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PRATT'S  
**GOVERNMENT  
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LAW**  
REPORT



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**EDITOR'S NOTE: SUSPENSION AND DEBARMENT**

Victoria Prussen Spears

**EXAMINING AND DISPELLING COMMON MISCONCEPTIONS ABOUT SUSPENSION AND DEBARMENT**

Dominique L. Casimir

**SBA TO SHARPEN SUSPENSION AND DEBARMENT PROCEDURES**

Frederic M. Levy, Michael Wagner, and Carl Wiersum

**GOVERNMENT CONTRACTORS ARE SUBJECT TO NEW COUNTERFEIT PARTS REPORTING REQUIREMENTS**

Mary Beth Bosco and Eric S. Crusius

**BID PROTESTS AND BRIDGE CONTRACTS: WHEN IS THE SOLE SOURCE BRIDGE CONTRACT JUSTIFIED BY URGENT AND COMPELLING NEED?**

Jonathan A. DeMella

**FEINWACHS HOLDS FCA RELATOR'S EMAILS TO COUNSEL, EVEN THOUGH ON EMPLOYER'S SERVER, PROTECTED AS WORK PRODUCT**

Pablo J. Davis

**IBM WINS DISMISSAL OF FCA QUI TAM SUIT ALLEGING IT USED FAKED AUDIT TO PRESSURE THE IRS TO RENEW SOFTWARE LICENSE**

Pablo J. Davis

**IN THE COURTS**

Steven A. Meyerowitz

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<b>Editor's Note: Suspension and Debarment</b> Victoria Prussen Spears	43
<b>Examining and Dispelling Common Misconceptions About Suspension and Debarment</b> Dominique L. Casimir	45
<b>SBA to Sharpen Suspension and Debarment Procedures</b> Frederic M. Levy, Michael Wagner, and Carl Wiersum	51
<b>Government Contractors Are Subject to New Counterfeit Parts Reporting Requirements</b> Mary Beth Bosco and Eric S. Crusius	54
<b>Bid Protests and Bridge Contracts: When Is the Sole Source Bridge Contract Justified by Urgent and Compelling Need?</b> Jonathan A. DeMella	57
<b><i>Feinwachs</i> Holds FCA Relator's Emails to Counsel, Even Though on Employer's Server, Protected as Work Product</b> Pablo J. Davis	62
<b>IBM Wins Dismissal of FCA <i>Qui Tam</i> Suit Alleging It Used Faked Audit to Pressure the IRS to Renew Software License</b> Pablo J. Davis	66
<b>In the Courts</b> Steven A. Meyerowitz	70

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# Government Contractors Are Subject to New Counterfeit Parts Reporting Requirements

*By Mary Beth Bosco and Eric S. Crusius\**

*The authors of this article explain that, pursuant to a new Federal Acquisition Regulation, covered contractors must report instances of counterfeit parts or suspected counterfeit parts within 60 days and must proactively monitor the government's database compiling sources of counterfeit parts. The new regulation also expands coverage from the Defense Department's counterfeit electronic parts rule and includes civilian agencies.*

A new Federal Acquisition Regulation ("FAR"), "Reporting of Nonconforming Items to the Government Industry Data Exchange Program," took effect on December 23, 2019. The new FAR provision<sup>1</sup> and clause<sup>2</sup> apply to both the civilian agencies and the Department of Defense ("DoD").

The regulation's major component is the requirement for federal government contractors to notify contracting officers of the presence of counterfeit parts or suspected counterfeit parts in their supply chain and to submit a report to the Government Industry Data Exchange Program ("GIDEP"). The notice and the report must be submitted within 60 days of discovery of the counterfeit or suspected counterfeit part.

This article first outlines the contracts and contractors that are covered, and then discusses the rule's requirements.

## **WHAT CONTRACTS ARE COVERED?**

The new FAR provision and clause cover both civilian and defense contracts over the simplified acquisition threshold (\$150,000 or \$250,000 depending on whether the applicable agency has issued a class deviation). The clause must be included, subject to certain exemptions described below, in contracts for (i) items that are "subject to higher-level quality standards," which will be defined in the individual contract; or (ii) items that the contracting officer designates as critical.

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<sup>1</sup> FAR 46.317.

<sup>2</sup> FAR 52.246-26.

A critical item is one that if it fails, is likely either to result in hazardous or unsafe conditions for individuals using or depending on the item, or to prevention of a vital agency mission. Prime contractors must include the clause in subcontracts that meet the above requirements.

In addition to contracts below the simplified acquisition threshold, the regulation exempts commercial item contracts. Other exemptions include counterfeit parts subject to an ongoing criminal investigation, medical devices, and foreign corporations with no office or other facility in the United States.

### **WHAT ARE THE NOTICE AND REPORTING REQUIREMENTS?**

Covered contractors must provide written notice to their contracting officers within 60 days of becoming aware or “having reason to suspect” that any part purchased for delivery to, or purchased on behalf of, the government is counterfeit or suspected to be counterfeit. A counterfeit item is one that is:

[a]n 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 current 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.

A suspect counterfeit part is one for which the contractor has “credible evidence” that provides reasonable doubt of the part’s authenticity. The regulations provide examples of circumstances that might provide a contractor with reason to suspect a counterfeit part: Inspection, testing, record review, or notification from a third party such as a customer. Contractors are required to retain counterfeit or suspected counterfeit items until their contracting officers provide disposition instructions.

In addition to providing notice to the contracting officer, the new FAR clause requires contractors to submit a report to GIDEP within 60 days of becoming aware of or having reason to suspect a part as counterfeit. The clause, however, does not expand on the contents of the report. The GIDEP reporting requirement is also triggered when a contractor becomes aware of or has reason to suspect that a “common item” has a major or critical nonconformance.

A common item is one that has multiple applications, such as use in both federal and commercial products. A critical nonconformance means that a part is likely to result in hazardous or unsafe conditions for manufacturers or users of the product, or is likely to prevent the performance of vital agency missions. A major nonconformance is a degree less dangerous than a critical nonconformance.

It is a flaw 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.

Finally, to the extent not encompassed above, DoD contractors are required to report counterfeit or suspected counterfeit electronic parts to the GIDEP. The DoD counterfeit electronic parts clause defines those parts to include “[a]n integrated circuit, a discrete electronic component (including, but not limited to, a transistor, capacitor, resistor, or diode), or a circuit assembly . . .”<sup>3</sup> A DoD contractor that reports a counterfeit or suspect counterfeit electronic part is exempt from any civil liability based on the report.

### **WHAT ARE THE OTHER REQUIREMENTS?**

The new FAR rule also requires contractors to monitor information relating to counterfeit parts in the supply chain. More specifically, contractors must screen GIDEP reports<sup>4</sup> as part of their quality control activities.

### **CONCLUSION**

The new FAR rule reflects the government’s heightened attention to the security of the supply chain. This attention is exemplified by the 2018 Strengthening and Enhancing Cyber-capabilities by Utilizing Risk Exposure SECURE Technology Act.<sup>5</sup> This law created a Federal Acquisition Security Council to set policy and adopt standards for a federal supply chain risk management strategy and to recommend banning federal contractors or subcontractors that fail to secure their systems and supply chains. Supply chain security is subject to increasing government security and rapidly evolving requirements.

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<sup>3</sup> Defense Federal Acquisition Regulation Supplement (“DFARS”) 252.246-7008.

<sup>4</sup> See <http://www.gidep.org>.

<sup>5</sup> P.L.115-390.