nonconforming Items, as prescribed in 46.317.

* * * * *

PART 46—QUALITY ASSURANCE

■ 6. Amend section 46.101 by adding, in alphabetical order, the definitions for “Common item”, “Counterfeit item”, “Design activity”, “Quality escape”, and “Suspect counterfeit item” to read as follows:

46.101 Definitions.

* * * * *

Common item means an item that has multiple applications versus a single or peculiar application. Common items include, for example, raw or processed materials, parts, components, subassemblies, and finished assemblies that are commonly available products (such as nondevelopmental items, off-the-shelf items, National Stock Number items, or commercial catalog items).

* * * * *

Counterfeit item means an unlawful or unauthorized reproduction, substitution, or alteration that has been knowingly mismarked, misidentified, or otherwise misrepresented to be an authentic, unmodified item from the original manufacturer, or a source with the express written authority of the original manufacturer or design activity, including an authorized aftermarket manufacturer. Unlawful or unauthorized substitution includes used items represented as new, or the false identification of grade, serial number, lot number, date code, or performance characteristics.

Design activity means an organization, Government or contractor, that has responsibility for the design and configuration of an item, including the preparation or maintenance of design documents. Design activity could be the original organization, or an organization to which design responsibility has been transferred.

* * * * *

Quality escape means a situation in which a supplier's internal quality control system fails to identify and contain a nonconforming condition.

* * * * *

Suspect counterfeit item means an item for which credible evidence (including but not limited to, visual inspection or testing) provides reasonable doubt that the item is authentic.

* * * * *

■ 7. Amend section 46.102 by adding a sentence to the end of paragraph (f) to read as follows:

46.102 Policy.

* * * * *

(f) * * * In supply contracts and service contracts that include supplies, contractors shall be required to use the Government-Industry Data Exchange Program (GIDEP) (see 12.301(d)(4)); and

* * * * *

■ 8. Amend section 46.105 by revising paragraph (a)(3); and adding paragraphs (e) and (f) to read as follows:

46.105 Contractor responsibilities.

(a) * * *

(3) Ensuring that vendors or suppliers of raw or processed materials, parts, components, subassemblies, and finished assemblies have an acceptable quality control system and that quality escapes from these vendors and suppliers are not incorporated into the contractor's final product; and

* * * * *

(e) The contractor is responsible for screening reports in the Government-Industry Data Exchange Program (GIDEP) to avoid the use and delivery of items that are counterfeit or suspect counterfeit items or that contain a major or critical nonconformance.

(f) The contractor is responsible for providing a written report—

(1) To the contracting officer within 30 days from when the contractor becomes aware that any end item, component, subassembly, part, or material contained in supplies purchased by the contractor for delivery to, or for the Government is counterfeit or suspect counterfeit. If the contractor has the item(s) in its possession at the time of discovery, then the Contractor shall retain such item(s) until disposition instructions have been provided by the contracting officer; and

(2) To the GIDEP within 60 days from when it becomes aware that an item purchased by or for the contractor for delivery to, or for the Government—

(i) Is counterfeit or suspect counterfeit; or

(ii) Contains a major or critical nonconformance that—

(A) Is a common item; and

(B) Constitutes a quality escape that has resulted in the release of like nonconforming items to more than one customer.

■ 9. Amend section 46.202–1 by adding a sentence to the end of paragraph to read as follows:

46.202–1 Contracts for commercial items.
* * * In supply contracts and service contracts that include supplies, contractors shall be required to use the Government-Industry Data Exchange Program (GIDEP) (see 12.301(d)(5)).

■ 10. Add section 46.317 to read as follows:

46.317 Reporting nonconforming items.

The contracting officer shall insert the clause at 52.246–XX, Reporting Nonconforming Items, in solicitations and contracts for the acquisition of supplies, or services that include supplies, that are—

- (a) Delivered to the Government;
- (b) Acquired by the contractor for use in performing services, or;
- (c) Furnished by the contractor for use by, or for the Government. If required by agency policy, the contracting officer may modify paragraph (c) but only to change the responsibility for the contractor to submit reports to the agency rather than to GIDEP, so that the agency instead of the contractor submits reports to GIDEP within the mandatory 60 days.

■ 11. Amend section 46.407 by adding paragraph (h) to read as follows:

46.407 Nonconforming supplies or services.

* * * * *

(h) The contracting officer shall provide disposition instructions for counterfeit or suspect counterfeit items in accordance with agency policy. In some cases, agency policy may require the contracting officer to direct the contractor to retain such items for investigative or evidentiary purposes.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 12. Amend section 52.213–4 by revising the date of the clause and paragraph (a)(2)(viii) to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (Date)

- (a) * * *
- (2) * * *
- (viii) 52.244–6, Subcontracts for Commercial Items (DATE).

* * * * *

■ 13. Amend section 52.244–6 by revising the date of the clause;

redesignating paragraph (c)(1)(xi) as (c)(1)(xii); and adding a new paragraph (c)(1)(xi) to read as follows:

52.244–6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (Date)

* * * * *

- (c) * * *
- (1) * * *
- (xi) 52.246–XX, Reporting Nonconforming Items (DATE), if flowdown is required in accordance with paragraph (e) of FAR clause 52.246–XX.

* * * * *

■ 14. Add section 52.246–XX to read as follows:

52.246–XX Reporting Nonconforming Items.

As prescribed in 46.317, insert the following clause:

Reporting Nonconforming Items (Date)

(a) *Definitions.* As used in this clause—
Common item means an item that has multiple applications versus a single or peculiar application. Common items include, for example, raw or processed materials, parts, components, subassemblies, and finished assemblies that are commonly available products (such as nondevelopmental items, off-the-shelf items, National Stock Number items, or commercial catalog items).

Counterfeit item means an unlawful or unauthorized reproduction, substitution, or alteration that has been knowingly mismarked, misidentified, or otherwise misrepresented to be an authentic, unmodified item from the original manufacturer, or a source with the express written authority of the original manufacturer or design activity, including an authorized aftermarket manufacturer. Unlawful or unauthorized substitution includes used items represented as new, or the false identification of grade, serial number, lot number, date code, or performance characteristics.

Critical nonconformance means a nonconformance that is likely to result in hazardous or unsafe conditions for individuals using, maintaining, or depending upon the supplies or services; or is likely to prevent performance of a vital agency mission.

Design activity means an organization, Government or contractor, that has responsibility for the design and configuration of an item, including the preparation or maintenance of design documents. Design activity could be the original organization, or an organization to which design responsibility has been transferred.

Major nonconformance means a nonconformance, other than critical, that is likely to result in failure of the supplies or services, or to materially reduce the usability of the supplies or services for their intended purpose.

Quality escape means a situation in which a supplier's internal quality control system

fails to identify and contain a nonconforming condition.

Suspect counterfeit item means an item for which credible evidence (including but not limited to, visual inspection or testing) provides reasonable doubt that the item is authentic.

(b) The Contractor shall provide written notification to the Contracting Officer within 30 days from when it becomes aware that any end item, component, subassembly, part or material contained in supplies purchased by the Contractor for delivery to, or for the Government is counterfeit or suspect counterfeit. If the Contractor has the item(s) in its possession at the time of discovery, then the Contractor shall retain such item(s) until disposition instructions have been provided by the Contracting Officer.

(c)(1) The Contractor shall, as a part of the Contractor's inspection system or program for the control of quality, screen GIDEP reports to avoid the use and delivery of items that are counterfeit or suspect counterfeit items or contain a major or critical nonconformance.

(2) The Contractor shall report to GIDEP within 60 days of becoming aware that an item purchased by or for the Contractor for delivery to, or for the Government—

- (i) Is counterfeit or suspect counterfeit; or
- (ii) Contains a major or critical nonconformance that—

(A) Is a common item; and

(B) Constitutes a quality escape that has resulted in the release of like nonconforming items to more than one customer.

(3) The Contractor shall obtain the appropriate form at www.gidep.org and submit the form electronically to gidep@gidep.org.

(d) If this is a contract with the Department of Defense, as provided in paragraph (c)(5) of section 818 of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112–81), the Contractor or subcontractor that provides a written report or notification under this clause shall not be subject to civil liability on the basis of such reporting, provided that the Contractor or any subcontractor made a reasonable effort to determine that the end item, component, part, or material contained electronic parts (*i.e.*, an integrated circuit, a discrete electronic component (including, but not limited to, a transistor, capacitor, resistor, or diode), or a circuit assembly) that were counterfeit items or suspect counterfeit items.

(e) The 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.

(End of clause)

[FR Doc. 2014–13336 Filed 6–9–14; 8:45 am]

BILLING CODE 6820–EP–P