

Counterfeit Parts

Responding Via the Procurement Process

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The logo for LMI (Lewin, Mott & Root) features the letters 'LMI' in a dark blue, serif font. A small orange squiggle is positioned above the letter 'I'.

LMI

Background

- “...each member of the Acquisition Team is to exercise personal initiative and sound business judgment in providing the best value product...to meet the customer’s need. In exercising initiative, Government members of the Acquisition Team may assume if a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority.”
[FAR guiding principles, FAR 1.102(d), emphasis added]

Background (cont'd)

- The procurement regulations express a preference for the promotion of “full and open competition” through the use of “competitive procedures”
 - BUT, they are not a suicide pact
 - There is statutory authority for contracting without providing for full and open competition
- “Purchases shall be made from, and contracts shall be awarded to, **responsible contractors only.**” [FAR 9.103(a), emphasis added]

The Context

- The presence of counterfeit parts in the supply chain poses:
 - Potential safety risks to the war fighter
 - Direct economic damage to manufacturers, distributors, intellectual property owners, and the taxpayer
- There is a need for innovative and reasonable solutions to the challenge of preventing counterfeit parts from entering the supply chain
 - Entry can be from otherwise responsible suppliers or from suppliers with whom the Government should not be doing business
 - Solutions should be a practical and measured response to the problem

Specific Questions To Be Addressed - #1

- Do the procurement regulations allow competition to be restricted to a set of “trusted” sources?
- Answer: Yes, if done carefully and IAW regulations
 - FAR 6.302-1, Only one responsible source and no other supplies or services will satisfy agency requirements.
 - For DoD, this could be a limited number of responsible sources
 - FAR 9.2, Qualification Requirements
 - This is the support for QBLs, QMLs, and QPLs
 - In this case, perhaps a new type – Qualified Supplier List (QSL)?
 - DFARS PGI 209.202(a)(1) “...The inclusion of other qualification requirements in an acquisition or group of acquisitions requires approval by the chief of the contracting office.”

Specific Questions To Be Addressed - #2

- Can suppliers be required to report counterfeit incidents?
- Answer: Yes, in either of two ways
 - As a special provision/clause in Section H or as a DLA or DoD standard provision/clause in appropriate contracts/orders.
 - Making it mandatory might overcome reluctance of some to participate voluntarily due to fears of suit for libel
 - As a factor to be considered in the responsibility determination
 - Include as a part of the representations and certifications
 - But,
 - How to know if there is compliance?
 - What actions would be taken if non-compliance shown?

Specific Questions To Be Addressed - #3

- Can DLA buyers be required to use the ERIA database to avoid purchasing from questionable suppliers?
- Answer: Probably not
 - Database is not managed and controlled by the Government
 - Due process issues
 - Restricting potential sources, ab initio, would likely be construed as de facto debarment