

52.246-26 Reporting Nonconforming Items.

As prescribed in 46.317 , insert the following clause

Reporting Nonconforming Items (Nov 2021)

(a) *Definitions*. As used in this clause—

Common item means an item that has multiple applications versus a single or peculiar application.

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 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.

Critical item means an item, the failure of which is likely to result in hazardous or unsafe conditions for individuals using, maintaining, or depending upon the item; or is likely to prevent performance of a vital agency mission.

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.

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*—

(1) Screen Government-Industry Data Exchange Program (GIDEP) reports, available at www.gidep.org, as a part of the Contractor's *inspection* system or program for the control of quality, to avoid the use and delivery of counterfeit or *suspect counterfeit items* or delivery of items that contain a major or *critical nonconformance*. This requirement does not apply if the Contractor is a foreign corporation or partnership that does not have an office, place of business, or fiscal paying agent in the *United States*;

(2) Provide written notification to the *Contracting Officer* within 60 days of becoming aware or having reason to suspect, such as through *inspection*, testing, record review, or notification from another source (*e.g.*, seller, customer, third party) 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;

(3) Retain counterfeit or *suspect counterfeit items* in its possession at the time of discovery until disposition instructions have been provided by the *Contracting Officer*; and

(4) Except as provided in paragraph (c) of this clause, submit a report to GIDEP at www.gidep.org within 60 days of becoming aware or having reason to suspect, such as through *inspection*, testing, record review, or notification from another source (*e.g.*, seller, customer, third party) that an item purchased by the Contractor for delivery to, or for, the Government is—

(i) A counterfeit or *suspect counterfeit item*; or

(ii) A *common item* that has a major or *critical nonconformance*.

(c) The Contractor *shall* not submit a report as required by paragraph (b)(4) of this clause, if—

(1) The Contractor is a foreign corporation or partnership that does not have an office, place of business, or fiscal paying agent in the *United States*;

(2) The Contractor is aware that the counterfeit, suspect counterfeit, or nonconforming item is the subject of an on-going criminal investigation, unless the report is approved by the cognizant law-enforcement agency; or

(3) For nonconforming items other than counterfeit or *suspect counterfeit items*, it can be confirmed that the organization where the defect was generated (*e.g.*, original *component* manufacturer, original equipment manufacturer, aftermarket manufacturer, or distributor that alters item properties or configuration) has not released the item to more than one customer.

(d) Reports submitted in accordance with paragraph (b)(4) of this clause *shall* not include—

(1) Trade secrets or confidential commercial or financial information protected under the Trade Secrets Act ([18 U.S.C. 1905](http://www.usc.gov/title-18/usc18-1905)); or

(2) Any other information prohibited from disclosure by statute or regulation.

(e) Additional guidance on the use of GIDEP is provided at <http://www.gidep.org/about/opmanual/opmanual.htm>.

(f) 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 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 are counterfeit electronic parts or suspect counterfeit electronic parts *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 report was factual.

(g) Subcontracts.

(1) Except as provided in paragraph (g)(2) of this clause, the Contractor *shall* insert this clause, including this paragraph (g), in subcontracts that are for—

(i) Items subject to higher-level quality standards in accordance with the clause at Federal Acquisition Regulation (FAR) [52.246-11](http://www.far.gov/52.246-11), Higher-Level Contract Quality Requirement;

(ii) Items that the Contractor determines to be *critical items* for which use of the clause is appropriate;

(iii) Electronic parts or end items, *components*, parts, or materials containing electronic parts, whether or not covered in paragraph (g)(1)(i) or (ii) of this clause, if the subcontract exceeds the *simplified acquisition threshold*, as defined in FAR 2.101 on the date of subcontract award, and this contract is by, or for, the Department of Defense (as required by paragraph (c)(4) of section 818 of the *National Defense* Authorization Act for Fiscal Year 2012 (Pub. L. 112-81)); or

(iv) For the *acquisition* of services, if the subcontractor will furnish, as part of the service, any items that meet the criteria specified in paragraphs (g)(1)(i) through (g)(1)(iii) of this clause.

(2) The Contractor *shall* not insert the clause in subcontracts for-

(i) *Commercial products* and *commercial services*; or

(ii) Medical devices that are subject to the Food and Drug Administration reporting requirements at 21 CFR 803.

(3) The Contractor *shall* not alter the clause other than to identify the appropriate parties.

(End of clause)

Parent topic: 52.246 [Reserved]