since 1979

40

THE COALITION

for Government Procurement

October 15, 2019

General Services Administration
Regulatory Secretariat Division (MVCB)
1800 F Street NW, 2nd Floor
Washington, DC 20405

RE: FAR Case 2018-017

To Whom it May Concern:

The Coalition for Government Procurement (Coalition) appreciates the opportunity to comment on the Interim Rule in the above-referenced FAR Case, which amends the Federal Acquisition Regulation (FAR) to implement section 889(a)(1)(A) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232).

By way of background, the Coalition is a non-profit association of firms selling commercial services and products to the Federal Government. Its members collectively account for a significant percentage of the sales generated through GSA contracts, including the Multiple Award Schedule (MAS) program. Coalition members also are responsible for many of the commercial item solutions purchased annually by the Federal Government. These members include small, medium, and large business concerns. The Coalition is proud to have collaborated with Government officials for 40 years in promoting the mutual goal of common-sense acquisition.

The Coalition unequivocally supports the goal of the Interim Rule and the underlying law it seeks to implement in the Government's effort to defend the nation from the persistent cyber and supply chain threats of China and its proxies. We believe, however, that there are several aspects of the Interim Rule that should be clarified to assure that it is carried out with maximum effect. In this regard, the Coalition has identified the following issues:

- The Interim Rule lacks specificity regarding certain definitions and processes.
- Although implicit in its representation language, the Interim Rule should be explicit in acknowledging contractors' reasonable reliance on subcontract provisions and subcontractor representations regarding compliance.
- The Interim Rule does not address specifically how these requirements will apply to providers under various e-commerce pilots and the implementation of e-commerce pursuant to Section 846 of the Fiscal Year 2018 National Defense Authorization Act (NDAA).

- The Interim Rule, as anticipated for implementation via GSA's recent bilateral modification, does not allow for cost recovery.
- The Interim Rule sets forth onerous reporting timeframes.

These issues are addressed below.

Lack of Specificity Regarding Definitions and Processes

This Interim Rule prohibits agencies, on or after August 13, 2019, from procuring or extending or renewing contracts to procure any equipment, system, or service that uses "covered telecommunications equipment or services" "as a substantial or essential component of any system, or as a critical technology as part of any system." "Covered telecommunications equipment or services" is defined in several subsections of a new FAR Subpart 4.2101 using the term "telecommunications equipment."

Under 47 USC 153(52), that term is defined as, "equipment, *other than customer premises equipment*, used by a carrier to provide telecommunications services, and includes software integral to such equipment (including upgrades)."[1] [Emphasis added.] Under these circumstances, without more, the term could be understood to omit equipment intended to be covered or vice versa. The nature of equipment intended to be covered could have implications for a host of products associated with the Internet of Things (IoT), as well as other products, like medical telemetry devices, that may interconnect with a carrier's network, but otherwise may be more akin to customer premises equipment. For this reason, vendors need to understand explicitly whether the Government's intent is to leverage the term as it exists in telecommunications law.

In addition, the Interim Rule states that the term (covered telecommunications equipment or services) includes,

> Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

The Coalition understands the necessity of this provision, as the nation faces an aggressive adversary that could switch proxies repeatedly to facilitate its nefarious ends. Still, given that they are being asked to make an explicit representation regarding the existence of covered telecommunications equipment or services, vendors need an identification of such entities at the time they make their representation. So too, because vendors/contractors carry an ongoing reporting obligation during contract performance, the Government needs to make clear how industry will be advised of new entities "owned or controlled by, or otherwise connected to, the government of a covered foreign country," and thus, subject to the prohibition. This clarification will enable vendors to comply with the rule. To this end, it would be helpful to have the Government establish an identified communications chain to promote information

[1] "Customer premises equipment" is defined as "equipment employed on the premises of a person (*other than a carrier*) to originate, route, or terminate telecommunications." [Emphasis added.] 47 USC 153(16). A "carrier" is defined as one "engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy... ." 47 USC 153(11).

sharing so that all parties are current on the status of firms identified and thereby are able to facilitate compliance with the rule to the maximum extent practicable.

Another term requiring clarification is "substantial or essential component," which the Interim Rule defines as, "any component necessary for the proper function or performance of a piece of equipment, system, or service." This term is so broad that it is difficult to see a clear definition of its bounds, and thus, it may prompt vendors to consider simply defaulting an "any component" standard, which may not be in the Government's interest. Further, this lack of clarity does not affect vendors alone. Agencies may have different views on the term and execute inconsistent interpretations of it. For these reasons, the Government should consider adding specificity to the term or finding and applying an existing suitable definition which enjoys common understanding in the Government space.

Coalition members also have expressed concerns about the process for waiver under the Interim Rule. Once a determination has been made by a government agency that a product constitutes a substantial or essential component, and no exceptions apply, government contractors may seek a waiver and offer a mitigation plan. The Interim Rule provides, as required by Section 889(d)(1)(a), that the head of an executive agency may, on a one-time basis, waive the requirements for Section 889(a)(1)(A) for up to two years if the entity seeking the waiver provides a "compelling justification" for the additional time needed for the entity to implement the requirements under the law. Entities that seek a waiver will be required to submit to the head of the executive agency "[a] full and complete laydown of the presences of covered telecommunications or video surveillance equipment or services in the relevant supply chain and a phase-out plan to eliminate such covered telecommunications or video surveillance equipment or services from the relevant systems."

Unfortunately, the Interim Rule provides no further information on the process for requesting a waiver. We are concerned that these circumstances will lead to an environment where the Government and contractors confront agency-specific processes for waivers. Government contractors that sell like products to multiple agencies may have to seek waivers from all government agencies with which they do business. This arrangement, then, invites disorder and inconsistency without any corresponding national security benefit. For this reason, the Coalition requests that the Final Rule clarify that the same fundamental information can be provided to multiple agencies when it concerns the same product for the same use.

Along these lines, we also request that the Final Rule clarify what constitutes an adequate "phase-out plan to eliminate such covered telecommunications." In making a representation in furtherance of the agency head seeking a waiver, some government contractors will need time to identify and source replacement telecommunications equipment. To that end, a government contractor may wish to describe the steps it is taking to find an alternate supplier to be completed by the date of the agreed-upon waiver timeline within the two-year period. If a full mitigation plan is required up front for purposes of the waiver process, vital product lines may be discontinued while an alternate supplier is identified and incorporated into such products. In the healthcare context, for instance, such an interruption could present serious quality-of-care issues for service members, families, and veterans.

Explicit Acknowledgement of Reasonable Reliance

The Interim Rule requires that each offeror represent, with its proposal, whether it will provide covered telecommunications equipment or services, and, in cases where it so represents, it must provide significant detail regarding the equipment or services and an explanation for its use. Prime contractors

maintain responsibility for flowing down this reporting to, and requiring compliance by, all subcontractors.

With privity of contract between the Government and the prime contractor, the prime contractor retains exceptional, ongoing responsibility for its supply chain, a substantial part of which, may exist outside of its purview. In addition to its physical review of itself, the prime contractor must rely on the force of contractual provisions to obtain assurance from its subcontractors. All parties participating in the contracting process share a common interest in mitigating the risk from this adversary in our nation's supply chain. It is for this reason that they undertake and report on their supply chains. To this end, the Interim Rule implicitly recognizes that contractors reasonably may rely upon subcontract provisions and the representations proffered by their subcontractors regarding compliance under the rule. Still, the Coalition believes that this recognition should be stated explicitly in the rule. Explicit acknowledgement of this reasonable reliance would improve the quality and accuracy of reporting approaches, assure a common understanding of what is being represented, and facilitate implementation of the rule to its maximum effect.[2]

Lack of Clarity around Various E-Commerce Initiatives

The FAR Council and the OFPP Administrator, pursuant to their respective authorities under Title 41, determined that application of the rule at or below the Simplified Acquisition Threshold (SAT), to the acquisition of commercial items, and to the acquisition of COTS items is in the best interests of the Government based on the following:

> While the law does not specifically address acquisitions of commercial items, including COTS items, there is an unacceptable level of risk for the Government in buying equipment, systems, or services that use covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. This level of risk is not alleviated by the fact that the equipment or service being acquired has been sold or offered for sale to the general public, either in the same form or a modified form as sold to the Government (*i.e.*, that it is a commercial item or COTS item), nor by the small size of the purchase (*i.e.*, at or below the SAT). As a result, agencies may face increased exposure for violating the law and unknowingly acquiring covered telecommunication equipment or services absent coverage of these types of acquisitions by this rule.

The Interim Rule also amends FAR Part 13 to add the following language regarding purchases at or below the Micro Purchase Threshold (MPT):

> (j) On or after August 13, 2019, do not procure or obtain, or extend or renew a contract to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of

[2] Without conceding that a mistaken representation here would constitute a violation of the False Claims Act, it should not go unrecognized that, in some circumstances, the act could be implicated by the representation requirement. Given the gravity of the concern that the Government is seeking to address, the use of such representations may be understandable, but the Coalition feels that with such use comes an obligation on the part of the Government to provide clarity. Explicit acknowledgement of the reasonable reliance discussed here would promote such clarity.

any system, or as critical technology as part of any system, unless an exception applies or a waiver is granted. (See subpart 4.21.)

Although the Interim Rule clearly does not exempt from its application commercial/COTS items, or purchases at or below the SAT or the MPT, it is unclear how the rule will operate in the context of multiple e-commerce pilot efforts underway in various agencies throughout the Government. Among these initiatives is GSA's CPI e-commerce effort, under which, GSA, pursuant to Section 846 of the Fiscal Year 2018 National Defense Authorization Act (NDAA), will conduct a procurement to "pilot" an e-commerce platform solution for up-to-three years, implicating up-to-$18 billion dollars in market value.

Two common elements exist in these e-commerce pilots: they involve commercial products, and they are limited to purchases below the MPT. Notwithstanding the determination in the Interim Rule, there appear to be no requirements for e-commerce platform vendors to restrict prohibited products from the platform. Rather, it will be incumbent on Government purchasers to verify the integrity and suitability of a product at the time of purchase.

Although it is correct, if not imperative, for the Government to dedicate its efforts to the implementation of Section 889, the Coalition believes that it is counterintuitive for the Government to engage in those efforts, impose requirements on vendors, and, at the same time, potentially open a pipeline to China via e-commerce pilots, through which, otherwise prohibited products might be purchased. (Recall that below the MPT, various laws do not apply, notably, for these purposes, the Buy American Act and the Trade Agreements Act.) Even under a best-case scenario, the Government's pilots make each Government purchase, of which there are thousands annually, a risk transaction. Statistically, it is only a matter of time before a mistake is made, and by then, the damage will have been done because the offending product will have been installed in a Government system and either corrupted a network, exfiltrated sensitive data or intelligence, or both. In addition, to the extent these e-commerce pilot platforms may be the source of Government Furnished Equipment, they could raise reputational and other risks for vendors, who, by Government-directed use, will be accountable for compliance.

Based on the foregoing, to minimize risk to the Government and maximize the effectiveness of the Interim Rule, the Coalition believes that the Interim Rule should be amended to address e-commerce activities throughout Government. Specifically, the risk associated with potential failure points (transactions) should be mitigated, if not eliminated, by requiring that providers of e-commerce platforms/services screen and remove, *i.e.*, not offer for sale, any prohibited products of their own or from third-party suppliers. Further, those providers should be responsible for assuring the integrity of any products they offer on their platforms. Of course, the providers must be compelled to conduct due diligence of their own platforms with regard to the Interim Rule and make the associated representations. To do any less would undermine the operation of the Interim Rule.

Cost Recovery

The Interim Rule, as anticipated for implementation via GSA's recent bilateral modification, does not allow for the complete recovery of costs associated with its implementation. Its time allocations for collection and accurate representation would appear to indicate that these actions are not an imposition. The Coalition addressed this concern in its recent comments on GSA's bilateral modification, and those points bear repeating here.

Clearly, the implementation of the Interim Rule will not affect every Government contract, but for those contracts it does affect, it will impose, as mentioned above, increased compliance responsibilities and risks on contractors. These compliance responsibilities never could have been within the contemplation of the parties at the execution of the contract; indeed, it literally took an act of Congress (the enactment of Section 889) for them to be identified and imposed on Government and industry. Thus, the time and cost associated with them could not have been accommodated in contractor proposals. Under these circumstances, there exists no clear analog process to be leveraged in auditing systems and processes, including those of all subcontractors, to assure that covered equipment or services are not present. Rather, the processes utilized to assure compliance must be developed, and they must be thorough to address the legitimate, significant security concerns at play and to mitigate the risk associated with the mandated representation as to the presence of covered equipment or services that is part and parcel of the Interim Rule. As discussed, that representation implicates a False Claims Act certification, the breadth of which is significant, and which could involve significant risk associated with monetary penalties and contractor responsibility to continue government business.

Based on the foregoing, the Government should contemplate a process for including contractor cost recovery associated with the compliance responsibilities under the new clauses. Specifically, it should work with contractors to identify the parameters associated with cost recovery to assure that it achieves the results contemplated by the Interim Rule in a manner that does not cause unfair burden to its contractors.

Onerous Reporting Timeframes

Under the Interim Rule, if, during contract performance, a contractor uncovers or is notified by a subcontractor of the use of covered telecommunications equipment or services extant in its systems, the contractor generally must report that finding, unless the underlying contract applies a different reporting regime. Thus, on its face, the Interim Rule anticipates the existence of differing reporting process for the same event depending on the contract vehicle or agency, leading to inconsistent policy, confusion, and failed compliance with respect to the requirement. Of greater concern than these differing reporting regimes, however, is the baseline reporting timeframe set forth in the Interim Rule. Contractors are required to report a host of identifying information within one (1) day following identification or notification. Within ten (10) days of this report, contractors are required to report:

> ... [a]ny further available information about mitigation actions undertaken or recommended. In addition, the Contractor shall describe the efforts it undertook to prevent use or submission of covered telecommunications equipment or services, and any additional efforts that will be incorporated to prevent future use or submission of covered telecommunications equipment or services.

The one-day initial reporting timeframe is patently unreasonable. Small firms may not be resourced sufficiently, and large firms may be organizationally and geographically too dispersed, to fulfill this requirement. Indeed, the Government might also be challenged in meeting such a turnaround time. We recommend that the clause be revised to reflect a 72-hour initial reporting period, consistent with DFARS 252.204-7012. In addition, we recommend that the 10-day reporting period be extended to 30-days to allow contractors sufficient time to identify an adequate mitigation plan and path forward.

The Coalition hopes you find these comments useful and thanks you for your time and consideration.

Sincerely,

Thomas R. Sisti
Executive Vice President & General Counsel