September 11, 2020

William Clark
Director, Office of Government Acquisition Policy
General Services Administration
1800 F St. NW
Washington, DC 20405

Re: FAR Case 2019-009

To Mr. Clark:

The Coalition for Government Procurement (Coalition) appreciates the opportunity to comment on the interim rule in the above-referenced FAR Case, which sets forth the Interim Rule (IR) amending the Federal Acquisition Regulation (FAR) to implement section 889(a)(1)(B) 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.

Section 889(a)(1)(B) prohibits agencies from entering into, or extending or renewing, a contract with an entity that uses any equipment, system, or service that uses "covered" telecommunications equipment or services "as a substantial or essential component of any system, or as critical technology as part of any system." Covered equipment or services includes:

- Telecommunications equipment and services made or provided by Huawei Technologies Company, ZTE Corporation or their subsidiaries or affiliates.
- Video surveillance products and/or telecommunications equipment and services made or provided by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company, or their subsidiaries or affiliates.

Coalition members unequivocally support the goal of the IR and the underlying law it seeks to implement in the Government's effort to defend our nation from the persistent cyber and supply chain threats from China and its proxies. We believe, however, that there are several aspects of the IR 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 government's anticipated representation for a vendor's use of covered technology or services conflicts with the language of the statute and the thrust of the IR.
- Anticipated reporting timeframes associated with the annual representations permitted under the System for Award Management (SAM) may be onerous.

The IR also prompted member questions and comments that will be enumerated below.

Members are concerned that, for the past two years, stakeholders have sought the redress of issues regarding the implementation of Section 889(a)(1)(B) in order to enable the industrial base to comply with the statute and provide seamless performance to the government. Unfortunately, industry did not receive clarifications and guidance during this time and find themselves with only 60 days to conduct the "reasonable inquiry" necessary for representations to the government and to establish processes to ensure compliance over time. Therefore, we implore the government to expedite meaningful engagement with all stakeholders to clarify implementation issues, minimize disruption to the government's industrial base, and, most importantly, maximize government defenses against cyber and supply chain threats from China and its proxies.

Conflicting Representation Process

This IR implementing Section 889(a)(1)(B) requires each offeror, after conducting a "reasonable inquiry" for each offer they make to the government, to submit a representation whether they use covered telecommunications equipment or services. The rule's revisions to 52.204-25 (Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment) define "reasonable inquiry" as,

> an inquiry designed to uncover any information in the entity's possession about the identity of the producer or provider of covered telecommunications equipment or services used by the entity that excludes the need to include an internal or third-party audit.

Unlike the case regarding the prohibition under Section 889(a)(1)(A), which flows down to all subcontractors, the Section 889(a)(1)(B) prohibition,

> will not flow down because the prime contractor is the only 'entity' that the agency 'enters into a contract' with, and an agency does not directly 'enter into a contract' with any subcontractors, at any tier.

Recall that, after enactment of Section 889(a)(1)(B), stakeholders believed that implementation would be challenging because, by rooting compliance broadly in a firm's "use" of covered technology and services, the language potentially reaches engagements that have no nexus to

government systems or contracts, but otherwise are part of normal global business activity. Though vendors might try to segregate systems and resources, flowing-down compliance to multiple levels in an effort to map-out vulnerabilities, ultimately, they will face a potentially high risk burden based on their engagement with other firms on a global level who may not be compliant. Small vendors will be affected as much as large vendors, as they might face resource challenges assuring compliance. So too, the government will be affected, as it may find itself compelled to identify many participants in its industrial base noncompliant. For this reason, many believed that policymakers should consider bounding the application of the section to the risk associated with government networks and systems, thus allowing government and industry to construct an approach to implementing the restriction reasonably without implicating unassociated business activity.

The IR, though not addressing such an approach, when read in concert with the language of the statute, appears to have made progress in addressing the concern that the application of the statute would be broad. Specifically, the statute bounds the bar on contracting to a firm's use of covered technology or services "as a substantial or essential component of any system, or as critical technology as part of any system." With IR implementation focused on a reasonable inquiry at the prime contractor level, compliance activities are somewhat manageable, and risk exposure is somewhat contained.

The progress of the IR, unfortunately, appears to be undermined by the anticipated representation under the rule. Specifically, it is expected that vendors will represent that they either do or do not use covered technology or services, or use any equipment, system, or service that uses covered technology or services. By casting the representation in binary (yes-no) terms and reaching to "any use", the government appears to be amending the statute to expand its application via the regulatory process. It is decoupling the representation from a critical element of the contracting ban in the statute: "a substantial or essential component" and "critical technology."

Further, the anticipated representation is contrary to the overarching approach of the IR. The IR lays out a process that manifests deliberate crafting to balance carefully the critical security needs of the government against overarching compliance requirements that are disruptive to the industrial base. For instance, the IR limited its focus to the prime contractor, and it established a review standard, reasonable inquiry, that appears to be designed to mitigate vendors' open-ended compliance burden and promote security for the government. These elements of the rule, however, are not advanced if, with each proposal, vendors must address use beyond the language of the statute.

A reasonable argument can be made that a rule requiring a representation that goes beyond what is required by the statute is *ultra vires*. Thus, a violation of the rule that nonetheless complies with the statute is defensible. Clearly, however, this approach is not what the drafters of the rule or statute intended, and vendors should not be required to assume the risk of a "defensible" representation, especially considering that vendors will face the representation with each offer they submit.

Moreover, at a time when the government is seeking to streamline its processes to be frictionless and perform at the speed of innovation, such a representation breeds administrative waste in

the form of time and cost. For instance, because of the potential False Claims Act (FCA) implications of representations that prove inaccurate, there is a risk of vendor over-reporting (relative to what is intended by the statute) to avoid a violation of the FCA. This over-reporting will bog-down contracting officers who will assess these representations, and it will slow procurements. As mentioned, the government does not need this inefficiency in its procurement process, especially during a pandemic, when it needs rapid, frictionless access to products and services.

Based on the foregoing, the Coalition believes the government should clarify representations under the IR. Such representations should reference specifically the use limitations "substantial or essential component" and "critical technology."

Potentially Onerous Reporting Timeframes

It is envisioned that the SAM will be amended to allow annual representations by offerors (after they conduct a reasonable inquiry) in order to reduce paperwork burdens, provided their representations regarding the equipment or services are in the negative. Under the IR issued last August to implement Section 889(a)(1)(A), contractors are required to engage in ongoing monitoring of their systems to assure that covered technology or services are not used in the performance of government contracts. Where contractors find or become aware of such equipment or services during their monitoring activities, they are required to report a host of identifying information within one (1) day following that identification or notification. Within ten (10) days of this report, contractors are required to report mitigation activities and efforts undertaken to prevent use of covered equipment or services.

The Coalition objected to the one-day/ten-day construct as patently unreasonable. We do so again in connection with the implementation of Section 889(a)(1)(B) for the same reasons. Small firms may not be resourced sufficiently, and large firms may be organizationally and geographically too dispersed, to fulfill this requirement. Indeed, arguably, the application of such a reporting regime under Section 889(a)(1)(B) would be more onerous than under Section 889(a)(1)(A), as the breadth of the former provision is more expansive than the latter, making identification reporting, remediation planning, and further reporting that much more challenging. The Government should work with industry to develop and apply a reasonable notice period here, with appropriate safeguards, in the meantime, for isolating the risks uncovered.

Other Matters Raised

In addition to the matters raised above, Coalition members expressed other concerns that call for clarification. For your convenience, they are itemized below.

- Members support limiting application of the rule to prime contractors as the legal entities with whom the government contracts. In addition, they support the explicit clarification that a reasonable inquiry does not require an internal or third-party audit. The IR, however, indicates that the FAR Council is considering extending the representation to cover domestic parents and affiliates of the prime contractor. Members do not believe this expansion is helpful, as it would impose a heavy financial

and operational burden on contractors, especially larger entities with multiple affiliates, with little meaningful benefit to the government.
    - Many companies operate independently from their parents and affiliates under separate legal entities and with separate systems and processes. Thus, the exercise of requiring an offeror's parents and affiliates to conduct a reasonable inquiry makes neither economic nor national security sense.
    - Extending the operation of the rule to a contractor's parents and affiliates might affect a broad, national policy initiative, but it would do so by distorting the government contracting process. The externalities of this approach disrupt, through additional cost, time, and risk, the operations of the government's industrial base in a way that, ironically, runs counter to the government's interest in maintaining the resources that would support its defense against cyber and supply chain threats from China and its proxies. Broad national policy should be operationalized on a broad national basis.
- The IR states that, "During the first year that 889(a)(1)(B) is in effect, contractors and subcontractors will need to learn about the provision and its requirements and develop a compliance plan." The effective date of the rule is August 13, 2020. Under the circumstances, members are hopeful this language signals that the government is considering some kind of Safe Harbor process for the implementation of this challenging provision. If so, clarification of the details of that process would be appreciated.
- Members are concerned that this IR will impact their engagement with exclusively commercial customers. Often these relationships require utilizing the systems of those customers for certain purposes, like billing or reporting. It would be helpful for the government to clarify that reaching such separate engagements is not intended.
- Members would appreciate knowing how the government is going to keep contractors informed of changes to the list of covered entities associated with contractors' representations.
- Members would appreciate knowing what is included in "covered telecommunications equipment or services?"
    - How does a contractor apply the statutory qualifier that, to be considered covered telecommunications equipment or services, video surveillance equipment be used "for the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes?"
        - How does a contractor determine if its facilities are "critical infrastructure?"
    - How does a contractor apply the statutory exception that covered telecommunications equipment does not include "telecommunications equipment that cannot route or redirect user data traffic, or cannot permit visibility into any user data traffic or packets that such equipment transmits or otherwise handles?"
        - Can the government provide examples of the types of equipment that qualify for this exception?
- Members would appreciate understanding the notion of "use," and whether the government intends to reach use associated with separate, segregated activities.
- Members would appreciate knowing what compliance monitoring, if any, will be performed by the government beyond the representation process.

- Potential actions necessary to achieve compliance with the IR may come with significant cost. To what extent will the government assist firms be sharing the burdens of these costs?
- As the nation faces the pandemic, government and industry alike are compelled to resort to remote working solutions.
    - To what extent are contractors expected to account for the various personal platforms being leveraged by their employees?
    - Will the government consider exceptions for such equipment?
- Members would appreciate knowing whether the government defined and considered the secondary effects of the IR and whether it is willing to clarify the IR to reduce these effects.
    - To what extent has the government assessed the impact of the IR on competition in the government market and the industrial base overall, and what has it concluded?
    - To what extent has the government assessed vendor defensives actions, like solicitations of representations from all suppliers; what has it concluded; and to what extent can it provide guidance to prevent needless cascading of representation requests and the associated disruption to business relationships?
        - In this regard, to what extent has the government assessed the impact of this rule on small businesses, and what mechanisms, if any, are being considered to assist those business under these circumstances, especially in connection with representation requests from those above them in the supply chain?

The Coalition appreciates the opportunity to provide feedback on the IR and hopes you find these comments useful.

Thank you for your time and consideration.

Sincerely,

Roger Waldron
President