

Council of Defense and Space Industry Associations
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March 2, 2020

Attn: Ms. Heather Kitchens
OUSD(A&S) DPC/DARS
Room 3B941
3060 Defense Pentagon
Washington, DC 20301-3060

Ref: DFARS Case 2018-D022 – “Covered Defense Telecommunications Equipment or Services” - CODSIA Case 2020-001

Dear Ms. Kitchens:

On behalf of the member associations of the Council of Defense and Space Industry Associations (CODSIA),¹ we are pleased to submit these comments on the DFARS interim rule “Defense Federal Acquisition Regulation Supplement: Covered Defense Telecommunications Equipment or Services” published in the December 31, 2019 *Federal Register*. We support the general spirit of the rule in helping our country to achieve important security goals but suggest the following modification.

This interim rule, and its counterparts implementing Sec. 889(a)(1)(A) of the 2019 NDAA, were each published without the typical opportunity for comment provided through the proposed rule process. This immediate method of implementation leaves contractors without the ability to adequately provide notice to suppliers and efficiently reconfigure supply chains, increasing the costs of complying with this regulation.

As with the other Sec. 889 interim rules, this interim rule imposes an additional acquisition requirement on those businesses seeking to sell goods and services to the government. The annual representation requirement included in this interim rule will also require businesses to reconfigure business practices. This representation is in addition to the representation requirements associated with Sec. 889. These two requirements work together to increase administrative costs on the contractor. Administrative burdens like this inject additional cost into the acquisition system,

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

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increasing costs to government. This interim rule also imposes a reporting requirement on those contract actions at or below the Micro-purchase Threshold, often held by small businesses or those with commercial offerings. Each of them will find difficulty in justifying their continued involvement with government business as a result of these cost increases. Administrative burdens associated with reporting requirements in this regulation should be reduced where possible for the final rule.

The reporting requirements should also be more flexible to accommodate the difficulties of complying with this regulation. Currently, if a contractor discovers covered equipment in their supply chain, they are only given one business day to report this information to the contracting officer. This is unnecessarily restrictive. Although we understand the national security concerns necessitate quick action, this reporting timeframe is much faster than other federal reporting requirements (e.g. DFARS 252.204-2012 (72 hours), 52.204-21 (timely manner)) and may not allow contractors time to accurately determine whether the equipment in question is actually covered under the rule, leading to increased work on both industry and government. Additionally, the interim rule calls for contractors to notify officials within 10 days of discovery as to their mitigation plans. This timeline is also unrealistic when considering the complexities of modern supply chains. Both of these timing requirements are unduly restrictive and should be revisited.

Moreover, the interim rule requires reporting by a contractor when it is notified by a subcontractor at any tier or by any other source. This requirement is not qualified with a threshold such as “credible information;” CODSIA believes the inclusion of such language would eliminate confusion as to when reporting is necessary.

DoD should reconsider the interim rule’s flow-down requirements. The rule requires contractors to insert the provisions of Section 1656 of the FY 2018 NDAA in all subcontracts “and other contractual instruments,” including subcontracts for the acquisition of commercial items. While there is no single definition of “subcontract” applicable to the FAR, it is well-established that the term “subcontract” does not include many prime contractor purchases, such as the purchase of commercial items not intended for direct use in connection with the government contract. The inclusion of the phrase “other contractual instruments” seems to be unique to this interim rule. This language is vague and could be interpreted as to require government contractors to include the rule’s requirement as a flow-down clause in *every* contract their company signs to purchase goods and services of any type. This would be virtually impossible to implement and would be highly disruptive to all government buying. We recommend that DoD update the interim rule to remove this problematic phrase.

The scope of this regulation and the underlying law needs further clarification. First, the law prohibits DoD from contracting for or obtaining “any equipment, system, or service to carry out the DoD nuclear deterrence or homeland defense missions”. While there are some examples available in the regulatory text, there is not a comprehensive list

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available of how this definition will be applied and which entities or contracts it will cover. In FAR 52.204-26, added by the second interim FAR rule published December 13, 2019, contractors are required to review the list of excluded parties in SAM for entities excluded from receiving awards for “covered telecommunications and equipment or service.” We have interpreted this requirement to be predicated on the government generating in SAM that list of excluded parties – and this should be the only list of such parties and products or services, and the only requirement imposed on contractors.

This rule also deviates by using the term “covered defense telecommunications equipment or services” instead of “covered telecommunications equipment or services.” While we understand the aim of this language is to help achieve the underlying purposes of Sec. 1656 of the FY 2018 NDAA, inconsistencies like this drive ambiguity and compliance difficulties into the system for businesses holding contracts across the government. The term “defense” is also not more specifically defined in the rule, thus leaving considerable room for interpretation as to the bounds of the application of this rule.

There also continues to be issues with the definition of “covered defense telecommunications equipment or services” as was pointed out in the comments on the Sec. 889(a)(1)(A) rules. This definition governs the ability of companies to attest to whether they are in compliance with the regulation and must be clearly communicated to the companies. This ambiguity is compounded further by the definitions in 204.2101(1) – (3). This open-ended language relating to what exact equipment is covered leaves industry without a clear basis for self-evaluating whether they can make an accurate representation to not having covered equipment.

The interim rule extends to “subsidiaries and affiliates” of Huawei Technologies Company and ZTE Corporation. The rule fails to identify which entities are considered as “subsidiaries and affiliates” of these companies. Contractors should not have to scour Justice Department indictments or government websites for such information. CODSIA recommends that DoD provide a publicly available list of those companies that are considered subsidiaries or affiliates. As noted above, this list should be included in the SAM.gov database. This list would need to be accessible and updated as necessary to ensure contractor compliance.



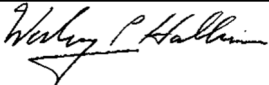

CODSIA is standing by and willing to help regulators revise language associated with this rule in a way that will achieve the stated security goals of the underlying law but also ensure that the regulatory burden and costs on contractors is minimized.

Thank you for your attention to these comments. If you have any questions or need any additional information, please do not hesitate to contact Corbin Evans, Director of Regulatory Policy at the National Defense Industrial Association, who serves as the

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CODSIA project officer for this case. He can be reached at (703) 247-2598 or at CEvans@NDIA.org.

Sincerely,

	
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