THE COALITION
for Government Procurement

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RE: Bilateral Modification GSA Multiple Award Schedule to Add Clauses Regarding Representations and Prohibitions in Connection with Certain Telecommunications and Video Surveillance Services or Equipment

Jeff and Mark:

The Coalition for Government Procurement (Coalition) appreciates the opportunity to comment on the subject bilateral modification. This modification seeks to incorporate into contracts FAR clauses related to the prohibition on the use of any equipment, system, or service that uses telecommunications equipment or services or surveillance equipment or services (covered equipment or services) of certain Chinese entities "as a substantial or essential component of any system, or as critical technology as part of any system."

These clauses address the vendor/contractor representations about the use of subject equipment or services, as well as prohibition on the use of such equipment or services, as defined and addressed in FAR Case 2018-017. Supplemental information for the modification includes a recently issued General Services Acquisition Regulation (GSAR) deviation, Class Deviation CD-2019-11, which attempts to incorporate a risk-based approach in connection with contractor representations at the GSA contract and order level. For certain low and medium risk contracts, where there is a reduced risk of the covered telecommunications equipment or service being utilized, representations regarding use will be required at the contract level, not the order level.

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 finds the following aspects of the bilateral modification to be problematic:

- The modification is bilateral and does not afford contractors the ability to claim for the increased cost associated with compliance.
- The associated GSAR Class Deviation injects a significant element of confusion into the representation process, raising administrative risk.
- The modification is implementing an interim rule that contains significant issues that may cause changes based on comments those issues prompt.

These topics are addressed below, along with suggested remediation.

The Bilateral Modification

The bilateral nature of the modification does not afford contractors the ability to address any compliance costs associated with the responsibilities imposed by the newly incorporated clauses. This result is onerous in light of the nature of the changes associated with the FAR clauses.

The clauses implementing the interim rule impose 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 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. Thus, the processes utilized to assure compliance must be developed, and they must be thorough to address not only the legitimate, significant security concerns at play, but also 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. 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.

GSAR Class Deviation

The GSAR provides a new representation clause and requires that clause and the aforementioned FAR clauses in all new and existing GSA contracts. The representation shall be provided as part of the proposal and resubmitted on an annual basis. To address the potential for significant contract administration burden under the interim rule issued pursuant to FAR Case 2018-017, in connection with a GSA-funded order placed against an IDIQ, the FAR clauses will be implemented based on a determination whether there exists low, medium, or high risk.

High risk contracts, without exception, will require a representation at both the contract and order level. For low risk contracts, there will be only a contract level representation, unless the CO determines that there might be the potential for proposals including covered equipment or services. Representations under medium risk contracts will be at the contract level unless the CO determines that there might be the potential for proposals including covered equipment or services.

The risk definitions are confusing. In particular, it is unclear whether a substantive distinction exists between the standards for low and medium risk. The language discussing those risks, particularly the language addressing when a CO considers that there may be potential for the order to include the covered equipment or services, is virtually the same. Thus, execution of contract administration of orders associated with those risks may be confused.

Further, there are no guidelines for COs to follow in determining that "there may be potential for information technology or communications technology" to warrant the triggering of a representation requirement with the issuance of an order. Thus, implementation of this GSAR could spawn multiple, conflicting bases for such determinations, increasing confusion in the contracting environment and increasing contractor cost and causing delay.

GSA is right to seek a way to handle "the difficulty associated with modifying over 18,000 indefinite delivery contracts and thousands of non-indefinite delivery contracts." To the concerns expressed above, however, GSA should clarify its definitions between low and medium risk, or simply eliminate the distinction between the two altogether if clarification proves elusive. In addition, GSA should release guidance to assure that CO determinations made under the modification are consistent.

The Interim Rule

The modification is implementing an interim rule that contains significant issues that may cause changes based on comments those issues prompt. For instance,

- The interim rule is devoid of guidance to contractors conducting for conducting due diligence compliance assessments of their systems and those of their supply chains/subcontractors.
- Although the interim rule contains does not exempt commercial/COTS items from its application, it is unclear how the rule will operate in the context of GSA's CPI e-commerce initiative, especially whether those platforms may be the source of Government Furnished Equipment, and, if so, who will be accountable for compliance.
- The reporting time frames under the interim rule can be quite challenging and may need to be addressed (*e.g.*, contractors reporting initially on the finding of covered equipment or services must do so within one day).

In essence, with its comment period still open, the interim rule is a work in progress. To avoid lurches in policy and administration based on potentially changes in response to comments on the interim rule, GSA should consider throttling back its deviation until the rule is finalized.

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

Sincerely,

Roger Waldron
President