February 2, 2024

Ms. Marissa Ryba
Procurement Analyst
General Services Administration
1800 F St NW
Washington, DC 20405

Re: FAC 2023–06, FAR Case 2020-011 - Implementation of Federal Acquisition Supply Chain Security Act (FASCSA) Orders

Dear Ms. Ryba:

The Coalition for Government Procurement ("the Coalition") appreciates the opportunity to submit these comments on the above-referenced interim rule amending the Federal Acquisition Regulation (FAR) to implement supply chain risk information sharing and exclusion or removal orders consistent with the Federal Acquisition Supply Chain Security Act (FASCSA) of 2018, along with a final rule issued by the Federal Acquisition Security Council.

By way of background, the Coalition is a non-profit association of firms selling commercial services, products, and solutions to the Federal Government. Coalition members include small, medium, and large businesses that account for more than $145 billion in Federal Government contracts. The Coalition is proud to have worked with Government officials for more than 40 years towards the mutual goal of common-sense acquisition.

The Coalition supports the Federal Government's efforts to protect its supply chain and address potential vulnerabilities through greater coordination and information sharing within the Executive Branch and with the private sector. With regard to the interim rule, we submit the following recommendations and questions for the FAR Council's consideration.

Recommendations

1. **Modify FAR clauses 52.204-28, 52.204-29, 52.204-30 to provide that Government Agencies will incorporate applicable FASCSA Orders into Solicitations and Contracts.**

As written, the FASCSA Order FAR clauses require contractors to affirmatively search the System for Award Management (SAM.gov or SAM) not only during the solicitation phase, but also throughout performance, to identify any potentially applicable FASCSA Orders. Such a requirement will result in confusion and inconsistent interpretations of FASCSA Orders and their applicability, not only among competing contractors, but also between contractors and their government customers. To avoid such confusion, the Council should consider requiring Government Agencies themselves to specify the FASCSA Orders applicable to a particular contract opportunity in the solicitation materials, which then will be incorporated into the terms and conditions of the resulting contract. In order to fairly and reasonably evaluate offerors, contracting officers need to ensure there is a baseline understanding of solicitation

requirements – an understanding that is diminished if offerors are not placed on notice of the exclusions applicable to their offers.

Absent such express incorporation, executed agreements will face similar uncertainties. Contractors need to know the exact terms and conditions of their responsibilities in order to accept an agreement and affirmatively certify compliance with all obligations stated therein. Applicable FASCSA Orders should therefore be incorporated directly into the terms of government contracts to avoid all confusion and doubt. Similarly, it should be the responsibility of the Government Agencies to notify contractors of any new FASCSA Orders that may become applicable to a contract throughout performance by way of issuing a contract modification to add the FASCSA Order to the agreement.

Government Agencies already are required by these FAR clauses to know the existing FASCSA orders and affirmatively identify FASCSA Orders which may not be made available publicly on SAM. The additional burden of affirmatively looking up, identifying, and including applicable FASCSA Orders in solicitations and resulting contracts should be minimal at best, but will save extensive time in the long run from bid protests and contract disputes due to conflicting interpretations and understandings of FASCSA Orders, and will help better ensure contractor compliance.

2. **In the alternative, update SAM.gov to allow for automatic FASCSA Order alerts to contractors to increase compliance.**

FAR 52.204-29 requires contractors to review SAM for FASCSA Orders before submitting a response to a solicitation, and FAR 52.204-30 requires contractors to review SAM at least once every three months, or as advised by the contracting officer, to identify any newly covered orders issued after the date of solicitation. Requiring contractors to continuously monitor SAM is not a practical approach. While the regulations require monitoring once per quarter, many contractors receive new solicitations and contracts every day, which means devoting resources to continuous monitoring in SAM throughout the year – not merely on a quarterly basis.

To ease contractors' burden of having to monitor SAM proactively for these requirements, SAM should allow key contractor employees to register for new FASCSA order alerts. Such a registration process already is in place for SAM, and thus, tailoring an alert for this context should be relatively easy to do.

3. **Extend the Time Period for contractors to notify the Government of a covered product/service being delivered to the Government or used during contract performance from 3 business days to 30 business days from the date of receipt of a FASCSA Order alert.**

In addition, FAR 52.204-30 requires that, upon identifying a new FASCSA order, contractors evaluate their supply chain to determine whether the covered article, product, or service was provided to the Government or used during contract performance. If the covered article, product, or service was provided to the Government or used during contract performance, the contractor must notify the Government of that effect within three (3) business days. Depending upon the scope of the exclusion or removal order, three business days may not be sufficient time for the contractor to evaluate the supply chain and provide notice to the Government. For this reason, it is recommended that the contractor be provided thirty (30) business days to conduct such an assessment upon notification by the Contracting

Officer that a bilateral modification to the contract or order is contemplated to implement a new FASCSA order.

4. Provide Templates for contractors to 1) disclose covered products/services in response to a solicitation and, 2) following the identification of a covered product/service that was provided to the Government or used in the performance of a contract following the issuance of a new FASCSA Order.

The interim rule provides a list of the specific information that contractors must disclose to the Government in the following instances:

> 1) if covered articles, products or services are offered to an issuing agency in response to a solicitation, and
> 2) if the contractor identifies that a covered article, product or service has been provided to the Government or used in the performance of a contract after a new FASCSA order has been published.

In order to ensure that appropriate notice is provided to Federal agencies efficiently and effectively, and to support compliance with FASCSA, we recommend that the Government publish templates for contractors to use when issuing such reports.

5. Allow for the equitable adjustments following the issuance of FASCSA orders.

The administrative burdens associated with the continuous tracking, reporting and identification of potential covered articles, products, and services in a contractor's supply chain is significant, especially for small business suppliers and those entities with numerous contracts governmentwide. Not only are contractors required to review and analyze FASCSA Orders prior to submitting a bid, but they also must continuously review SAM to identify new orders that may apply to their performance at any given time. FAR 52.204-30(c) requires contractors to perform quarterly reviews of SAM and to notify agencies if at any time they come across a new FASCSA Order that may impact their performance. Contractors must also review their supply chains with each and every issuance of an order not only to prepare for future opportunities, but also to inform government customers of any new prohibited articles or services that have been at any time used during performance. The process of investigating a company's supply chain and creating compliance plans to ensure the company remains at all times in compliance with ever evolving orders is time consuming, labor intensive, and costly. The Government should be mindful of these burdens and the associated costs of FASCSA compliance. We recommend that the Government allow for equitable price adjustments and any other mechanisms through which contractors can recoup these costs.

6. Ask ordering agencies to identify FASCSA applicability clearly and make any awards and modifications that include FASCSA orders bilateral for signature.

To heighten visibility of the FASCSA requirement, we recommend that the Government identify FASCSA applicability clearly and make any awards (contracts or orders) and any modifications that include FASCSA Orders bilateral for signature.

7. Delay issuance of FASCSA orders by the Government on SAM or delay the interim rule until industry comments have been addressed.

Industry has significant comments and questions related to how to best comply with the requirements contained in this interim rule and respectfully requests clarification from the Government on these issues prior to implementation. We request that the FASC delay the issuance of any FASCSA Orders or use by the government of the FASCSA site that is already available within SAM until the FASC has had time to consider industry's comments.

8. Allow a three-month minimum implementation period following the issuance of FASCSA Order.

Since contractors are required to review SAM.gov on a quarterly basis, FASCSA Orders should have a minimum three-month implementation period to allow contractors time to properly comply with the as yet unknown structure and requirements of a FASCSA Order.

9. Clarify what it means for a covered article, product, or service to be used "as part of the performance of the contract."

As written, the interim rule prohibits contractors from "providing or using as part of the performance of the contract" any items set forth in a FASCSA Order. The prohibition clearly applies to articles, products, or services being directly procured or used by Government end customers, but the interim rule does not explain what it means for something to be used "as part of the performance of the contract." Because this could be interpreted in a variety of ways, including extremely narrowly or extremely broadly, we ask that the Council provide guidance on the scope of this prohibition.

10. Clarify certain key definitions.

Under the current definition of "information technology," (IT) the prohibition applies to IT equipment used "to a significant extent in the performance of a service or the furnishing of a product," without explaining what use "to a significant extent" means. Industry requests further guidance on when use of IT equipment – especially use that is not solely or directly related to the performance of a contract – rises to the level of "significant use."
Similarly, the current definition of IT provides the prohibition would not apply to IT equipment used that is merely "incidental to a federal contract." Again, additional guidance on how to distinguish from "significant use" and "incidental use" will greatly facilitate compliance with these prohibitions.

Additionally, the Council should consider aligning the definitions of "telecommunications equipment" and "telecommunications service" with the definitions in FAR Case 2021-017 (the proposed rule regarding Cyber Threat and Incident Reporting and Information Sharing). Aligning these definitions would ease compliance burdens and eliminate confusion as contractors prepare to comply with both new requirements.

11. **Clarify that contractors will not be subject to termination for default for non-compliance with new FASCSA Orders.**

When new FASCSA Orders are issued during performance and incorporated into a contract via modification, the regulations should make clear that contracts cannot be terminated for default for failures to comply with the new exclusion or removal orders that were not applicable at the time the parties entered into the agreement. Rather, Government Agencies should be limited only to termination for convenience as a remedy for noncompliance.

12. **Clarify the scope of "removal" orders.**

FAR 52.204-30(d) indicates that FASCSA "removal" orders will require "Federal Supply Schedules, Governmentwide acquisition contracts, multi-agency contracts or any other procurement instrument intended for use by multiple agencies," to remove products or services covered by such orders during contract performance. The clause does not contain a similar requirement for non-multi agency contracts. Industry requests additional information on when removal orders are applicable. For example, do removal orders only apply to "Federal Supply Schedules, Governmentwide acquisition contracts, multi-agency contracts or any other procurement instrument intended for use by multiple agencies," or do they apply to all contractors under all procurement types?

Additionally, industry requests clarification regarding the practical impact of a removal order. Under FAR 52.204-30(d), what will be required of contractors to "remove any product or service produced or provided by a source"? Is the "removal" in FAR 52.204-30(d) the same obligation as for orders "requiring the removal of covered articles from executive agency information systems" from the definition of "FASCSA Order"?

In short, though industry understands the impact of an "exclusion order" on government procurement decisions, the interim rule does little to explain what "removal orders" are, who they apply to, and what ultimately contractors will be required to do in order to appropriately "remove" a covered article – and whether that removal only applies to government information systems or more broadly to contractor offerings and use.

Finally, industry requests further information on the timeline for complying with a removal order issued during performance (e.g., how long after the issuance of a removal order and/or modification of a contract do contractors have to remove a covered article before they are considered non-compliant), as well as guidance for how contractors will be compensated for complying with the applicable order.

13. **Exclude Commercial Off the Shelf (COTS) providers from flow down requirements.**

Federal government policy as reflected in the FAR recognizes that the supply chain involved in the manufacturing of COTS products is not always habituated to standard government contract requirements. This demonstrates the FAR Council's understanding of the complex nature of COTS supply chains. The representations associated with this draft rule demonstrate a presumption on the part of the drafters that COTS providers have the capacity to include this clause into those contracts or

effectuate timely changes in their supply chain. As written, the rule is also broader than its underlying statute in applying to all contractors without regard to industry or risk potential. This is inconsistent with the Council's treatment of similar sourcing restrictions aimed at improving the nation's cybersecurity profile and ensuring supply chain integrity.[1]

Unlike other potential COTS flowdown clauses, the ability to include these clauses directly impacts the compliance abilities of the contractor. As a result, it is also unclear whether a failure to include this clause in those downstream agreements would impact ability to represent "reasonable inquiry" and as such, raises a legitimate concern regarding compliant representations for the reality that many contractors may be unable, despite efforts, to negotiate inclusion of this requirement in supply chain, manufacturing and other quality agreements.

We respectfully request that the Council reconsider application of the flow down requirements to COTS providers.

Questions

1. FASCSA Orders:

- Would the types of FASCSA orders that we might expect to see issued be related to items that pose a threat to National Security and not simply services and products on a GSA Pricelist and routinely part of Government acquisitions under the Federal Supply Schedules?
- Is there any information or guidance regarding how frequently industry might expect to see these orders issued? Will there be any notices of upcoming FASCSA Orders issued prior to the orders' release and effective date to give contractors time to adequately prepare for compliance?
- In terms of FASCSA agency coordination, what if different decisionmakers (e.g., DHS or DNI) have different perspectives on whether a covered article should be excluded?

2. Waivers:

- If an agency or contractor seeks a waiver of a FASCSA Order, how long does the agency who issued the order have to issue a determination whether to grant or deny the waiver?
- If a waiver request concerning a covered article or source is under review, is the use of that article or source permitted until the determination is made regarding the waiver?
- How would contractors know that an agency has submitted a waiver regarding a particular FASCSA Order?
- Will waivers be issued for only a single contract opportunity? Or will waivers more broadly apply across procurement opportunities and agencies?
- What "other appropriate actions" can contracting officers pursue if they determine not to issue a waiver?

[1] See FAR 52.204-21, Basic Safeguarding of Covered Contractor Information Systems; *see also* DFARS 252.204-7021, which will implement DOD cybersecurity maturity model certification requirements.

3. Supply Chain Risk:

- The definition of "supply chain risk" is overly broad. Does this include monitoring the supply chain of commercial systems, or is it limited to articles and sources that interact with the federal government's information system?

Thank you again for the opportunity to submit these comments on FAC 2023–06, FAR Case 2020-011 - Implementation of Federal Acquisition Supply Chain Security Act (FASCSA) Orders. If you have any questions, please contact me at rwaldron@thecgp.org or (202) 331-0975.

Best regards,

Roger Waldron
President