

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 1, 4, 13, 39, and 52**

[FAC 2020–08; FAR Case 2019–009; Docket No. FAR–2019–0009, Sequence No. 1]

RIN 9000–AN92

**Federal Acquisition Regulation:
Prohibition on Contracting With
Entities Using Certain
Telecommunications and Video
Surveillance Services or Equipment**

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are 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).

DATES:

Effective: August 13, 2020.

Applicability: Contracting officers shall include the provision at FAR 52.204–24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment and clause at FAR 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment as prescribed—

- In solicitations issued on or after August 13, 2020, and resultant contracts; and
- In solicitations issued before August 13, 2020, provided award of the resulting contract(s) occurs on or after August 13, 2020.

Contracting officers shall modify, in accordance with FAR 1.108(d), existing indefinite delivery contracts to include the FAR clause for future orders, prior to placing any future orders.

If exercising an option or modifying an existing contract or task or delivery order to extend the period of performance, contracting officers shall include the clause. When exercising an option, agencies should consider modifying the existing contract to add the clause in a sufficient amount of time to both provide notice for exercising the option and to provide contractors with adequate time to comply with the clause.

The contracting officer shall include the provision at 52.204–24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment, in all solicitations for an order, or notices of intent to place an order, including those issued before the effective date of this rule, under an existing indefinite delivery contract.

Comment date: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before September 14, 2020 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2019–009 via the Federal eRulemaking portal at *Regulations.gov* by searching for “FAR Case 2019–009”. Select the link “Comment Now” that corresponds with FAR Case 2019–009. Follow the instructions provided at the “Comment Now” screen. Please include your name, company name (if any), and “FAR Case 2019–009” on your attached document. If your comment cannot be submitted using <https://www.regulations.gov>, call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Instructions: Please submit comments only and cite FAR Case 2019–009, in all correspondence related to this case. Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting.

All filers using the portal should use the name of the person or entity submitting comments as the name of their files, in accordance with the instructions below. Anyone submitting business confidential information should clearly identify the business confidential portion at the time of submission, file a statement justifying nondisclosure and referencing the specific legal authority claimed, and provide a non-confidential version of the submission.

Any business confidential information should be in an uploaded file that has a file name beginning with the characters “BC.” Any page containing business confidential information must be clearly marked “BUSINESS CONFIDENTIAL” on the top of that page. The corresponding non-confidential version of those comments must be clearly marked “PUBLIC.” The file name of the non-

confidential version should begin with the character “P.” The “BC” and “P” should be followed by the name of the person or entity submitting the comments or rebuttal comments. All filers should name their files using the name of the person or entity submitting the comments. Any submissions with file names that do not begin with a “BC” or “P” will be assumed to be public and will be made publicly available through <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: *Farpolicy@gsa.gov* or call 202–969–4075. Please cite “FAR Case 2019–009.”

SUPPLEMENTARY INFORMATION:

I. Background

Section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year 2019 (Pub. L. 115–232) prohibits executive 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. The provision goes into effect August 13, 2020.

The statute covers certain telecommunications equipment and services produced or provided by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of those entities) and certain video surveillance products or telecommunications equipment and services produced or provided by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of those entities). The statute is not limited to contracting with entities that use end-products produced by those companies; it also covers the use of 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.

Section 889 has two key sections, Section 889(a)(1)(A) and Section (a)(1)(B). Section (a)(1)(A) went into effect via FAR Case 2018–017 at 84 FR 40216 on August 13, 2019. The 889(a)(1)(A) rule does the following:

- It amends the FAR to include the 889(a)(1)(A) prohibition, which prohibits agencies from procuring or obtaining equipment or services that use covered telecommunications equipment or services as a substantial or essential component or critical technology. (FAR 52.204–25)
- It requires every offeror to represent prior to award whether or not it will

provide covered telecommunications equipment or services and, if so, to furnish additional information about the covered telecommunications equipment or services. (FAR 52.204–24)

- It mandates that contractors report (within one business day) any covered telecommunications equipment or services discovered during the course of contract performance. (FAR 52.204–25)

In order to decrease the burden on contractors, the FAR Council published a second interim rule for 889(a)(1)(A), at 84 FR 68314 on December 13, 2019. This rule allows an offeror that represents “does not” in the annual representation at FAR 52.204–26 to skip the offer-by-offer representation within the provision at FAR 52.204–24.

The FAR Council will address the public comments received on both previous interim rules in a subsequent rulemaking. In addition, each agency has the opportunity under 889(a)(1)(A) to issue agency-specific procedures (as they do for any acquisition-related requirement). For example, GSA issued a FAR deviation¹ where GSA categorized risk to eliminate the representations for low and medium risk GSA-funded orders placed under GSA indefinite-delivery contracts. For agency-specific procedures, please consult with the requiring agency.

This rule implements 889(a)(1)(B) and requires submission of a representation with each offer that will require all offerors to represent, after conducting a reasonable inquiry, whether covered telecommunications equipment or services are used by the offeror. DoD, GSA, and NASA recognize that some agencies may need to tailor the approach to the information collected based on the unique mission and supply chain risks for their agency.

In order to reduce the information collection burden imposed on offerors subject to the rule, DoD, GSA, and NASA are currently working on updates to the System for Award Management (SAM) to allow offerors to represent annually after conducting a reasonable inquiry. Only offerors that provide an affirmative response to the annual representation would be required to provide the offer-by-offer representation in their offers for contracts and for task or delivery orders under indefinite-delivery contracts. Similar to the initial rule for section 889(a)(1)(A), that was published as an interim rule on August 13, 2019 and was followed by a second interim rule on December 13, 2019 to update the System for Award Management, the FAR Council intends

to publish a subsequent rulemaking once the updates are ready in SAM.

Overview of the Rule

This rule implements section 889(a)(1)(B) and applies to Federal contractors’ use of covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. The rule seeks to avoid the disruption of Federal contractor systems and operations that could in turn disrupt the operations of the Federal Government, which relies on contractors to provide a range of support and services. The exfiltration of sensitive data from contractor systems arising from contractors’ use of covered telecommunications equipment or services could also harm important governmental, privacy, and business interests. Accordingly, due to the privacy and security risks associated with using covered telecommunications equipment or services as a substantial or essential component or critical technology of any system, the prohibition applies to any use that meets the threshold described above.

It amends the following sections of the FAR:

- FAR subpart 4.21, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.
- The provision at 52.204–24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment.
- The contract clause at 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.

Definitions Discussed in This Rule

This rule does not change the definition adopted in the first interim rule of “critical technology,” which was included in the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) (Section 1703 of Title XVII of the NDAA for FY 2019, Pub. L. 115–232, 50 U.S.C. 4565(a)(6)(A)). The rule does not change the definitions of “Covered foreign country,” “Covered telecommunications equipment or services,” and “Substantial or essential component.” The term offeror will continue to refer to only the entity that executes the contract.

This rule also adds new definitions for “backhaul,” “interconnection arrangements,” “reasonable inquiry,” and “roaming,” to provide clarity regarding when an exception to the prohibition applies. These terms are not currently defined in Section 889 or

within the FAR. These definitions were developed based on consultation with subject matter experts as well as analyzing existing telecommunications regulations and case law.²

The FAR Council is considering as part of finalization of this rulemaking with an effective date no later than August 13, 2021, to expand the scope to require that the prohibition at 52.204–24(b)(2) and 52.204–25(b)(2) applies to the offeror and any affiliates, parents, and subsidiaries of the offeror that are domestic concerns, and expand the representation at 52.204–24(d)(2) so that the offeror represents on behalf of itself and any affiliates, parents, and subsidiaries of the offeror that are domestic concerns, as to whether they use covered telecommunications equipment or services. Section IV of this rule is requesting specific feedback regarding the impact of this potential change, as well as other pertinent policy questions of interest, in order to inform finalization of this and potential future subsequent rulemakings.

II. Discussion and Analysis

To implement section 889(a)(1)(B), the contract clause at 52.204–25 was amended to prohibit agencies “from entering into a contract, 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,” unless an exception applies or a waiver is granted. This prohibition applies at the prime contract level to an entity that uses any equipment, system, or service that itself uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, regardless of whether that usage is in performance of work under a Federal contract.

The 52.204–25 prohibition under section 889(a)(1)(A) will continue to flow down to all subcontractors; however, as required by statute the prohibition for section 889(a)(1)(B) 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.

The rule also adds text in subpart 13.2, Actions at or Below the Micro-

¹ <https://www.acquisition.gov/gsa-deviation/supply-chain-aug13>.

² See *FiberTower Spectrum Holdings, LLC v. F.C.C.*, 782 F.3d 692, 695 (D.C. Cir. 2015); *Worldcall Interconnect, Inc. v. Fed. Comm’n’s Comm’n*, 907 F.3d 810, 814 (Nov. 15, 2018).

Purchase Threshold, to address section 889(a)(1)(B) with regard to micro-purchases. The prohibition will apply to all FAR contracts, including micro-purchase contracts.

Representation Requirements

Representations and Certifications are requirements that anyone wishing to apply for Federal contracts must complete. They require entities to represent or certify to a variety of statements ranging from environmental rules compliance to entity size representation.

Similar to the previous rule for section 889(a)(1)(A), that was published as an interim rule on August 13, 2019, and was followed by a second interim rule on December 13, 2019, that updated the System for Award Management (SAM), the FAR Council is in the process of making updates to SAM requiring offerors to represent whether they use covered telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services within the meaning of this rule. This rule will add a new OMB Control Number to the list at FAR 1.106 of OMB approvals under the Paperwork Reduction Act. Offerors will consult SAM to validate whether they use equipment or services listed in the definition of “covered telecommunications equipment or services” (see FAR 4.2101).

An entity may represent that it does not use covered telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services within the meaning of this rule, if a reasonable inquiry by the entity does not reveal or identify any such use. A reasonable inquiry is 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. A reasonable inquiry need not include an internal or third-party audit.

Grants

Grants are not part of this FAR based regulation and are handled separately. Please note guidance on Section 889 for grants, which are not covered by this rule, was posted for comment at <https://www.federalregister.gov/documents/2020/01/22/2019-28524/guidance-for-grants-and-agreements>.

Agency Waiver Process

Under certain circumstances, section 889(d)(1) allows the head of an executive agency to grant a one-time

waiver from 889(a)(1)(B) on a case-by-case basis that will expire no later than August 13, 2022. Executive agencies must comply with the prohibition once the waiver expires. The executive agency will decide whether or not to initiate the formal waiver process based on market research and feedback from Government contractors during the acquisition process, in concert with other internal factors. The submission of an offer will mean the offeror is seeking a waiver if the offeror makes a representation that it uses covered telecommunications equipment or services as a substantial or essential component of a system, or as critical technology as part of any system and no exception applies. Once an offeror submits its offer, the contracting officer will first have to decide if a waiver is necessary to make an award and then request the offeror to provide: (1) A compelling justification for the additional time to implement the requirements under 889(a)(1)(B), for consideration by the head of the executive agency in determining whether to grant a waiver; (2) a full and complete laydown of the presences of covered telecommunications or video surveillance equipment or services in the entity’s supply chain; and (3) a phase-out plan to eliminate such covered telecommunications equipment or services from the entity’s systems. This does not preclude an offeror from submitting this information with their offer, in advance of a contracting officer decision to initiate the formal waiver request through the head of the executive agency.

Since the formal waiver is initiated by an executive agency and the executive agency may not know if covered telecommunications equipment or service will be used as part of the supply chain until offers are received, a determination of whether a waiver should be considered may not be possible until offers are received and the executive agency analyzes the representations from the offerors.

Given the extent of information necessary for requesting a waiver, the FAR Council anticipates that any waiver would likely take at least a few weeks to obtain. Where mission needs do not permit time to obtain a waiver, agencies may reasonably choose not to initiate one and to move forward and make award to an offeror that does not require a waiver.

Currently, FAR 4.2104 directs contracting officers to follow agency procedures for initiating a waiver request. Since a waiver is based on the agency’s judgment concerning particular uses of covered telecommunications

equipment or services, a waiver granted for one agency will not necessarily shed light on whether a waiver is warranted in a different procurement with a separate agency. This agency waiver process would be the same for both new and existing contracts. If a waiver is granted, with respect to particular use of covered telecommunications equipment or services, the contractor will still be required to report any additional use of covered telecommunications equipment or services discovered or identified during contract performance in accordance with 52.204–25(d).

Before granting a waiver, the agency must: (1) Have designated a senior agency official for supply chain risk management, responsible for ensuring the agency effectively carries out the supply chain risk management functions and responsibilities described in law, regulation, and policy; additionally this senior agency official will serve as the primary liaison with the Federal Acquisition Security Council (FASC); (2) establish participation in an information-sharing environment when and as required by the FASC to facilitate interagency sharing of relevant supply chain risk information; and (3) notify and consult with the Office of the Director of National Intelligence (ODNI) on the issue of the waiver request: The agency may only grant the waiver request after consulting with ODNI and confirming that ODNI does not have existing information suggesting that the waiver would present a material increase in risk to U.S. national security. Agencies may satisfy the consultation requirement by making use of one or more of the following methods as made available to agencies by ODNI (as appropriate): Guidance, briefings, best practices, or direct inquiry. If the agency has met the three conditions enumerated above and intends to grant the waiver requested, the agency must notify the ODNI and the FASC 15 days prior to granting the waiver, and provide notice to the appropriate Congressional committees within 30 days of granting the waiver. The notice must include:

(1) An attestation by the agency that granting of the waiver would not, to the agency’s knowledge having conducted the necessary due diligence as directed by statute and regulation, present a material increase in risk to U.S. national security; and

(2) The required full and complete laydown of the presences of covered telecommunications or video surveillance equipment or services in the entity’s supply chain; and

(3) The required phase-out plan to eliminate covered telecommunications or video surveillance equipment or services from the entity's systems.

The laydown described above must include a description of each category of covered telecommunications or video surveillance equipment or services discovered after a reasonable inquiry, as well as each category of equipment, system, or service used by the entity in which such covered technology is found after such an inquiry.

In the case of an emergency, including a declaration of major disaster, in which prior notice and consultation with the ODNI and prior notice to the FASC is impracticable and would severely jeopardize performance of mission-critical functions, the head of an agency may grant a waiver without meeting the notice and consultation requirements to enable effective mission critical functions or emergency response and recovery. In the case of a waiver granted in response to an emergency, the head of an agency granting the waiver must make a determination that the notice and consultation requirements are impracticable due to an emergency condition, and within 30 days of award, notify the ODNI, the FASC, and Congress of the waiver issued under emergency circumstances.

The provision of a waiver does not alter or amend any other requirements of U.S. law, including any U.S. export control laws and regulations or protections for sensitive sources and methods. In particular, any waiver issued pursuant to these regulations is not authorization by the U.S. Government to export, reexport, or transfer (in-country) items subject to the Export Administration or International Traffic in Arms Regulations (15 CFR 730–774 and 22 CFR 120–130, respectively).

Director of National Intelligence Waiver

The statute also permits the Director of National Intelligence (DNI) to provide a waiver if the Director determines one is in the national security interests of the United States.³ The statute does not include an expiration date for the DNI waiver. This authority is separate and distinct from that granted to an agency head as outlined above.

ODNI Categorical Scenarios

Additionally, the ODNI, in consultation with the FASC, will issue on an ongoing basis, for use in informing agency waiver decisions, guidance describing categorical uses or commonly-occurring use scenarios

where presence of covered telecommunications equipment or services is likely or unlikely to pose a national security risk.

Other Technical Changes

The solicitation provision at 52.204–24 has two representations, one for 889(a)(1)(A) and one for 889(a)(1)(B). This rule adds the representation for 889(a)(1)(B). The solicitation provision at 52.204–24 also has two disclosure sections, one for 889(a)(1)(A) and one for 889(a)(1)(B). This rule adds the disclosure section for 889(a)(1)(B) with separate reporting elements depending on whether the procurement is for equipment, services related to item maintenance, or services not associated with item maintenance. The reporting elements within the disclosure are different for each category because the information needed to identify whether the prohibition applies varies for these three types of procurements. This rule also administratively rennumbers the paragraphs under the disclosure section. Finally, this rule will add cross-references in FAR parts 39, Acquisition of Information Technology, and to the coverage of the section 889 prohibition at FAR subpart 4.21.

Expected Impact of This Rule

The FAR Council recognizes that this rule could impact the operations of Federal contractors in a range of industries—including in the health-care, education, automotive, aviation, and aerospace industries; manufacturers that provide commercially available off-the-shelf (COTS) items; and contractors that provide building management, billing and accounting, and freight services. The rule seeks to minimize disruption to the mission of Federal agencies and contractors to the maximum extent possible, consistent with the Federal Government's ability to ensure effective implementation and enforcement of the national security measures imposed by Section 889. As set forth in Section III.C below, the FAR Council recognizes the substantial benefits that will result from this rule.

To date, there is limited information on the extent to which the various industries will be impacted by this rule implementing the statutory requirements of section 889. To better understand the potential impact of section 889 (a)(1)(B), DoD hosted a public meeting on March 2, 2020 (See 85 FR 7735) to facilitate the Department's planning for the implementation of Section 889(a)(1)(B).

NASA also hosted a Section 889 industry engagement event on January 30, 2020, to obtain additional

information on the impact this prohibition will have on NASA contractors' operations and their ability to support NASA's mission.

In addition, the FAR Council hosted a public meeting on July 19, 2019, and GSA hosted an industry engagement event on November 6, 2019 (<https://interact.gsa.gov/FY19NDAASection889>) to gather additional information on how section 889 could affect GSA's business and supply chain. The presentations are located at <https://interact.gsa.gov/FY19NDAASection889>.

Please note presentations and comments from the public meetings are *not* considered public comments on this rule.

The FAR Council notes this rule is one of a series of actions with regard to section 889 and the impact and costs to all industry sectors, including COTS items manufacturers, resellers, consultants, etc. is not well understood and is still being assessed. For example, in a filing to the Federal Communications Commission, the Rural Wireless Association estimated that at least 25% of its carriers would be impacted.⁴

In addition, while the rule will be effective as of August 13, 2020, the FAR Council is seeking public comment, including, as indicated below, on the potential impact of the rule on the affected industries. After considering the comments received, a final rule will be issued, taking into account and addressing the public comments. See 41 U.S.C. 1707.

Industry Costs for New Representation and Scope of Section 889(a)(1)(B)

The statute includes two exceptions at 889 (a)(2)(A) and (B). The exception at 889(a)(2)(A) allows the head of executive agency to procure with an entity “to provide a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements.” The exception at 889(a)(2)(B) allows an entity to procure “telecommunications equipment that cannot route or redirect user data traffic or [cannot] permit visibility into any user data or packets that such equipment transmits or otherwise handles.” The exception allowing for procurement of services that connect to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements applies only to a Government agency that is contracting with an entity to provide a service. Therefore, the exception does

³ Sec. 889(d)(2).

⁴ <https://ecfsapi.fcc.gov/file/12080817518045/FY%202019%20NDAA%20Reply%20Comments%20-%20FINAL.pdf>.

not apply to a contractor's use of a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements. As a result, the Federal Government is prohibited from contracting with a contractor that uses covered telecommunications equipment or services to obtain backhaul services from an internet service provider, unless a waiver is granted.

III. Regulatory Impact Analysis Pursuant to Executive Orders 12866 and 13563

The costs and transfer impacts of section 889(a)(1)(B) are discussed in the analysis below. This analysis was developed by the FAR Council in consultation with agency procurement officials and OMB. We request public comment on the costs, benefits, and transfers generated by this rule.

A. Risks to Industry of Not Complying With 889

As a strictly contractual matter, an organization's failure to submit an accurate representation to the Government constitutes a breach of contract that can lead to cancellation, termination, and financial consequences.

Therefore, it is important for contractors to develop a compliance plan that will allow them to submit accurate representations to the Government in the course of their offers.

B. Contractor Actions Needed for Compliance

Adopting a robust, risk-based compliance approach will help reduce the likelihood of noncompliance. 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 as well as develop a compliance plan. The FAR Council assumes the following steps would most likely be part of the compliance plan developed by any entity.

1. *Regulatory Familiarization.* Read and understand the rule and necessary actions for compliance.

2. *Corporate Enterprise Tracking.* The entity must determine through a reasonable inquiry whether the entity itself uses "covered telecommunications" equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. This includes examining relationships with any subcontractor or supplier for which the prime contractor has a Federal contract and uses the supplier or subcontractor's "covered telecommunications" equipment or

services as a substantial or essential component of any system. A reasonable inquiry is an inquiry designed to uncover any information in the entity's possession—primarily documentation or other records—about the identity of the producer or provider of covered telecommunications equipment or services used by the entity. A reasonable inquiry need not include an internal or third-party audit.

3. *Education.* Educate the entity's purchasing/procurement, and materials management professionals to ensure they are familiar with the entity's compliance plan.

4. *Cost of Removal (if the entity independently decides to).* Once use of covered equipment and services is identified, implement procedures if the entity decides to replace existing covered telecommunications equipment or services and ensure new equipment and services acquired for use by the entity are compliant.

5. *Representation.* Provide representation to the Government regarding whether the entity uses covered telecommunications equipment and services and alert the Government if use is discovered during contract performance.

6. *Cost to Develop a Phase-out Plan and Submit Waiver Information.* For entities for which a waiver will be requested, (1) develop a phase-out plan to phase-out existing covered telecommunications equipment or services, and (2) provide waiver information to the Government to include the phase-out plan and the complete laydown of the presence of the covered telecommunications equipment or services.

C. Benefits

This rule provides significant national security benefits to the general public. According to the White House article "A New National Security Strategy for a New Era", the four pillars of the National Security Strategy (NSS) are to protect the homeland, promote American prosperity, preserve peace through strength, and advance American influence.⁵ The purpose of this rule is to align with the NSS pillar to protect the homeland, by protecting the homeland from the impact of Federal contractors using covered telecommunications equipment or services that present a national security concern.

The United States faces an expanding array of foreign intelligence threats by adversaries who are using increasingly

sophisticated methods to harm the Nation.⁶ Threats to the United States posed by foreign intelligence entities are becoming more complex and harmful to U.S. interests.⁷ Foreign intelligence actors are employing innovative combinations of traditional spying, economic espionage, and supply chain and cyber operations to gain access to critical infrastructure, and steal sensitive information and industrial secrets.⁸ The exploitation of key supply chains by foreign adversaries represents a complex and growing threat to strategically important U.S. economic sectors and critical infrastructure.⁹ The increasing reliance on foreign-owned or controlled telecommunications equipment, such as hardware or software, and services, as well as the proliferation of networking technologies may create vulnerabilities in our nation's supply chains.¹⁰ The evolving technology landscape is likely to accelerate these trends, threatening the security and economic well-being of the American people.¹¹

Since the People's Republic of China possesses advanced cyber capabilities that it actively uses against the United States, a proactive cyber approach is needed to degrade or deny these threats before they reach our nation's networks, including those of the Federal Government and its contractors. China is increasingly asserting itself by stealing U.S. technology and intellectual property in an effort to erode the United States' economic and military superiority.¹² Chinese companies, including the companies identified in this rule, are legally required to cooperate with their intelligence services.¹³ China's reputation for persistent industrial espionage and close collaboration between its government and industry in order to amass technological secrets presents additional threats for U.S. Government contractors.¹⁴ Therefore, there is a risk

⁶ National Counterintelligence Strategy of the United States of America 2020–2022.

⁷ National Counterintelligence Strategy of the United States of America 2020–2022.

⁸ National Counterintelligence Strategy of the United States of America 2020–2022.

⁹ National Counterintelligence Strategy of the United States of America 2020–2022.

¹⁰ National Counterintelligence Strategy of the United States of America 2020–2022.

¹¹ National Counterintelligence Strategy of the United States of America 2020–2022.

¹² National Counterintelligence Strategy of the United States of America 2020–2022.

¹³ NATO Cooperative Cyber Defense Center of Excellence Report on Huawei, 5G and China as a Security Threat.

¹⁴ NATO Cooperative Cyber Defense Center of Excellence Report on Huawei, 5G and China as a Security Threat.

⁵ <https://www.whitehouse.gov/articles/new-national-security-strategy-new-era/>.

that Government contractors using 5th generation wireless communications (5G) and other telecommunications technology from the companies covered by this rule could introduce a reliance on equipment that may be controlled by the Chinese intelligence services and the military in both peacetime and crisis.¹⁵

The 2019 Worldwide Threat Assessment of the Intelligence Community¹⁶ highlights additional threats regarding China's cyber espionage against the U.S. Government, corporations, and allies. The U.S.-China Economic and Security Review Commission Staff Annual Reports¹⁷ provide additional details regarding the United States' national security interests in China's extensive engagement in the U.S. telecommunications sector. In addition, the U.S. Senate Select Committee on Intelligence Open Hearing on Worldwide Threats¹⁸ further elaborates on China's approach to gain access to the United States' sensitive technologies and intellectual property. The U.S. House of Representatives Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE¹⁹ further identifies how the risks associated with Huawei's and ZTE's provision of equipment to U.S. critical infrastructure could undermine core U.S. national security interests.

Currently, Government contractors may not consider broad national security interests of the general public when they make decisions. This rule ensures that Government contractors keep public national security interests in mind when making decisions, by ensuring that, pursuant to statute, they do not use covered telecommunications equipment or services that present national security concerns. This rule will also assist contractors in mitigating supply chain risks (e.g. potential theft of trade secrets and intellectual property) due to the use of covered telecommunications equipment or services.

D. Public Costs

During the first year after publication of the rule, contractors will need to learn about the provisions and its

requirements. The DOD, GSA, and NASA (collectively referred to here as the Signatory Agencies) estimate this cost by multiplying the time required to review the regulations and guidance implementing the rule by the estimated compensation of a general manager.

To estimate the burden to Federal offerors associated with complying with the rule, the percentage of Federal contractors that will be impacted was pulled from Federal databases. According to data from the System for Award Management (SAM), as of February 2020, there were 387,967 unique vendors registered in SAM. As of September 2019, about 74% of all SAM entities registered for all awards were awarded to entities with the primary NAICS code as small; therefore, it is assumed that out of the 387,967 unique vendors registered in SAM in February 2020, 287,096 entities are unique small entities. According to data from the Federal Procurement Data System (FPDS), as of February 2020, there was an average of 102,792 unique Federal awardees for FY16–FY19, of which 73%, 75,112, are unique small entities. Based on data in SAM for FY16–FY19, the Signatory Agencies anticipate there will be an average of 79,319²⁰ new entities registering annually in SAM, of which 74%, 57,956, are anticipated to be small businesses.

We estimate that this rule will also affect businesses which become Federal contractors in the future. As stated above, we estimate that there are 79,319²¹ new entrants per year.

1. Time To Review the Rule

Below is a list of compliance activities related to regulatory familiarization that the Signatory Agencies anticipate will occur after issuance of the rule:

a. *Familiarization with FAR 52.204–24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment.* The Signatory Agencies assume that it will take all vendors who plan to submit an offer for a Federal award 20²² hours to familiarize themselves with the amendment to the offer-by-offer representation at 52.204–24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment. The Signatory Agencies assume that all

entities registered in SAM, or 387,967²³ entities, plan to submit an offer for a Federal award, since there is no data available on number of offerors for Federal awards. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be \$735 million (= 20 hours × \$94.76²⁴ per hour × 387,967). Of the 387,967 entities impacted by this part of the rule, it is assumed that 74%²⁵ or 287,096 entities are unique small entities.

In subsequent years, these costs will be incurred by 79,319²⁶ new entrants each year. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be \$150 million (= 20 hours × \$94.76 per hour × 79,319) per year in subsequent years.

b. *Familiarization with FAR 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.* The Signatory Agencies estimate that it will take all vendors who plan to submit an offer for a Federal award 8²⁷ hours to familiarize themselves with the amendment to the clause at 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment. The average number of unique awardees for FY16–FY19, or 102,792²⁸ entities, will be impacted by this part of the rule, assuming all entities awarded Federal contracts would have to familiarize themselves with the clause. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be \$78 million (= 8 hours × \$94.76 per hour × 102,792). Of the 102,792 unique Federal awardees assumed to be impacted by this part of the rule, 73% or 75,038, are unique small entities.

In subsequent years, these costs are estimated will be incurred by 26%²⁹ of new entrants, or 20,623 entities because it is assumed that 26% of new entrants will be awarded a Federal contract and will be required to familiarize

²³ According to data from the System for Award Management (SAM), as of February 2020, there were 387,967 unique vendors registered in SAM.

²⁴ The rate of \$94.76 assumes an FY19 GS 13 Step 5 salary (after applying a 100% burden to the base rate) based on subject matter judgment.

²⁵ As of September 2019, about 74% of all SAM entities registered for all awards were awarded to entities with the primary NAICS code as small.

²⁶ This value is based on data on new registrants in SAM.gov on average for FY16, FY17, FY18, and FY19.

²⁷ The 8 hours is an assumption based on historical familiarization hours and subject matter expert judgment.

²⁸ As of February 2020, there was an average of 102,792 unique Federal awardees for FY16–FY19.

²⁹ The percentage of 26% is the percentage of active entities registered in SAM.gov in FY20 that were awarded contracts.

¹⁵ NATO Cooperative Cyber Defense Center of Excellence Report on Huawei, 5G and China as a Security Threat.

¹⁶ <https://www.dni.gov/files/ODNI/documents/2019-ATA-SFR--SSCI.pdf>.

¹⁷ <https://www.uscc.gov/annual-reports/archives>.

¹⁸ <https://www.intelligence.senate.gov/sites/default/files/hearings/CHRG-115shrg28947.pdf>.

¹⁹ <https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=96>.

²⁰ This value is based on data on new registrants in SAM.gov on average for FY16, FY17, FY18, and FY19.

²¹ This value is based on data on new registrants in SAM.gov for FY19 and FY20.

²² The 20 hours are an assumption based on historical familiarization hours and subject matter expert judgment.

themselves with the clause. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *\$15.6 million* ($= 8 \text{ hours} \times \$94.76 \text{ per hour} \times 20,623$) per year in subsequent years.

The total cost estimated to review the amendments to the provision and the clause is estimated to be *\$813 million* in the first year after publication. In subsequent years, this cost is estimated to be *\$166 million* annually. The FAR Council acknowledges that there is substantial uncertainty underlying these estimates.

2. Time To Establish a Corporate Enterprise Tracking Tool and Verify Covered Telecom Is Not Used Within the Corporation or by the Corporation and Ensure There Are No Future Buys

In order to complete the representation, the entity must determine, by conducting a reasonable inquiry whether the entity itself uses “covered telecommunications” equipment or services. This includes a relationship with any subcontractor or supplier in which the prime contractor has a Federal contract and uses the supplier or subcontractor’s “covered telecommunications equipment or services” regardless of whether that usage is in performance of work under a Federal contract. The Signatory Agencies do not have reliable data to form an estimate as to the processes vendors will adopt to conduct a reasonable inquiry or the costs, in time and other resources, for conducting such an inquiry. The Signatory Agencies intend to evaluate any information on this topic in the comments submitted by the public.

3. Time To Complete Corporate-Wide Training on Compliance Plan

The Signatory Agencies estimate that most entities have already begun to understand the impact of Section 889 (a)(1)(A) and have already educated the appropriate personnel to that part of the prohibition. Section 889 (a)(1)(B) requires a more robust training of the organization’s compliance plan, which include business partners that are outside of the typical “covered telecommunications equipment or services” purchases; such as day-day office supplies. The Signatory Agencies estimate that it will take all vendors at least 4³⁰ hours of training to ensure personnel understand the organization’s compliance plan for tracking partners that procure “covered telecommunications equipment and

services” that may be indirectly related to their respective business activities. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *\$147 million* ($= 4 \text{ hours} \times \$94.76 \text{ per hour} \times 387,967$).

Of the 387,967³¹ entities impacted by this part of the rule, it is assumed that 74% or 287,096 entities are unique small entities.

In subsequent years, we assume that 50%³² of the 79,319³³ new entrants will incur these costs. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *\$15 million* ($= 4 \text{ hours} \times \$94.76 \text{ per hour} \times 50\% \times 79,319$) per year in subsequent years. The FAR Council acknowledges that there is substantial uncertainty underlying these estimates.

4. Time To Remove and Replace Existing Equipment or Services (if Contractor Decides to) in Order To Be Eligible for a Federal Contract

Data on the extent of the presence of the covered telecommunications equipment and services in the global supply chain is extremely limited, as is information as to the costs of removing and replacing covered equipment or services where it does exist. Furthermore, no data exists as to how many entities will receive a 2-year waiver from executive agency heads or a non-time-limited waiver from the ODNI. Accordingly, the Signatory Agencies are unable to form any estimate of the costs of this rule with regard to removing and replacing existing equipment and services. The Signatory Agencies intend to evaluate any information provided on this topic in comments submitted by the public.

5. Time To Complete the Representation 52.204–24

For the offer-by-offer representation at FAR 52.204–24 the Signatory Agencies assumed the cost for this portion of the rule to be *\$11 billion* ($= 3 \text{ }^{34} \text{ hours} \times \$94.76 \text{ per hour} \times 102,792 \text{ unique entities} \times 378 \text{ }^{35} \text{ responses per entity}$).

³¹ According to data from the System for Award Management (SAM), as of February 2020, there were 387,967 unique vendors registered in SAM.

³² The 50% value is an assumption based on subject matter expert judgment. In the absence, to be conservative, it assumes that 50% of new entrants will decide to perform corporate-wide training.

³³ This value is based on data on new registrants in SAM.gov on average for FY16, FY17, FY18, and FY19.

³⁴ The hours are an assumption based on subject matter expert judgment.

³⁵ The responses per entity is calculated by dividing the average number of annual awards in FY16–19 by the average number of unique entities awarded a contract (38,854,291 awards/102,792 unique awardees = 378).

In subsequent years, we assume that 26%³⁶ of new entrants will complete an offer and need to complete the offer-by-offer representation. Therefore, these costs will be incurred by 26% of the 79,319³⁷ new entrants each year.

Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *\$2.2 billion* ($= 3 \text{ hours} \times \$94.76 \text{ per hour} \times 26\% \times 79,319 \times 378 \text{ responses per entity}$) per year in subsequent years.

The FAR Council notes that these costs are based on offer-by-offer representations; upon completion of the updates to SAM, offerors will be able to make annual representations, which is anticipated to reduce the burden.

52.204–25

FAR 52.204–25 requires a written report in cases where a contractor (or subcontractor to whom the clause has been flowed down) identifies or receives notification from any source that an entity in the supply chain uses any covered telecommunications equipment or services. The signatory agencies estimate that 5%³⁸ of the unique entities awarded a contract (5,140) will submit approximately 5³⁹ written reports annually pursuant to FAR 52.204–25. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *\$7.3 million* ($= 3 \text{ hours} \times \$94.76 \text{ per hour} \times 5,140 \text{ entities} \times 5 \text{ responses per entity}$) per year in subsequent years.

In subsequent years, we assume that half of the entities impacted in year 1 will incur these costs for 52.204–25. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be *\$3.6 million* ($= 3 \text{ hours} \times \$94.76 \text{ per hour} \times 2,570 \text{ entities} \times 5 \text{ responses per entity}$) per year in subsequent years.

The total estimated burden for the representation and the clause for year one is *\$11 billion*. The total annual cost for both representations in subsequent years is calculated as: *\$2.2 billion*. The FAR Council acknowledges that there is substantial uncertainty underlying these estimates.

³⁶ The percentage of 26% is the percentage of active entities registered in SAM.gov in FY20 that were awarded contracts.

³⁷ This value is based on data on new registrants in SAM.gov on average for FY16, FY17, FY18, and FY19.

³⁸ The 5% value was derived from subject matter expert judgment.

³⁹ The 5 reports value was derived from subject matter expert judgment.

³⁰ The hours are an assumption based on subject matter expert judgment.

6. Time To Develop a Full and Complete Laydown and Phase-Out Plan To Support Waiver Requests

The calculation at #2 above captures the time to develop a full and complete laydown. There is no way to accurately estimate the time required for offerors to develop a phase-out plan or the number of offerors for which a waiver will be requested.

The total cost of the above Public Cost Estimate in Year 1 is at least: *\$12 billion*.

The total cost of the above Cost Estimate in Year 2 is at least: *\$2.4 billion*.

The total cost estimate per year in subsequent years is at least: *\$2.4 billion*.

The following is a summary of the estimated costs calculated in perpetuity at a 3 and 7-percent discount rate:

Summary (billions)	Total costs
Present Value (3%)	\$89
Annualized Costs (3%)	2.7
Present Value (7%)	43
Annualized Costs (7%)	3

The FAR Council acknowledges that there is substantial uncertainty underlying these estimates, including elements for which an estimate is unavailable given inadequate information. As more information becomes available, including through comment in response to this notice, the FAR Council will seek to update these estimates which could very likely increase the estimated costs.

E. Government Cost Analysis

The FAR Council anticipates significant impact to the Government as a result of this rule. These impacts will appear as higher costs, reduced competition, and inability to meet some mission needs. These costs are justified in light of the compelling national security objective that this rule will advance.

The primary cost to the Government will be to review the representations and to process the waiver request. The cost to review the representations uses the same variables as the cost to the public to fill out the representation resulting in a total cost to the Government of \$11 billion as the hourly rate, hours to review, and number of representations are the same as the industry calculations. The other cost to the Government, is the cost to review the written reports required by the clause and the calculation uses the same variables as the cost to the public to complete the report, resulting in a total cost to the Government of \$7.3 million.

Higher Costs and Reduced Competition: It is anticipated that at

least three factors will each lead to the Government paying higher prices for services and products it buys: (1) Contractors will pass along some of the new costs of compliance; (2) due to anticipated compliance costs, some contractors will choose to exit the Federal market, particularly for commercial services and products and a reduced level of competition would increase prices; and (3) the risk of commercial firms choosing not to do business with the Government may be heightened in areas of high technological innovation such as digital services. In recent years, DoD and GSA, among other Departments and agencies, have placed particular emphasis on recruiting non-traditional contractors to provide emerging tech services and this rule could discourage innovative technology firms from competing on Federal Government contracts.

It is also anticipated that many Federal contractors may need to hire or contract for consultants to aid them in reviewing and updating their supply chains. Market principles suggest that this may increase the costs for such experts, making it more difficult for small businesses to afford them.

Inability to Meet Mission Needs: The Government uses Competition in Contracting Act exceptions (FAR subpart 6.3) to use sole source acquisitions to meet agency needs. These acquisitions would be impacted as offerors will also be subject to the section 889 requirements. There are industries where the Government makes up a small portion of the total market. There may be markets where the vendors will choose to no longer do business with the Government; leaving no sources to meet those specific requirements for the Government. This will reduce agencies' abilities to satisfy some mission needs.

The total cost of the above Government Cost Estimate in Year 1 is: *\$11 billion*.

The total cost of the above Cost Estimate in Year 2 is: *\$2.2 billion*.

The total cost estimate per year in subsequent years is: *\$2.2 billion*.

The following is a summary of the estimated costs calculated in perpetuity at a 3 and 7-percent discount rate:

Summary (billions)	Total costs
Present Value (3%)	\$82.5
Annualized Costs (3%)	2.5
Present Value (7%)	40
Annualized Costs (7%)	2.8

F. Analysis of Alternatives

Alternative 1: The FAR Council could take no regulatory action to implement this statute. However, this alternative would not provide any implementation and enforcement of the important national security measures imposed by the law. Moreover, the general public would not experience the benefits of improved national security resulting from the rule as detailed above in Section C. As a result, we reject this alternative.

Alternative 2: The FAR Council could provide uniform procedures for how agency waivers must be initiated and processed. The statute provides this waiver authority to the head of each executive agency. Each executive agency operates a range of programs that have unique mission needs as well as unique security concerns and vulnerabilities. Since the waiver approval process will be based on each agency's judgment concerning particular use cases, standardizing the waiver process across agencies is not feasible. We believe that this alternative would not be able to best serve the public, as it would lead to inefficient waiver determinations at agencies whose ideal waiver process differs from the best possible uniform approach. As a result, we reject this alternative.

IV. Specific Questions for Comment

To understand the exact scope of this impact and how this impact could be affected in subsequent rulemaking, DoD, GSA, and NASA welcome input on the following questions regarding anticipated impact on affected parties.

- To what extent do you currently use any equipment, system, or service that itself 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 FAR Council is considering as part of finalization of this rulemaking to expand the scope to require that the prohibition at 52.204–24(b)(2) and 52.204–25(b)(2) applies to the offeror and any affiliates, parents, and subsidiaries of the offeror that are domestic concerns, and expand the representation at 52.204–24(d)(2) so that the offeror represents on behalf of itself and any affiliates, parents, and subsidiaries of the offeror that are domestic concerns, as to represent whether they use covered telecommunications equipment or services. If the scope of rule was extended to cover affiliates, parents, and subsidiaries of the offeror that are domestic concerns, how would that

impact your ability to comply with the prohibition?

- To the extent you use any equipment, system or service that uses covered telecommunications equipment or services, how much do you estimate it would cost if you decide to cease such use to come into compliance with the rule?
- To what extent do you have insight into existing systems and their components?
- What equipment and services need to be checked to determine whether they include any covered telecommunications equipment or services?
 - What are the best processes and technology to use to identify covered telecommunications equipment or services?
 - Are there automated solutions?
- What are the challenges involved in identifying uses of covered telecommunications equipment or services (domestic, foreign and transnational) that would be prohibited by the rule?
- Do you anticipate use of any products or services that are unrelated to a service provided to the Federal Government and connects to the facilities of a third-party (e.g. backhaul, roaming, or interconnection arrangements) that uses covered telecommunications equipment or services?
- To what extent do you currently have direct control over existing equipment, systems, or services in use (e.g., physical security systems) and their components, as contrasted with contracting for equipment, systems, or services that are used by you within meaning of the statute yet provided by a separate entity (e.g., landlords)? How long will it take if you decide to remove and replace covered telecommunications equipment or services that your company uses?
- When a company identifies covered telecommunications equipment or services, what are the steps to take if you decide to replace the equipment or services?
 - What do companies do if their factory or office is located in foreign country where covered telecommunications equipment or services are prevalent and alternative solutions may be unavailable?
 - What are some best practices (e.g., sourcing strategies) or technologies that can assist companies with replacing covered telecommunications equipment or services?
- Are there specific use cases in the supply chain where it would not be feasible to cease use of equipment,

system(s), or services that use covered telecommunications equipment and services? Please be specific in explaining why cessation of use is not feasible.

- Will the requirement to comply with this rule impact your willingness to offer goods and services to the Federal Government? Please be specific in describing the impact (e.g., what types of products or services may no longer be offered, or offered in a modified form, and why)
- The FAR Council recognizes there could be further costs associated with this rule (e.g. lost business opportunities, having to relocate a building in foreign country where there is no market alternative). What are they?
- What additional information or guidance do you view as necessary to effectively comply with this rule?
- What other challenges do you anticipate facing in effectively complying with this rule?
- Do you have data on the extent of the presence of covered telecommunications equipment or services? If so, please provide that data.
- Do you have data on the fully burdened cost to remove and replace covered telecommunications equipment or services, if that is a decision that you decide to make? If so, please provide that data and identify how you would revise the estimated costs in the cost analysis.

V. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule does not add any new provisions or clauses. The rule does not change the applicability of existing provisions or clauses to contracts at or below the SAT and contracts for the acquisition of commercial items, including COTS items. The rule is updating the provision at FAR 52.204–24 and the clause at FAR 52.204–25 to implement section 889(a)(1)(B).

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to acquisitions at or below the simplified acquisition threshold (SAT). Section 1905 generally limits the applicability of new laws when agencies are making acquisitions at or below the SAT, but provides that such acquisitions will not be exempt from a provision of law under certain circumstances, including when, as in this case, the FAR Council makes a written determination and finding that it would not be in the best interest of the

Federal Government to exempt contracts and subcontracts in amounts not greater than the SAT from the provision of law.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including Commercially Available Off-the-Shelf Items

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial items, and is intended to limit the applicability of laws to contracts for the acquisition of commercial items. Section 1906 provides that if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items.

Finally, 41 U.S.C. 1907 states that acquisitions of commercially available off-the-shelf (COTS) items will be exempt from a provision of law unless certain circumstances apply, including if the Administrator for Federal Procurement Policy makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items from the provision of law.

C. Determinations

The FAR Council has determined that it is in the best interest of the Government to apply the rule to contracts at or below the SAT and for the acquisition of commercial items. The Administrator for Federal Procurement Policy has determined that it is in the best interest of the Government to apply this rule to contracts for the acquisition of COTS items.

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 contracting with entities that use 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).

VI. Interim Rule Determination and Executive Orders 12866, 13563, and 13771

A determination has been made under the authority of the Secretary of Defense (DoD), Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling circumstances necessitate that this interim rule go into effect earlier than 60 days after its publication date.

Since Section 889 of the NDAA was signed on August 13, 2018, the FAR Council has been working diligently to implement the statute, which has multiple effective dates embedded in Section 889. Like many countries, the United States has increasingly relied on a global industrial supply chain. As threats have increased, so has the Government's scrutiny of its contractors and their suppliers. Underlying these efforts is the concern a foreign government will be able to expropriate valuable technologies, engage in espionage with regard to sensitive U.S. Government information, and/or exploit vulnerabilities in products or services. It is worth noting this rule follows a succession of other FAR and DOD rules dealing with supply chain and cybersecurity.

Government agencies are already authorized to exclude certain contractors and products from specified countries. For example, Section 515 of the Consolidated Appropriations Act of 2014 required certain non-DoD agencies to conduct a supply chain risk assessment before acquiring high- or moderate-impact information systems. The relevant agencies are required to conduct the supply chain risk assessments in conjunction with the FBI to determine whether any cyber-espionage or sabotage risk associated with the acquisition of these information systems exist, with a focus on cyber threats from companies "owned, directed, or subsidized by the People's Republic of China."

More recently, U.S. intelligence agencies raised concerns that Kaspersky Lab executives were closely tied to the Russian government, and that a Russian cybersecurity law would compel Kaspersky to help Russian intelligence agencies conduct espionage. As a result, DHS issued a Binding Operational Directive effectively barring civilian Government agencies from using the software. In the FY 2018 NDAA, Congress prohibited the entire U.S. Government from using products and services from Kaspersky or related entities. In June 2018, this prohibition

was implemented as an interim rule across the U.S. Government by FAR 52.204–23.

Section 889 differs from the previous efforts in substantial ways. Unlike the blanket prohibition on agency use of goods and services from Kaspersky Labs, the prohibitions in Section 889 apply to multiple companies, and apply with slightly different characterizations to products and services from the various named companies. Additionally, section 889 contains carve-outs under which the prohibitions do not apply, further complicating interpretation and implementation of rulemaking. Finally, section 889 contains distinct prohibitions related to contracting, with the first applying to products and services purchased for use by the Government, and the second applying to use of the covered telecommunications equipment or services by contractors. Given the various provisions of Section 889, including the focus in the (a)(1)(A) prohibition on addressing risk to the Government's own use of covered telecommunications equipment and services and the shorter time period available to implement that prohibition, the FAR Council first developed and published at 84 FR 40216 on August 13, 2019, FAR Case 2018–017 to implement that prohibition. As discussed in the background section of this rule, that rule focused on products and services sold to the Government (directly or indirectly through a prime contract). Changes necessary to the System for Award Management to reduce the burden of the rule were not available by the effective date of the first rule, so in order to decrease the burden on contractors from this first rule, the FAR Council published a second interim rule on Section 889(a)(1)(A) at 84 FR 68314 on December 13, 2019. After the publication of this second rule, the FAR Council accelerated its ongoing work on the provisions of Section 889(a)(1)(B). Section 889(a)(1)(B) focuses on the Federal Government's ability to contract with companies that use the covered products or services at the requisite threshold.

Given the expansiveness and complexity of Section 889(a)(1)(B), this rule required substantial up-front analysis. As described elsewhere in the rule, all three signatory agencies held public meetings to hear directly from industry on concerns with this rule, with the first occurring in July of 2019 and the most recent occurring in March of 2020. The rule was prepared in part in the spring of 2020 as the nation began shutdown due to the COVID–19 pandemic and work across the

Government was diverted to respond to the national emergency; the concentration of all available resources on the response to the pandemic very significantly delayed the Government's ability to finish the rule. These factors have left the FAR Council with insufficient time to publish the rule with 60 days before the legislatively established effective date of August 13, 2020, or to complete full public notice and comment before the rule becomes effective. As noted, however, the agencies are seeking public comment on this interim rule and will consider and address those comments.

Having an implementing regulation in place by the effective date is critically important to avoid confusion, uncertainty, and potentially substantial legal consequences for agencies and the vendor community. The statute requires contractors to identify the use of covered telecommunications equipment and services in their operations and the prohibitions will take effect on August 13, 2020. If they did so without an implementing regulation in place, contractors would have no guidance as to how to comply with the requirements of Section 889(a)(1)(B), leading to situations where contractors could refuse to contract with the Government over fears that lack of compliance could yield claims for breach of contract, or claims under the False Claims Act. Concerns of this sort were expressed during the outreach conducted by the FAR Council, with contractors expressing confusion as to the scope of the statutory prohibition, and asking for explicit guidance regarding what is required to comply with the requirement; this guidance is provided by the rule in the form of instructions regarding a reasonable inquiry and what must be represented to the Government. Absent coverage in the FAR to implement these requirements in a uniform manner as of the effective date, agencies would also be forced to implement the statute on their own, absent that unifying guidance, leading to rapidly divergent implementation paths, and creating substantial additional confusion and duplicative costs for the regulated contracting community. Publication of a proposed rule under these circumstances, while providing some indication of the direction the Government intended to take, would not provide sufficient clarity or certainty to avoid these consequences, given the complexity of the subject rule.

For the foregoing reasons, pursuant to 41 U.S.C. 1707(d), the FAR Council finds that urgent and compelling circumstances make compliance with

the notice and comment and delayed effective date requirements of 41 U.S.C. 1707(a) and (b) impracticable, and invokes the exception to those requirements under 1707(d). While a public comment process will not be completed prior to the rule's effective date, the FAR Council has incorporated feedback solicited through extensive outreach already undertaken, including through public meetings conducted over the course of nine months, and the feedback received through the two rulemakings associated with Section 889(a)(1)(A). The FAR Council will also consider comments submitted in response to this interim rule in issuing a subsequent rulemaking.

This interim rule is economically significant for the purposes of Executive Orders 12866 and 13563. This rule is not subject to the requirements of E.O. 13771 (82 FR 9339, February 3, 2017) because the benefit-cost analysis demonstrates that the regulation is anticipated to improve national security as its primary direct benefit. This rule is meant to mitigate risks across the supply chains that provide hardware, software, and services to the U.S. Government and further integrate national security considerations into the acquisition process.

The Office of Information and Regulatory Affairs (OIRA) has determined that this is a major rule under the Congressional Review Act (CRA) (5 U.S.C. 804(2)). Under the CRA (5 U.S.C. 801(a)(3)), a major rule generally may not take effect until 60 days after a report on the rule is received by Congress. As a result of the factors identified above, the FAR Council has insufficient time to prepare and complete a full public notice and comment rulemaking proceeding and to timely complete a final rule prior to the effective date of August 13, 2020. Because of the substantial additional impact to the regulated community if the rule is not in place on the effective date, the FAR Council has found good cause to forego notice and public procedure, the Council also determines, pursuant to 5 U.S.C. 808(2), that this interim rule will take effect on August 13, 2020.

Pursuant to 41 U.S.C. 1707 and FAR 1.501–3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA expect that this rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601,

et seq. An Initial Regulatory Flexibility Analysis (IRFA) has been performed, and is summarized as follows:

The reason for this interim rule is 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).

The objective of the rule is to provide an information collection mechanism that relies on an offer-by-offer representation that is required to enable agencies to determine and ensure that they are complying with section 889(a)(1)(B).

The legal basis for the rule is section 889(a)(1)(B) of the NDAA for FY 2019, which prohibits the Government 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, on or after August 13, 2020, unless an exception applies or a waiver has been granted. This prohibition applies to an entity that uses at the prime contractor level 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, regardless of whether that usage is in performance of work under a Federal contract. This prohibition does not flow-down to subcontractors.

This collection includes a burden for requiring an offeror to represent if it “does” or “does not” use any equipment, system, or service that uses covered telecommunications equipment or services.

The representation requirement being added to the FAR provision at 52.204–24 will be included in all solicitations, including solicitations for contracts with small entities and is an offer-by-offer representation. A data set was generated from the Federal Procurement Data System (FPDS) for FY 2016, 2017, 2018 and 2019 for use in estimating the number of small entities affected by this rule.

The FPDS data indicates that the Government awarded contracts to an average of 102,792 unique entities, of which 75,112 (73 percent) were small entities. DoD, GSA, and NASA estimate that the representation at 52.204–24 will impact all unique entities awarded Government contracts, of which 75,112 are small entities.

This rule amends the solicitation provision at 52.204–24 to require all vendors to represent on an offer-by-offer basis, that it “does” or “does not” use any covered telecommunications equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services and if it does to provide an additional disclosure.

If the offeror selects “does” in the representation at 52.204–24(d)(2), the offeror is required to further disclose, per paragraph (e), substantial detail regarding the basis for selecting “does” in the representation.

This rule will impact some small businesses and their ability to provide

Government services at the prime contract level, since some small entities lack the resources to efficiently update their supply chain and information systems, which may be useful to comply with the prohibition.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

The FAR Council intends to publish a subsequent rulemaking to allow offerors, including small entities, to represent annually in the System for Award Management (SAM) after conducting a reasonable inquiry. Only offerors that provide an affirmative response to the annual representation would be required to provide the offer-by-offer representation at 52.204–24(d)(2). The annual representation is anticipated to reduce the burden on small entities.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2019–009) in correspondence.

VIII. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA) provides that an agency generally cannot conduct or sponsor a collection of information, and no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, unless that collection has obtained OMB approval and displays a currently valid OMB Control Number.

DoD, GSA, and NASA requested, and OMB authorized, emergency processing of the collection of information involved in this rule, consistent with 5 CFR 1320.13. DoD, GSA, and NASA have determined the following conditions have been met:

a. The collection of information is needed prior to the expiration of time periods normally associated with a routine submission for review under the provisions of the PRA, because the prohibition in section 889(a)(1)(B) goes into effect on August 13, 2020.

b. The collection of information is essential to the mission of the agencies to ensure the Federal Government complies with section 889(a)(1)(B) on the statute's effective date in order to protect the Government supply chain

from risks posed by covered telecommunications equipment or services.

c. Moreover, DoD, GSA, and NASA cannot comply with the normal clearance procedures because public harm is reasonably likely to result if current clearance procedures are followed. Authorizing collection of this information on the effective date will ensure that agencies do not enter into, extend, or renew contracts with any entity that uses equipment, systems, or services that use telecommunications equipment or services from certain named companies as a substantial or essential component or critical technology as part of any system in violation of the prohibition in section 889(a)(1)(B).

DoD, GSA, and NASA intend to provide a separate 60-day notice in the **Federal Register** requesting public comment on the information collections contained within this rule under OMB Control Number 9000–0201.

The annual public reporting burden for this collection of information is estimated as follows:

Agency: DoD, GSA, and NASA.
Type of Information Collection: New Collection.
Title of Collection: Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment.
FAR Clause: 52.204–24.
Affected Public: Private Sector—Business.
Total Estimated Number of Respondents: 102,792.
Average Responses per Respondents: 378.
Total Estimated Number of Responses: 38,854,291.
Average Time (for both positive and negative representations) per Response: 3 hours.
Total Annual Time Burden: 116,562,873.
Agency: DoD, GSA, and NASA.
Type of Information Collection: New Collection.
Title of Collection: Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.
FAR Clause: 52.204–25.
Affected Public: Private Sector—Business.
Total Estimated Number of Respondents: 5,140.
Average Responses per Respondents: 5.
Total Estimated Number of Responses: 25,700.
Average Time per Response: 3 hours.
Total Annual Time Burden: 77,100.
Agency: DoD, GSA, and NASA.
Type of Information Collection: New Collection.
Title of Collection: Waiver from Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.
FAR Clause: 52.204–25.
Affected Public: Private Sector—Business.
Total Estimated Number of Respondents: 20,000.

Average Responses per Respondents: 1.
Total Estimated Number of Responses: 20,000.
Average Time per Response: 160 hours.
Total Annual Time Burden: 3,200,000.

The public reporting burden for this collection of information consists of a representation to identify whether an offeror uses covered telecommunications equipment or services for each offer as required by 52.204–24 and reports of identified use of covered telecommunications equipment or services as required by 52.204–25. The representation at 52.204–24 is estimated to average 3 hours per response to review the prohibitions, research the source of the product or service, and complete the additional detailed disclosure, if applicable. Reports required by 52.204–25 are estimated to average 3 hours per response, including the time for reviewing definitions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the report.

If the Government seeks a waiver from the prohibition, the offeror will be required to provide a full and complete laydown of the presences of covered telecommunications or video surveillance equipment or services in the entity's supply chain and a phase-out plan to eliminate such covered telecommunications equipment or services from the offeror's systems. There is no way to estimate the total number of waivers at this time. For the purposes of complying with the PRA analysis, the FAR Council estimates 20,000 waivers; however there is no data for the basis of this estimate. This estimate may be higher or lower once the rule is in effect.

The subsequent 60-day notice to be published by DoD, GSA, and NASA will invite public comments.

List of Subjects in 48 CFR Parts 1, 4, 13, 39, and 52

Government procurement.

William F. Clark,
Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA are amending 48 CFR parts 1, 4, 13, 39, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 4, 13, 39, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

■ 2. In section 1.106 amend the table by revising the entries for “4.21”, “52.204–24” and “52.204–25” to read as follows:

1.106 OMB approval under the Paperwork Reduction Act.

*	*	*	*	*
FAR segment		OMB control No.		
4.21	9000–0199 and 9000–0201.		
52.204–24	9000–0199 and 9000–0201.		
52.204–25	9000–0199 and 9000–0201		

PART 4—ADMINISTRATIVE AND INFORMATION MATTERS

4.2100 [Amended]

■ 3. Amend section 4.2100 by removing “paragraph (a)(1)(A)” and adding “paragraphs (a)(1)(A) and (a)(1)(B)” in its place.

■ 4. Amend section 4.2101 by adding in alphabetical order the definitions “Backhaul”, “Interconnection arrangements”, “Reasonable inquiry” and “Roaming” to read as follows:

4.2101 Definitions.

* * * * *
Backhaul means intermediate links between the core network, or backbone network, and the small subnetworks at the edge of the network (e.g., connecting cell phones/towers to the core telephone network). Backhaul can be wireless (e.g., microwave) or wired (e.g., fiber optic, coaxial cable, Ethernet).
* * * * *

Interconnection arrangements means arrangements governing the physical connection of two or more networks to allow the use of another's network to hand off traffic where it is ultimately delivered (e.g., connection of a customer of telephone provider A to a customer of telephone company B) or sharing data and other information resources.

Reasonable inquiry means 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.

Roaming means cellular communications services (e.g., voice,

video, data) received from a visited network when unable to connect to the facilities of the home network either because signal coverage is too weak or because traffic is too high.

* * * * *

■ 5. Amend section 4.2102 by revising paragraphs (a) and (c) to read as follows:

4.2102 Prohibition.

(a) Prohibited equipment, systems, or services.

(1) On or after August 13, 2019, agencies are prohibited from procuring or obtaining, or extending or renewing 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 any system, or as critical technology as part of any system, unless an exception at paragraph (b) of this section applies or the covered telecommunications equipment or services are covered by a waiver described in 4.2104.

(2) On or after August 13, 2020, agencies are prohibited from entering into a contract, 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, unless an exception at paragraph (b) of this section applies or the covered telecommunications equipment or services are covered by a waiver described in 4.2104. This prohibition applies to the use of covered telecommunications equipment or services, regardless of whether that use is in performance of work under a Federal contract.

* * * * *

(c) *Contracting Officers.* Unless an exception at paragraph (b) of this section applies or the covered telecommunications equipment or service is covered by a waiver described in 4.2104, Contracting Officers shall not—

(1) Procure or obtain, or extend or renew a contract (e.g., exercise an option) to procure or obtain, 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; or

(2) Enter into a contract, or extend or renew 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.

* * * * *

■ 6. Amend section 4.2103 by revising paragraph (a)(2) to read as follows:

4.2103 Procedures.

(a) * * *

(2)(i) If the offeror selects “will not” in paragraph (d)(1) of the provision at 52.204–24 or “does not” in paragraph (d)(2) of the provision at 52.204–24, the contracting officer may rely on the representations, unless the contracting officer has reason to question the representations, the contracting officer shall follow agency procedures.

(ii) If an offeror selects “will” in paragraph (d)(1) of the provision at 52.204–24, the offeror must provide the information required by paragraph (e)(1) of the provision at 52.204–24, and the contracting officer shall follow agency procedures.

(iii) If an offeror selects “does” in paragraph (d)(2) of the provision at 52.204–24, the offeror must complete the disclosure at paragraph (e)(2) of the provision at 52.204–24, and the contracting officer shall follow agency procedures.

* * * * *

■ 7. Amend section 4.2104 by revising paragraphs (a)(1) introductory text and (a)(2), and adding paragraphs (a)(3) and (4) to read as follows:

4.2104 Waivers.

(a) * * *

(1) *Waiver.* The waiver may be provided, for a period not to extend beyond August 13, 2021 for the prohibition at 4.2102(a)(1), or beyond August 13, 2022 for the prohibition at 4.2102(a)(2), if the Government official, on behalf of the entity, seeking the waiver submits to the head of the executive agency—

* * * * *

(2) *Executive agency waiver requirements for the prohibition at 4.2102(a)(2).* Before the head of an executive agency can grant a waiver to the prohibition at 4.2102(a)(2), the agency must—

(i) Have designated a senior agency official for supply chain risk management, responsible for ensuring the agency effectively carries out the supply chain risk management functions and responsibilities described in law, regulation, and policy;

(ii) Establish participation in an information-sharing environment when and as required by the Federal Acquisition Security Council (FASC) to

facilitate interagency sharing of relevant acquisition supply chain risk information;

(iii) Notify and consult with the Office of the Director of National Intelligence (ODNI) on the waiver request using ODNI guidance, briefings, best practices, or direct inquiry, as appropriate; and

(iv) Notify the ODNI and the FASC 15 days prior to granting the waiver that it intends to grant the waiver.

(3) *Waivers for emergency acquisitions.*

(i) In the case of an emergency, including a declaration of major disaster, in which prior notice and consultation with the ODNI and prior notice to the FASC is impracticable and would severely jeopardize performance of mission-critical functions, the head of an agency may grant a waiver without meeting the notice and consultation requirements under 4.2104(a)(2)(iii) and 4.2104(a)(2)(iv) to enable effective mission critical functions or emergency response and recovery.

(ii) In the case of a waiver granted in response to an emergency, the head of an agency granting the waiver must—

(A) Make a determination that the notice and consultation requirements are impracticable due to an emergency condition; and

(B) Within 30 days of award, notify the ODNI and the FASC of the waiver issued under emergency conditions in addition to the waiver notice to Congress under 4.2104(a)(4).

(4) *Waiver notice.*

(i) For waivers to the prohibition at 4.2102(a)(1), the head of the executive agency shall, not later than 30 days after approval—

(A) Submit in accordance with agency procedures to the appropriate congressional committees the full and complete laydown of the presences of covered telecommunications or video surveillance equipment or services in the relevant supply chain; and

(B) The phase-out plan to eliminate such covered telecommunications or video surveillance equipment or services from the relevant systems.

(ii) For waivers to the prohibition at 4.2102(a)(2), the head of the executive agency shall, not later than 30 days after approval submit in accordance with agency procedures to the appropriate congressional committees—

(A) An attestation by the agency that granting of the waiver would not, to the agency’s knowledge having conducted the necessary due diligence as directed by statute and regulation, present a material increase in risk to U.S. national security;

(B) The full and complete laydown of the presences of covered

telecommunications or video surveillance equipment or services in the relevant supply chain, to include a description of each category of covered technology equipment or services discovered after a reasonable inquiry, as well as each category of equipment, system, or service used by the entity in which such covered technology is found after conducting a reasonable inquiry; and

(C) The phase-out plan to eliminate such covered telecommunications or video surveillance equipment or services from the relevant systems.

* * * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 8. Amend section 13.201 by redesignating paragraph (j) as (j)(1) and adding paragraph (j)(2) to read as follows:

13.201 General.

* * * * *

(j)(1) * * *

(2) On or after August 13, 2020, agencies are prohibited from entering into a contract, 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, unless an exception applies or a waiver is granted (see subpart 4.21). This prohibition applies to the use of covered telecommunications equipment or services, regardless of whether that use is in performance of work under a Federal contract.

PART 39—ACQUISITION OF INFORMATION TECHNOLOGY

■ 9. Amend section 39.101 by redesignating paragraph (f) as (f)(1) and adding paragraph (f)(2) to read as follows:

39.101 Policy.

* * * * *

(f)(1) * * *

(2) On or after August 13, 2020, agencies are prohibited from entering into a contract, 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, unless an exception applies or a waiver is granted (see subpart 4.21). This prohibition applies to the use of covered telecommunications equipment or services, regardless of whether that

use is in performance of work under a Federal contract.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 10. Revise section 52.204–24 to read as follows:

52.204–24 Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment.

As prescribed in 4.2105(a), insert the following provision:

Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment (AUG 2020)

The Offeror shall not complete the representation at paragraph (d)(1) of this provision if the Offeror has represented that it “does not provide covered telecommunications equipment or services as a part of its offered products or services to the Government in the performance of any contract, subcontract, or other contractual instrument” in the provision at 52.204–26, Covered Telecommunications Equipment or Services—Representation, or in paragraph (v) of the provision at 52.212–3, Offeror Representations and Certifications—Commercial Items.

(a) *Definitions.* As used in this provision—*Backhaul, covered telecommunications equipment or services, critical technology, interconnection arrangements, reasonable inquiry, roaming, and substantial or essential component* have the meanings provided in the clause 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.

(b) *Prohibition.* (1) Section 889(a)(1)(A) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232) prohibits the head of an executive agency on or after August 13, 2019, from procuring or obtaining, or extending or renewing 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 any system, or as critical technology as part of any system. Nothing in the prohibition shall be construed to—

(i) 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; or

(ii) Cover telecommunications equipment that cannot route or redirect user data traffic or cannot permit visibility into any user data or packets that such equipment transmits or otherwise handles.

(2) Section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232) prohibits the head of an executive agency on or after August 13, 2020, from entering into a contract 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. This prohibition applies to the use of covered telecommunications equipment or services, regardless of whether that use is in performance of work under a Federal contract. Nothing in the prohibition shall be construed to—

(i) 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; or

(ii) Cover telecommunications equipment that cannot route or redirect user data traffic or cannot permit visibility into any user data or packets that such equipment transmits or otherwise handles.

(c) *Procedures.* The Offeror shall review the list of excluded parties in the System for Award Management (SAM) (<https://www.sam.gov>) for entities excluded from receiving federal awards for “covered telecommunications equipment or services.”

(d) *Representations.* The Offeror represents that—

(1) It [] will, [] will not provide covered telecommunications equipment or services to the Government in the performance of any contract, subcontract or other contractual instrument resulting from this solicitation. The Offeror shall provide the additional disclosure information required at paragraph (e)(1) of this section if the Offeror responds “will” in paragraph (d)(1) of this section; and

(2) After conducting a reasonable inquiry, for purposes of this representation, the 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.

(e) *Disclosures.* (1) Disclosure for the representation in paragraph (d)(1) of this provision. If the Offeror has responded “will” in the representation in paragraph (d)(1) of this provision, the Offeror shall provide the following information as part of the offer:

(i) For covered equipment—

(A) The entity that produced the covered telecommunications equipment (include entity name, unique entity identifier, CAGE code, and whether the entity was the original equipment manufacturer (OEM) or a distributor, if known);

(B) A description of all covered telecommunications equipment offered (include brand; model number, such as OEM number, manufacturer part number, or wholesaler number; and item description, as applicable); and

(C) Explanation of the proposed use of covered telecommunications equipment and any factors relevant to determining if such use would be permissible under the prohibition in paragraph (b)(1) of this provision.

(ii) For covered services—

(A) If the service is related to item maintenance: A description of all covered

telecommunications services offered (include on the item being maintained: Brand; model number, such as OEM number, manufacturer part number, or wholesaler number; and item description, as applicable); or

(B) If not associated with maintenance, the Product Service Code (PSC) of the service being provided; and explanation of the proposed use of covered telecommunications services and any factors relevant to determining if such use would be permissible under the prohibition in paragraph (b)(1) of this provision.

(2) Disclosure for the representation in paragraph (d)(2) of this provision. If the Offeror has responded “does” in the representation in paragraph (d)(2) of this provision, the Offeror shall provide the following information as part of the offer:

(i) For covered equipment—

(A) The entity that produced the covered telecommunications equipment (include entity name, unique entity identifier, CAGE code, and whether the entity was the OEM or a distributor, if known);

(B) A description of all covered telecommunications equipment offered (include brand; model number, such as OEM number, manufacturer part number, or wholesaler number; and item description, as applicable); and

(C) Explanation of the proposed use of covered telecommunications equipment and any factors relevant to determining if such use would be permissible under the prohibition in paragraph (b)(2) of this provision.

(ii) For covered services—

(A) If the service is related to item maintenance: A description of all covered telecommunications services offered (include on the item being maintained: Brand; model number, such as OEM number, manufacturer part number, or wholesaler number; and item description, as applicable); or

(B) If not associated with maintenance, the PSC of the service being provided; and explanation of the proposed use of covered telecommunications services and any factors relevant to determining if such use would be permissible under the prohibition in paragraph (b)(2) of this provision.

(End of provision)

■ 11. Amend section 52.204–25 by—

■ a. Revising the date of the clause;

■ b. In paragraph (a), adding in alphabetical order the definitions “Backhaul”, “Interconnection arrangements”, “Reasonable inquiry” and “Roaming”;

■ c. Revising paragraph (b); and

■ d. Removing from paragraph (e) “this paragraph (e)” and adding “this paragraph (e) and excluding paragraph (b)(2)” in its place.

The revisions read as follows:

52.204–25 Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.

* * * * *

Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment (AUG 2020)

(a) * * *

Backhaul means intermediate links between the core network, or backbone network, and the small subnetworks at the edge of the network (e.g., connecting cell phones/towers to the core telephone network). Backhaul can be wireless (e.g., microwave) or wired (e.g., fiber optic, coaxial cable, Ethernet).

* * * * *

Interconnection arrangements means arrangements governing the physical connection of two or more networks to allow the use of another’s network to hand off traffic where it is ultimately delivered (e.g., connection of a customer of telephone provider A to a customer of telephone company B) or sharing data and other information resources.

Reasonable inquiry means 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.

Roaming means cellular communications services (e.g., voice, video, data) received from a visited network when unable to connect to the facilities of the home network either because signal coverage is too weak or because traffic is too high.

* * * * *

(b) *Prohibition.* (1) Section 889(a)(1)(A) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232) prohibits the head of an executive agency on or after August 13, 2019, from procuring or obtaining, or extending or renewing 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 any system, or as critical technology as part of any system. The Contractor is prohibited from providing to the Government 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, unless an exception at paragraph (c) of this clause applies or the covered telecommunication equipment or services are covered by a waiver described in FAR 4.2104.

(2) Section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232) prohibits the head of an executive agency on or after August 13, 2020, from entering into a contract, 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, unless an exception at paragraph (c) of this clause applies or the covered telecommunication

equipment or services are covered by a waiver described in FAR 4.2104. This prohibition applies to the use of covered telecommunications equipment or services, regardless of whether that use is in performance of work under a Federal contract.

* * * * *

■ 12. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Removing from paragraphs (a)(3) and (e)(1)(iv) “AUG 2019” and adding “AUG 2020” in their places, respectively;

■ c. Revising the date of Alternate II; and

■ d. In Alternate II, amend paragraph (e)(1)(ii)(D) by removing “AUG 2019” and adding “AUG 2020” in its place.

The revisions read as follows:

52.212–5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (AUG 2020)

* * * * *

Alternate II (AUG 2020). * * *

* * * * *

■ 13. Amend section 52.213–4 by—

■ a. Revising the date of the clause;

■ b. Removing from paragraph (a)(1)(iii) “AUG 2019” and adding “AUG 2020” in its place; and

■ c. Removing from paragraph (a)(2)(viii) “JUN 2020” and adding “AUG 2020” in its place.

The revision reads as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (AUG 2020)

* * * * *

■ 14. Amend section 52.244–6 by—

■ a. Revising the date of the clause; and

■ b. Removing from paragraph (c)(1)(vi) “AUG 2019” and adding “AUG 2020” in its place.

The revision reads as follows:

52.244–6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (AUG 2020)

* * * * *

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