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CODSIA Case – 2020-006

September 14, 2020

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

RE: FAR Case 2019-009, Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment

On behalf of the undersigned associations of the Council of Defense and Space Industry Associations (CODSIA)¹, we are pleased to submit these comments on the interim FAR rule implementing Sec. 889(a)(1)(B) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019, which prohibits government agencies from contracting with entities that use telecommunications and certain video surveillance equipment and services from five named entities², as published in the July 14, 2020 *Federal Register*³.

The CODSIA member associations wholeheartedly support the U.S. government's goal of preventing the exfiltration of sensitive information. Our member companies partner directly with the Federal government to provide products and services intended to build the U.S.'s technological capabilities against its adversaries and equip the warfighter. We understand the inherent challenges that come with implementing a law as far-reaching as Sec. 889 and also appreciate the inclusion of the new term "reasonable inquiry" as a means of reducing the burden on contractors as they complete the law's required representation. Nonetheless, given the complex and interconnected nature of Federal supply chain acquisition risk management policies and regulations, many aspects of the interim rule require further elaboration and definition to help contractors ensure they can

¹ CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues at the suggestion of the Department of Defense. CODSIA consists of eight associations – Aerospace Industries Association (AIA), American Council of Engineering Companies (ACEC), Associated General Contractors (AGC), CompTIA, Information Technology Industry Council (ITI), National Defense Industrial Association (NDIA), Professional Services Council (PSC), and U.S. Chamber of Commerce. CODSIA's member associations represent thousands of government contractors nationwide. The Council acts as an institutional focal point for coordination of its members' positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

² Sec. 889 names five entities in its definition of "covered telecommunications equipment or services:" Huawei Technologies Company, ZTE Corporation, Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company and Dahua Technology Company.

³ 85 Fed. Reg. 42665, July 14, 2020, available at <https://www.federalregister.gov/documents/2020/07/14/2020-15293/federal-acquisition-regulation-prohibition-on-contracting-with-entities-using-certain>

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comply with the goals of the NDAA and the requirements of the interim rule, as noted in our comments below.

Align Representation Requirements with Statutory Language

FAR 52.204-24(d)(2) has been amended as follows to implement the Sec. 889(a)(1)(B) representation requirement:

“Offeror represents that— It [] does, [] does not use covered telecommunications equipment or services, or use **any** equipment, system, or service that uses covered telecommunications equipment or services. The Offeror shall provide the additional disclosure information required at paragraph (e)(2) of this section if the Offeror responds “does” in paragraph (d)(2) of this section.” [Emphasis added].

This representation language diverges from the language of the statute by its use of the term “any” as highlighted above and its omission of the important qualifying language of the statute. The statute provides explicit limiting language by applying the prohibition only to use as a “*substantial or essential*” component of a system or as an item of “*critical technology*” in a system as so designated by the government. The broad language of the interim rule is not only divergent from the statutory text, but as drafted it conflicts with the reasonable inquiry requirement and the applicability of the rule only to prime contractors articulated in the rulemaking. The FAR representation should instead track directly to the language of the statute. We suggest that the FAR Council adopt the following substitution, with emphasis added:

“Offeror represents that— It [] does, [] does not use covered telecommunications equipment or services, or use 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**. The Offeror shall provide the additional disclosure information required at paragraph (e)(2) of this section if the Offeror responds “does” in paragraph (d)(2) of this section.”

Consistent with Sec. 889(a)(1)(B), the interim rule requires contractors to undertake a “reasonable inquiry.” Contractors are best positioned to evaluate the information in their possession about the use of covered equipment or services used by the contractor. The same is true for contractors’ ability to determine if any such equipment or services are either a substantial or essential component of any system used by the contractor or are critical technology for any system they use. The apparent shifting of this assessment to contracting officers requires agencies to assess and understand equipment systems or services used by the contractor. This apparent shift will result in

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delay and likely will cause many contractors to go through the waiver process unnecessarily, potentially depriving the agency of the contractors' solutions. It also places contractors at a competitive disadvantage, even if their solutions do not contravene the statutory prohibition. Similarly, contractors are best positioned to undertake the technical analysis necessary to determine if an exception under Section 889(a)(2) applies.

In addition, should our recommendation above related to the revised representation not be adopted, the interim rule must recognize that, even if a contractor checks "does" in response to the required representation, that the procurement prohibition should not take effect until a definitive determination has been completed that confirms the technology at issue comprises a "substantial or essential component of any contractor system or is critical technology" or is not subject to an exception or eligible for a waiver. In order to effectively identify and mitigate the potential security threats presented by covered technology, it will be essential to allow contractors to assess and mitigate such technology without triggering *de facto* debarment from federal contracting – a draconian sanction that will in many cases result in unfairly punishing U.S. companies and U.S. workers and depriving the government of competitive solutions.

Provide Consistent Agency Interpretation and Application of the Rule

We recommend providing additional clarity to ensure that agencies do not have differing interpretations of the rule's application and its requirements. While we understand each agency has a distinct risk profile and mission needs, drafting and enforcing uniform guidance for agencies will ensure the quickest possible contractor delivery of innovative products and minimize the disruption to government contracting brought on by the statute. This is especially crucial when considering the volume of transactions occurring through the various Government-wide Acquisition Contracts (GWACs) and GSA's implementation of the Cross-Agency Priority Goal on Sharing Quality Services; the shifting focus on leveraging shared services across multiple agencies necessitates better inter-agency coordination and consistent agency implementation and application of a government-wide procurement regulation of this magnitude. However, agencies' implementation should not be inconsistent with the interim rule's direction on applicability. Unfortunately, some agencies appear to be implementing the interim rule in a manner inconsistent with the interim rule's clear direction.

Our membership has reported that, beginning August 11, 2020, agencies have notified contractors of their intention to issue unilateral changes to existing contracts, some with contract modifications expected as late as October 2020, but with effective dates retroactive to August 13, 2020. These "notifications" require representations with language excerpted from FAR 52.204-24 that the contractor "does not use any

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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,” in order to continue performance of pre-existing contracts. We believe this is inconsistent with the statute and the interim rule which is intended to be prospective and expressly applicable only to “solicitations issued on or after August 13, 2020, and resultant contracts; and solicitations issued before August 13, 2020, provided award of the resulting contract(s) occurs on or after August 13, 2020. Adding quick-turn FAR 52.204-24 representation to a contract action that does not require that such a representation be provided, adds an additional obligation to an already burdensome regulation, disclosure and waiver process and is counter-productive, especially when there are inconsistencies in the manner agencies are applying the requirement.

Clarify the Applicability of the ‘Part A’ and ‘Part B’ Prohibitions

Sec. 889 (a)(1)(A) and Sec. 889(a)(1)(B), while related, regulate different prohibited activity. Accordingly, the final rule should separate the representations concerning Sec. 889(a)(1)(A) and Sec. 889(a)(1)(B), which not only regulate different prohibited activity, but also require a different level of inquiry, including a flowdown obligation under Sec. 889(a)(1)(A), prior to providing a representation, into separate FAR provisions. As federal agencies have implemented the Sec. 889(a)(1)(B) prohibition, there has been considerable confusion and disruption as there are cases in which contracts have been modified to incorporate the Sec. 889(a)(1)(B) prohibition, but have also incorporated the Sec. 889(a)(1)(A) prohibition where it is not applicable, such as cases where products have already been delivered under the contract. Such an inclusion would require the contractor to submit a change proposal in order to recover costs associated with flowing the Sec. 889(a)(1)(A) prohibition through the supply chain and the costs and delay impacts associated with any potential redesign efforts. Separating these prohibitions into distinct FAR provisions will help clarify the appropriate respective applications and prevent such situations.

Limit the Rule’s Application to the Entity Executing a Federal Contract

Currently, the rule defines “offeror” to mean “the entity that executes the contract.” The background information accompanying the interim rule asks for comments on expanding this definition for the final rule to encompass an entity’s affiliates, subsidiaries and parents that are domestic concerns through finalization of this rulemaking that would take effect August 13, 2021. There are several issues with this possible expansion of Sec. 889(a)(1)(B)’s scope. First, the plain language of Sec. 889(a)(1)(B) prohibits the government from contracting with “*an entity* that uses” covered telecommunications equipment or services—there is nothing tying the prohibition to

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multiple entities or to a contracting entity's affiliates, parents, or subsidiaries. Second, the FAR Council's more expansive consideration would result in extending Sec. 889's stated purpose (*i.e.*, removal of covered equipment/services from the Federal supply chain) *beyond* the Federal supply chain. It would end up applying to entities who have no contractual relationship with the U.S. government or a Federal contractor but is merely a corporate affiliate with a Federal contractor. Third, the rule already captures affiliates where there is any potential link to the government end customer because the rule requires disclosure by the contracting entity of its use of any equipment, system, or service that uses covered telecommunications equipment or services, which can very well apply to the contracting entity's use of an affiliate's equipment, system, or service. Fourth, "offerors" generally do not have documentation or other records in their possession revealing what telecommunications and video surveillance equipment their affiliates, subsidiaries and parents may use—especially when the contractor has no service/supply arrangement with their affiliates. So, many contractors would have to undertake an inquiry well beyond the scope of the "reasonable inquiry" defined by this rule if the representation in 52.204-24(d)(2) were expanded. This unnecessary burden on Federal contractors would do nothing to address any additional risk to the Federal supply chain that is not already addressed. Ultimately, many contractors may consider leaving the Federal market entirely if the rule were expanded further, substantially impeding the government's ability to procure cutting-edge products. Thus, we strongly recommend the final rule not adopt an expansion of the current definition thus keeping the interpretation of "offeror" as is in the interim rule.

Exclude Commercial Customers from the Rule's Application

The use of covered telecommunications equipment or services by a commercial customer of an entity should not be considered "use" of covered telecommunications equipment or services by that entity for the purposes of determining compliance with Sec. 889(a)(1)(B). Consistent with the current scope of the rule, which extends to the entity executing the contract with a government agency, the rule should be limited to procurement decisions over which the contracting entity has control. More specifically, a contracting entity should not be responsible for—or required to make any inquiry into—a decision to utilize covered equipment that is made by a customer with which the contracting entity has a commercial relationship. Otherwise, contractors would be forced to choose between meeting the new government-specific requirements and remaining competitive in the global market.

For instance, consider the example of a contractor's provision of IT services to a commercial customer that requires the contractor to access the customer's internal telecommunications network or security systems that include covered equipment. The contractor has no control over the customer's procurement or use of the covered

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equipment. If the scope of the rule is not limited to the procurement decisions of the contractor, then the contractor is faced with choosing between executing a contract with a government agency or providing the IT services to the commercial customer.

In sum, the interim rule may have the unintended consequence of government's IT falling even further behind private industry if government contractors are compelled to make this choice or are otherwise made responsible for the procurement decisions of their commercial customers.

Clarify That the Rule Does Not Apply to Backhaul, Roaming, and Interconnection Agreements

Sec. 889(a)(2)(A) provides that the prohibitions in Sec. 889 do not “prohibit the head of an executive agency from procuring with an entity to provide a service that connects to the facilities of a third-party, such as backhaul, roaming or interconnection arrangements.” The drafters of the interim rule interpret this provision to permit the government to buy a service that connects to third-party backhaul—presumably, even when covered telecommunications equipment is used in a backhaul. The commentary states that the exception “applies only to a Government agency that is contracting with an entity to provide a service.” Yet, the drafters also interpret the exception to mean that the government may not (without a waiver) contract with a contractor that uses covered telecommunications equipment or services to obtain backhaul services from an internet service provider. The commentary says that the exception “does not apply to a contractor’s use of a service that connects to the facilities of a third-party, such as backhaul.”

This commentary has created significant confusion for contractors. In one instance, it seems that a government agency does not need a waiver to contract for services connecting to government networks to third-party backhaul containing covered telecommunications equipment. But, at the same time, an executive agency would need a waiver to contract with a supplier that relies on a third-party telecommunications services provider whose network contains backhaul with covered telecommunications equipment. If our reading of the commentary is accurate, the drafters are applying a more restrictive standard to contracts that would not involve connecting government networks to third-party backhaul containing covered telecommunications equipment than they are to contracts that would connect government networks to such backhaul. This outcome seems to be at odds with the purpose of the statutory exception—namely, excluding third-party backhaul (and roaming and interconnection agreements) from the scope of Sec. 889’s prohibitions.

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We recommend clarifying the application of 889(a)(2)(A) so that a contractor's use of third-party backhaul services, roaming services, or interconnection agreements that may contain covered telecommunications equipment is not considered to be a use of covered telecommunications equipment or services for the purpose of the prohibition in Part B and its implementation in the FAR. This would clarify the ambiguity that exists in the interim rule and align with the plain language and logic of 889(a)(2)(A), which applies to both Sec. 889(a)(1)(A) (relating to services sold to the government) and Sec. 889(a)(1)(B) (relating to use by the contractor unrelated to a government contract). Because the statute specifically permits the government to acquire services that connect to backhaul (even when covered telecommunications equipment is used in the backhaul), the drafters should not take a more restrictive position barring a contractor's use of backhaul that is not tied to performance of a government contract.

Limit the Rule's Application to Domestic Use of Covered Equipment

The interim rule contains a single scenario that is referenced in multiple locations in the rule to the offering entity's international operations. For instance, during the discussion of the costs associated with this rule, the background information includes as an example the possibility of an offering entity having to relocate a building in a foreign country where there is no market alternative. The background information on the rule also includes this specific question: "What do companies do if their factory or office is located in a foreign country where covered telecommunications equipment or services are prevalent and alternative solutions may be unavailable?" In those cases where the rule applies to a building of a domestic concern that is covered under the rule, located in a foreign country, the domestic concern would either seek a waiver or determine if there is a technical solution or other option available that would result in eliminating the covered use. A more efficient option, however, would be to limit the rule's applicability to covered equipment used in domestic offices of domestic concerns or, at a minimum, to significantly streamline the waiver process for covered equipment used in domestic concerns' foreign offices where no viable local alternatives exist. The Director of National Intelligence's August 12, 2020 waiver granted to USAID for telecommunications and internet services addresses this situation.⁴

A domestic concern's overseas facilities likely depend on the use of covered prohibited equipment at some point in their network. Such facilities use foreign carriers that could have covered equipment installed. It would be incongruent to say that a government facility's carrier can have covered equipment, but a business's overseas carrier cannot.

⁴ While we understand the waiver is marked "For Official Use Only" and is not available to the public, press reports and agency discussions have confirmed the essential elements.

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Create a Central Repository of Covered Subsidiaries and Affiliates

Though the Sec. 889(a)(1)(B) prohibition extends to the use of subsidiaries and affiliates of the five named entities, the interim rule does not list these subsidiaries and affiliates, define what constitutes a “subsidiary” or “affiliate”, or lay out a process for identifying them. The interim rule is effectively placing the burden of determining who is considered a subsidiary or affiliate of the covered entities on every contractor who will make the required representations, which could in turn lead to varying contractor interpretations of the rule and potential risk in the representation. This would be especially disadvantageous to small businesses.

We recommend the government maintain a publicly available list of those entities that are considered a subsidiary or affiliate of the excluded parties and provide media access control (MAC) addresses for the excluded parties and their affiliates and subsidiaries. This information could be tracked through DOD’s DIBNet reporting in coordination with the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP). This list would need to be accessible and updated as necessary to ensure contractor compliance. Directing offerors to use the publicly available list of affiliates and subsidiaries of these prohibited companies already provided by the Department of Commerce’s Bureau of Industry Security would reduce duplication and confusion between agencies and contractors, and enhance compliance with the rule.

Clarify and Reconsider Reporting Requirements

The rule does not create new FAR clauses for the purposes of reporting under Sec. 889(a)(1)(B) but instead amends two FAR clauses created in the implementation of Sec. 889(a)(1)(A): FAR 52.204-25, *Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment* and FAR 52.204-24, *Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment*. The drafters also note that Sec. 889(a)(1)(B), similar to Sec. 889(a)(1)(A), requires contractors to report any discovery of use of covered equipment during the course of contract performance and must follow the procedures for doing so laid out in the existing clauses.

More specifically, the clause at 52.204-25 directs contractors to report the discovery of covered equipment within only 24 hours. While we understand that the national security concerns at play necessitate quick action, this timeframe is unreasonable and much faster than most other federal reporting requirements (e.g., DFARS 252.204-2012 (72 hours), 52.204-21 (timely manner), etc.). Additionally, this clause does not indicate what mitigation actions will be necessary if a report is made under the interim rule. We

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recommend the interim rule be updated to clarify these requirements and ensure their consistency across the government.

Regardless, it is unclear why there is a need for broad reporting under the Sec. 889(a)(1)(B) prohibition. There is no need for a particular contracting officer to be involved in the reporting because the reach of Part B, unlike Part A, is at the offering entity level. Instead, reporting under Part B should be handled through the administrative contract administration office (ACO).

Leverage the Expertise of the Federal Acquisition Security Council (FASC)

The statute does not reference the FASC, which Congress established in the SECURE Technology Act (Public Law 115-390) and is comprised of senior officials with expertise in supply chain risk management, acquisitions, or information and communications technology. The Act created the FASC to establish supply chain risk management standards, guidelines, and practices for executive agencies to use when assessing and developing mitigation strategies to address supply chain risks, particularly in the acquisition and use of equipment and services such as those covered by Section 889. The interim rule references the FASC but limits its related activities to the waiver process. The FAR Council should consult with the FASC while finalizing the interim rule to ensure (1) it is scoped appropriately in accordance with the September 1, 2020 interim rule published by the Office of Management and Budget (OMB) regarding the FASC's operations⁵, (2) considers the range of acquisition-related security and counterintelligence risks across the Federal government, and (3) balances those risks against the potential costs and operational consequences of procurement restrictions.

Clarify and Simplify the Waiver Process

Sec. 889(a)(1)(B) allows agency heads to, on a one-time basis, waive the provision's requirements until August 13, 2022 at the latest if certain criteria are met. Due to the immense scope of the Sec. 889(a)(1)(B) prohibition, coupled with the failure to publish a proposed rule that would have helped prepare contractors to come into compliance with the law, many contractors will seek a waiver as a short-term solution while they work to conduct the reasonable inquiry stipulated by the rule and ensure they do not use covered equipment or services. Thus, in order to minimize disruption, the final rule must clearly lay out what is expected of both contractors and agency representatives in the waiver process. The final rule should also simplify this process wherever possible.

⁵ See OMB 9/1/20 rule, available at <https://www.govinfo.gov/content/pkg/FR-2020-09-01/pdf/2020-18939.pdf>

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The continuity of government operations and the assurance of mission success now that the rule is in effect will depend on agencies' ability to quickly deploy waivers. However, between the requirement that agencies conduct market research before formally initiating the waiver process and the requirement for agencies to notify the Federal Acquisition Security Council (FASC) and the Director of National Intelligence (DNI) 15 days in advance of issuing a waiver, this process will almost certainly be substantially time-consuming. The drafters even acknowledge the waiver process will take "a few weeks." It's likely that agencies will be incentivized to pick a technically acceptable offer that does not require a waiver over an offer that might better serve the agency's specific mission need but does require a waiver. We recommend that the final rule remove these two unnecessary steps as well as provide additional clarity on how the waiver process will work, especially in instances such as transactions under the micro-purchase threshold and contractors selling products and services on a Government-wide Acquisition Contract (GWAC).

Provide examples of criteria for the "compelling justification" requirement

Both Sec. 889 and the interim rule require agencies, as part of the waiver process, to obtain a "compelling justification" from the contractor for why additional time is needed. The rule does not offer any additional detail as to what could be considered a sufficiently compelling justification. A standardized list of criteria for compiling that "compelling justification" will reduce confusion and inconsistencies among agency representatives as to what information to require and ensure quick delivery of such justification to support agency waiver requirements. We recommend the final rule state that any one of the following criteria can serve as a "compelling justification:"

- 1) The covered equipment is used in a geography where there is no available market alternatives;
- 2) The engagement under which the covered equipment is used pre-dated the enactment of the rule⁶;
- 3) The system using covered equipment is a closed network, air-gapped or otherwise disconnected from the entity's U.S. operations;
- 4) The phase-out plan requires a timeline that will extend beyond the period of performance of a contract (or the extension or renewal of a contract) with the Federal government; and

⁶ We understand that the intent of the interim rule is to require contractors to phase out covered equipment. However, a use that has been in existence for more than three years will likely take a greater time to unwind, whereas a use that is newer should be easier to unwind. Thus, some additional flexibility for historical engagements would be helpful to contractors in their efforts to come into compliance with the rule.

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- 5) Applicable provisions in a commercial contract held by the contractor require additional time for wind-down activities (*i.e.*, allow the contractor to avoid exposure to contractual liabilities).

Provide guidance for the waiver process as it relates to micropurchases

The interim rule tasks the contracting officer with collecting the necessary information from the contractor and seeking a waiver on behalf of the agency. However, the interim rule applies Sec. 889(a)(1)(B) to micropurchases, which are typically made by a Government Purchase Card holder in lieu of a contracting officer. Oftentimes, these Government Purchase Card holders lack any training in the FAR or any training in contract compliance issues more broadly.

We recommend that the government issue supplementary guidance as to how the waiver process will work for transactions under the micro-purchase threshold. In particular, more detail is needed on how Sec. 889(a)(1)(B) will be enforced for, as well as how waivers will be granted to accommodate, Government Purchase Card transactions, the majority of which involve companies without a SAM registration. Another option is to amend the interim rule to replace all mentions of “contracting officer” with the term “Government Purchasing Representative” that was created by the Information and Communications Technology (ICT) Supply Chain Risk Management (SCRM) Task Force Year One Working Group Four⁷.

Provide guidance for the waiver process as it relates to Government-wide Acquisition Contracts (GWACs)

The final rule should clarify how entities serving government customers through a GWAC can request a waiver. A contractor who represents that it “does” use covered telecommunications equipment or services will have to anticipate variability agency-to-agency. In short, every agency will be able to set its own criteria for evaluating a contractor’s “reasonable inquiry” and setting criteria for granting waivers. However, given the number of agencies that rely on GWACs to procure necessary products and services, the final rule can avoid such negative impacts by providing additional guidance as to how the waiver process will work in such instances. The drafters should clarify that since the interim rule provides that a contractor who represents that it “does” use

⁷ The Working Group’s draft FAR language intended to incentivize government procurement from Original Equipment Manufacturers (OEMs) and authorized resellers defines “Government Purchasing Representative” as “either a government Contract Officer or a Government Purchase Card (GPC) holder or any representative thereof.” For more information:
https://www.cisa.gov/sites/default/files/publications/ICT%20Supply%20Chain%20Risk%20Management%20Task%20Force%20Interim%20Report%20%28FINAL%29_508.pdf

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covered equipment will have to provide an offer-by-offer representation for each task or delivery order under all indefinite-delivery contracts, including GWACs, the ordering agency will be responsible for pursuing a waiver on behalf of the contractor.

Provide additional guidance and reasonable transparency on Director of National Intelligence (DNI) waivers

The statute provides broad waiver authority to the Director of National Intelligence (DNI), but the interim rule does not provide any detail as to how DNI waivers can be obtained⁸. Though the DNI memo laying out its justification for granting a waiver to DOD offered some insight into the criteria it will use to evaluate an agency's waiver request⁹, we believe more detail is needed on this process.

Continuity of operations, especially in the middle of a pandemic and at the end of the fiscal year, is essential to much of the Federal government. Between the lack of clarity for many aspects of the waiver process and the addition of extraneous steps agencies must undergo to issue one, the process laid out in the rule seems to be designed to discourage any company from seeking a waiver, or from any agency pursuing one. However, the alternative may be an inability to perform the required inquiry in time, slowing down or halting missions at a time when Americans are looking to the Federal government to lead the country out of the current crisis. While we understand agencies must take action to avoid supply chain threats, short-term reprieve is needed for agencies and contractors alike.

Provide a Full and Complete Cost Estimate of the Costs of the Interim Rule

The interim rule fails to provide a full and complete cost estimate for both public and government costs. For example, section iii.d (pp. 42670-42672) identifies six categories of "Public Cost," but only provides cost estimates for three of the categories. For the remaining three categories, which also happen to be the most resource- and labor-intensive, the interim rule attributes the lack of cost estimates to data limitations or an inability to provide accurate estimates. Even with the incomplete cost data, the interim rule still estimates the cost to implement this interim rule will be billions of dollars.

We recommend the FAR Council conduct a more comprehensive cost data analysis before implementing the Part B prohibition in any final rule. Despite the extremely conservative (and incomplete) cost analysis within the interim rule, it is evident that Sec.

⁸ It is our understanding that three agencies, DOD, the U.S. State Department and the U.S. Agency for International Development, have already received temporary waivers through September 30, 2020.

⁹ We believe all three waivers granted on August 12, 2020 are marked "For Official Use Only," and are not publicly available; however, they have been characterized in press reports and agency discussions.

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889(a)(1)(B) will be one of the most expensive acquisition regulations ever enacted. The financial stress on businesses will be exacerbated by the unprecedented time in which the prohibition takes effect, as well as the fact that many are already struggling to survive during the COVID-19 pandemic.

Conclusion

We appreciate your attention to these comments. CODSIA stands ready to work with GSA, DOD, NASA and other Federal government stakeholders to revise language associated with this rule in a way that will achieve Sec. 889(a)(1)(B)'s underlying national security goals while minimizing burdens on government and offerors, including the government's ability to access innovation and commercial products and services.

If you have any questions or need any additional information, please do not hesitate to contact Kelsey Kober, Manager of Policy, Public Sector at the Information Technology Industry Council (ITI), who serves as our project officer for this case. She can be reached at (202)-570-1177 or kkober@itic.org.

Sincerely,



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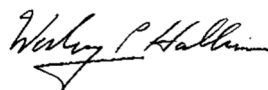
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