



PROFESSIONAL SERVICES COUNCIL

September 29, 2005

Defense Acquisition Regulations Council
OUSD (AT&L) DPAP (DAR)
IMC 3C132
3062 Defense Pentagon
Washington, D.C. 20301-3062

Attn: Ms. Michele Peterson

Re: DFARS 2004-D006: Notification Requirements for Critical Safety Items

Via email: dfars@osd.mil

Dear Ms. Peterson:

On behalf of the Professional Services Council (PSC), I am pleased to submit comments on the proposed DFARS rule published in the Federal Register on August 1, 2005 (70 F.R. 44077-78). The proposed rule would amend the DFARS to require notification of potential safety issues under DoD contracts and to create a new contract clause requiring contractors to promptly notify the Government of any nonconformance or deficiency in an item that could impact safety.

PSC is the leading national trade association that represents more than 185 companies of all business sizes providing professional and technical services to virtually every agency of the federal government, including information technology, engineering, logistics, operations and maintenance, consulting, international development, scientific, environmental, and social sciences.

Background

As a general matter, we recognize the importance of identifying safety critical parts and providing full and timely notification of any potential failure of a system that could affect safety. However, we believe this proposed rule will confuse the government and contractors about the scope of coverage of the rule, the actions to be taken and the remedies available. For that reason, we strongly urge the Department to reconsider this rule, address the substantive comments we offer, and publish a second proposed rule for public comment. We do not believe the Department has thought through the significant administrative burden the proposed rule will impose upon all DoD contractors and subcontractors and the similar burden the Department will face when confronted with the potential volume of data the rule will require these thousands of businesses to routinely submit.

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The Supplementary Information accompanying the proposed rule notes that this rule is a “result of Section 8143 of the fiscal year 2004 DoD Appropriations Act (P.L. 108-87) that required examination of the appropriate standards and procedures to ensure timely notification to the Government and contractors regarding safety issues, including defective parts.” Section 8143 requires a report by the Secretary of Defense to certain congressional committees on how to implement a system for tracking safety-critical parts and the appropriate standards for timely notification of contracting agencies and contractors about safety issues, including parts that may be defective. Two other reporting requirements address specific items relating to airplane parts.

In its June 30, 2004 report to Congress, the Department noted that while the scope of coverage of Section 8143 was not limited to aviation critical safety items, the focus of the amendment establishing the report was on aviation critical safety items and the Department explicitly limited the coverage of the report to those aviation critical safety items. In fact, 10 U.S.C. 2319(g) specifically defines the term “aviation critical safety item” as “parts, assemblies, installation equipment, launch equipment, recovery equipment, or support equipment for an aircraft or aviation weapon system, the failure, malfunction, or absence of which could cause a catastrophic loss or critical failure resulting in loss or serious damage to an aircraft or weapon system, an unacceptable risk or personal injury or loss of life, or an uncommanded engine shutdown.” Regulatory coverage for these aviation critical safety items is included in DFARS 209.270 and other departmental policies and directives.

As stated in the Department’s report required by Section 8143, other than for aviation critical safety items, there is no DoD statutory, regulatory or policy requirements or standards for notification of contracting agencies or higher tier contractors about safety issues, including defective parts. While we appreciate the importance of notification of newly discovered safety issues beyond aviation critical safety items, we have significant concerns about the methodologies proposed in this rule, identifying the scope of the systems to be covered, the nature of issues that must be reported, the government response when reports are made and the relationship between this reporting requirement at any point in the life cycle process with the contractor’s contractual obligation for ensuring delivered products meet contractual requirements. We also are concerned about the flow down of these requirements to lower tier subcontractors, particularly to those who are providing commercial items and services under FAR Part 12 authorities; this issue is not addressed in the proposed rule.

Specific Comments

We offer the following comments on specific provisions in the proposed rule.

Section 246.101--Definitions

The proposed rule amends DFARS 246, “Quality Assurance,” to add to the current definitions section of this subpart an additional definition of the term “replenishment part.” We have no objection to the definition. However, we could foresee confusion trying to interpret the phrase “purchased after provisioning.” Does this mean this clause only applies to follow-on actions after initial provisioning? We recommend that the DAR Council clarify the interpretation of the phrase “purchased after provisioning” or perhaps delete the phrase. We also recommend that the Department reconcile this provision with the provisions relating to the acquisition of

replenishment parts already addressed in DFARS Part 217 and because of the coverage in proposed 246.371.

We also request that the Department consider limiting the application of the rule to truly significant threats to safety from malfunctioning systems or subsystems, perhaps through modifying or qualifying the definition of supply or services for these purposes. For instance, we believe that software is covered under the proposed rule and any “bug” may need to be reported if the software was any part of a safety critical system.

Section 246.371 -- Notification of Potential Safety Issues

The proposed rule amends DFARS 246 to add a new policy section on notification of potential critical safety issues. It requires the inclusion of the new DFARS clause into three types of solicitations and contracts: (1) replenishment parts identified as critical safety items; (2) systems, subsystems, assemblies and subassemblies integral to a system; and (3) repair, maintenance, logistics support or overhaul services for systems, subsystems, assemblies and subassemblies integral to a system. We find this subsection to be overly expansive in its application and providing confusing direction to the contracting officer.

With respect to the first type of solicitation and contract for which the proposed clause must be included, while the term “replenishment part” is newly defined through the addition of DFARS 246.101, this section adds an important qualifier, “identified as critical safety parts.” However, we are concerned that, at the time of solicitation, the contracting officer may not know what parts are “critical safety parts” or whether a specific contract will require the acquisition of such items. As a result, out of an abundance of caution, we believe the contracting officer will automatically include the contract clause in far too many solicitations; thus, the resulting contracts will include the notification requirements intended only for critical safety items. Routine acquisitions of replenishment parts, including all maintenance, overhaul and repair contracts, will now include these new requirements even though they are not critical to safety. Furthermore, this definition uses the term “purchased after provisioning” without regard to who was making the purchase; we note that subparagraph (b)(1) of the proposed clause establishes a different and, in our view, smaller universe of coverage because it applies only to parts “identified as critical safety items acquired by the Government under this contract.” In such contracts, the contracting officer will thus need to determine what the Government may use the item for, and how a particular use of the item could be critical to safety. These provisions need to be harmonized.

With respect to the second type of solicitation and contract for which the proposed clause must be included, again, this section adds an important qualifier of “integral to a system.” Here, too, we are concerned that, at the time of solicitation, the contracting officer may not know which systems, subsystems, assemblies and subassemblies are truly “integral to a system” and thus we anticipate that contracting officers will deem each and every system, subsystem, assembly and subassembly integral to a system rather than risk missing one. Furthermore, by using the term “integral to a system” the DAR Council has established a different standard for coverage than “critical safety part” used in the first type of solicitation. This text should also be reconciled with the previous paragraph and clarified that the covered “system” is one whose failure or malfunction could cause an unacceptable risk of personal injury or loss of life. We also recommend that each term be used in the singular.

With respect to the third type of solicitation and contract for which the proposed clause must be included, it is confusing whether this subpart adds one or two qualifiers. We believe the intent of the provision is to address contracts for the repair, maintenance, logistics support or overhaul services only where a system, subsystem, assembly or subassembly has been determined to be “integral to a system” and whose failure or malfunction could cause an unacceptable risk of personal injury or loss of life identified under item (2) above. If so, we recommend that this subpart be revised to apply only to “repair, maintenance, logistics support or overhaul services for item (a)(2) above.” However, some of our member companies have interpreted this provision to be applicable to the repair and maintenance of a subsystem, assembly or subassembly only if such repair would be “integral to the overall system,” regardless of its affect on any subsystem, assembly or subassembly. We question whether the already overburdened acquisition workforce will be able to make reasonable safety determinations as each solicitation is issued.

Section 252.246.7xxx -- Notification of Potential Safety Issues Clause

This proposed addition includes the clause to be included in solicitations and resulting contracts.

Definitions

Subparagraph (a) includes definitions unique to this clause, including defining the key term “critical safety item.” We recommend that these definitions be moved in their entirety to Subpart 246.101 and included with other definitions there. A cross reference to the definitions in 246.101 would be appropriate here. Nevertheless, the definition in this section is more expansive because it includes “a part”, “installation equipment” and “support equipment” whose terms are not included in the prescription in 246.371 but this definition excludes “the system” that is included in 246.371.

Notification

Subparagraph (b) imposes a contractor notification requirement under two circumstances: (1) for all technical non-conformances for replenishment parts; and (2) for all non-conformances or deficiencies acquired by or serviced for the Government under this contract. As highlighted above, the universe of replenishment parts under item (1) addressed in this subparagraph (b) is smaller than those addressed in the definition of “replenishment part” in 246.101 that applies to parts “purchased after provisioning” without regard to the identity of the purchaser. Furthermore, the scope of coverage in (b)(2) is more expansive than the definition in 246.101 because it includes the phrase “a part.” Moreover, the phrase “technical nonconformances” is not defined in the rule. How does this notification requirement apply to software involved in “critical safety items” that may have no relation to the safety of the item or “bugs” in any software which may have no impact on safety or the essential functioning of the system? How does the notification apply to parts of a system that have no affect on the safety of the system as a whole?

Notification Timing

Subparagraph (c) requires the contractor to notify the Administrative Contracting Officer (ACO) and the Procurement Contracting Officer (PCO) within 72 hours after discovering or acquiring credible evidence of non-conformances or deficiencies identified in subparagraph (b). While we are concerned about the very short timeframes associated with the initial notification and the obligation for continuous notifications as further information becomes available, we understand the importance of timely notification. It could take 72 hours for a contractor to get notice of

defects to the appropriate level for reporting within its own organization. Moreover, with such a short time limit, over-reporting of potential defects will occur because there will be no time to determine if a suspected defect is in fact a defect, or how a defect relates to safety, or whether such urgent reporting is required to protect the safety integrity of a system. We recommend that flexibilities be added to the rule for a contractor to coordinate notification with appropriate government officials so that the 72-hour notification requirement does not compel unnecessary reporting or become an independent issue of contract administration.

Notice Applicable to Subcontractor Furnished Items

Subparagraph (d) imposes a responsibility on the contractor to provide the notification required under this clause for items furnished by any subcontractor. However, pursuant to the mandatory flow down of this clause required by subparagraph (f), the subcontractor is required to provide notice to (1) the contractor or higher-tier subcontractors and (2) the ACO and PCO, if known. The clause requires the prime contractor to facilitate direct communications between the government and the subcontractor as necessary. While we appreciate the importance of timely notification of critical deficiencies, we have a concern that imposing on subcontractors the requirement to bypass the prime or higher-tier contractor with direct notice to the government without the prime or higher-tier being provided an opportunity to evaluate the information and make an independent determination of the credibility and accuracy of the information, particularly because the subcontractor may not know how or whether a possible defect affects system performance, if at all.

Flow Down

Subparagraph (f) requires the mandatory flow down of this clause in all subcontracts issued under this contract. Again, while we share the importance of timely notification of safety issues, we are concerned about the flow down to commercial item subcontractors or to any subcontractor regardless of whether the subcontractor's work would involve "safety critical" items if it were a prime contractor subject to this clause. We recommend that this flow down be revised to impose on the prime contractor the responsibility for imposing a notification requirement on all subcontractors supplying "safety critical items," without regard to the form of the notification requirement.

Conclusion

We appreciate the importance of timely notification to the government of potential safety items affecting systems and subsystems. However, we believe this rule is confusing, inconsistent in its terms and conditions, and unnecessarily burdensome on the flow down of requirements. However, in our view each of these items is correctable. We encourage the DAR Council to correct the rule, address the scope of coverage we raised, and promptly publish a second proposed rule for public comment.

I am copying Lewis Oleinick of OMB with these comments since the clause would impose significant new reporting requirements covered by the Paperwork Reduction Act on all DOD contractors and all their subcontractors.

Thank you for your attention to these comments. If you have any questions, or if PSC can provide you with any additional information, please do not hesitate to let me know. I can be reached at (703) 875-8148 or at Chvotkin@pscouncil.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Alan Chvotkin". The signature is fluid and cursive, with the first name "Alan" being more prominent than the last name "Chvotkin".

Alan Chvotkin, Esq.
Senior Vice President and Counsel

cc: Lewis Oleinick, OMB