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September 14, 2020

*Via regulations.gov*

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**Re: Federal Acquisition Regulation (FAR) Case 2019-009 Final Interim Rule 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)**

On behalf of the American Bar Association (“ABA”) Public Contract Law Section, I am submitting comments in response to the Final Interim Rule cited above. The Section consists of attorneys and associated professionals in private practice, industry, and government service.<sup>1</sup> The Section’s governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The views expressed herein are presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the position of the ABA.<sup>2</sup>

<sup>1</sup> Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Scott Flesch and Douglas Mickle, members of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

<sup>2</sup> This letter is available in pdf format at [https://www.americanbar.org/groups/public\\_contract\\_law/resources/prior\\_section\\_comments/](https://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments/) under the topic “Acquisition Reform & Emerging Issues.”

## **I. BACKGROUND AND INTRODUCTION**

The Section commends the FAR Council (the “Council”) on the significant work completed to date on the above-referenced Final Interim Rule. The Section appreciates the urgency of Congress’s directive to address the significant security concerns that covered telecommunications equipment and services present, as well as the difficult time constraints, exacerbated by the COVID-19 pandemic, that the Council was under as it developed the Final Interim Rule. 85 Fed. Reg. 42665 at 42674 (July 14, 2020). The Section has carefully reviewed the Final Interim Rule and provides comments and proposed revisions for the Council’s consideration.

## **II. COMMENTS**

The Section understands that Congress passed the legislation in 2018 and that guidance on different aspects of the law has been issued since then. The Section submits, however, that the terms of the prohibition and the guidance provided thus far have not cleared up confusion on the scope and application of the requirements. For example, although 84 Fed. Reg. 40216 (August 13, 2019) provided guidance regarding the application of Section 889(a)(1)(A), it did not provide meaningful insight into what (a)(1)(B) ultimately would require. The Final Interim Rule, published one month before becoming effective, has rendered compliance difficult as a result of the sheer breadth of its prohibitions.<sup>3</sup> The Section suggests that a clear, phased in approach – differentiating between those areas where immediate compliance is essential, and those areas where it is not as essential – would allow vital industry partners to develop a path forward to reach full compliance.

The Section requests that in addition to providing these comments, it be allowed to provide additional comments after the September 14 deadline. We make this request because of the fluid nature of this rulemaking (*see, e.g.*, 85 Fed. Reg. 53126, Prohibition on Contracting With Entities Using Certain Telecommunications and Video Surveillance Services or Equipment) and the varying approaches to the Final Interim Rule that different agencies are exhibiting. *Compare* guidance from the General Services Administration with the Department of Defense.<sup>4</sup>

### **A. Comments Concerning Definitions**

The Section applauds the FAR Council for adding definitions of terms such as “backhaul” and “interconnection agreements.” The Section believes, however, that more

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<sup>3</sup> The Council’s August 27, 2020 postponement of the date for implementation of the interim rule’s Section 889(a)(1)(B) certification provision, 52.204-26 to October 26, 2020, also has exacerbated the confusion. 85 Fed. Reg. 53126. How are the Section 889(a)(1)(B) provisions 52.204-24(d)(2) and 52.204-25 to be addressed? This situation poses the real risk that contractors will believe that the postponement applies to all provisions and not just the representation in the System for Award Management (SAM) part of the rule. The Section recommends that the Council clarify this as well.

<sup>4</sup> *See* [https://www.gsa.gov/cdnstatic/MV-20-10\\_0.pdf](https://www.gsa.gov/cdnstatic/MV-20-10_0.pdf) and <https://www.acq.osd.mil/dpap/policy/policyvault/USA001557-20-DPC.pdf> (both last accessed Sept. 5, 2020).

guidance is needed. Without clarity, the rule poses the risk that different entities will assess and report based on independent and varying understandings of their requirements. These differences in approach could lead to inconsistencies and possible corresponding security gaps, as well as undermine the efficacy of competition. Clearer definitions will help contractors better understand what is being asked of them and allow them to address risks in a more cost effective, consistent, and compliant way.

## **1. Definition of “Use”**

The Section recommends that the term “use” be defined as “use in performance of the federal contract” subject to the representations and prohibitions in FAR 52.204-24 and FAR 52.204-25, respectively. As drafted, the Final Interim Rule applies to a company’s usage of covered equipment or services regardless of whether that usage is in performance of work under a Federal contract.

While we recognize that the statute and regulation prohibit agencies from entering into contracts with offerors that make internal use of covered equipment if it is critical technology or a substantial or essential component of any system, we submit that the definition is overly broad and may be perceived by some in industry as too burdensome with which to comply. For example, for commercial companies for which U.S. Government sales represent only a small percentage of their overall business, it may be more cost effective to exit the Government market rather than review and potentially change their internal infrastructures. Such a result would deny the Government of competition and innovations from the commercial market.

Accordingly, the Section recommends that the Council work with Congress to limit the scope of the prohibition to a contractor’s performance of the federal contract(s) at issue. If this is not possible, then the Section recommends that the FAR Council establish a phased-in approach, based on a triage type of analysis, identifying the most significant risks that need to be addressed and implementing the prohibitions there first and phasing in others. In the absence of an appropriately targeted, phased, or risk-based approach, the Government could lose out on the opportunity to acquire capabilities that would help it protect the cybersecurity of its networks and systems as a result of potentially remote cyber risks at a contractor site (*e.g.*, a single security camera in a parking lot).

## **2. Definition of “Telecommunications Equipment or Services”**

Although FAR 52.204-25 provides a definition of *covered telecommunications equipment or services*, this definition is phrased in terms of the Chinese entities that often provide such equipment or services. There remains ambiguity concerning the proper definition of *telecommunications*. Congress did not address this question in passing the statute. This has caused agencies and buying commands to develop their own working definition. One such example is the following:

*Telecommunications.* Any transmission, emission, or reception of: signs, signals, writings, images, sounds, or information of any nature by wire, radio, visual, or other electromagnetic systems.<sup>5</sup>

The above definition is overly broad and unworkable, as it includes forms of communication and signaling likely never intended to be included by either Congress or the Council in drafting the Final Interim Rule. The Council should consider providing further guidance on what is meant by telecommunications. Doing so would ground the Interim Rule in an established definition with a settled interpretation.

In the absence of such a clear definition of telecommunications, different agencies potentially will develop conflicting definitions of the term. Such an outcome would further complicate contractors' compliance efforts and could lead to the same inconsistencies, security gaps, and competitive impacts discussed above. Moreover, conflicting definitions would unduly increase the costs of compliance because contractors may not be able to provide a single approach for all contracts, and they will have to track and trace their compliance efforts separately in order to ensure that they comply with each agency's unique definition of telecommunications services or equipment.

Other questions that the definition raises include:

- What is the scope of coverage for self-contained systems that incorporate covered equipment, but otherwise meet the exceptions found in FAR 52.204-24(b)(1)(i)-(ii) and (b)(2)(i)-(ii) and FAR 52.204.25(c)?
- What is the exact scope of telecommunications services in this context? What is the scope of telecommunications equipment?
- What is the scope of a service that uses covered telecommunications equipment or services?
- What factors should be considered when determining whether the telecommunications equipment a contractor uses cannot route or redirect use data traffic or cannot permit visibility into any use data or packets that such equipment transmits or otherwise bundles?

The resolution of the above questions is imperative if government and industry are to have a shared understanding of the correct scope and implementation of the interim final rule.

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<sup>5</sup> See, e.g. <https://fas.org/irp/doddir/usaf/33-270.htm> (last accessed Sept. 5, 2020).

### 3. Definition of Key Terms Impacting “Video Surveillance”

FAR 52.204-25 provides that the impacted technology includes “video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities)” when it is “for the purpose of public safety, security of Government facilities, physical security surveillance of critical infrastructure, and other national security purposes.”

The FAR clause does not define some key terms and, as a result, it is unclear what equipment or services are impacted. For instance, “critical infrastructure” is not defined, and the lack of definition could cause contractors and other stakeholders to conclude erroneously that the equipment is covered or not covered by the rule. In light of this, we propose defining certain additional terms in the final rule in accordance with our comments below.

- **“Public safety”** - The “purpose of public safety” strongly insinuates that the goal of the video surveillance would be for the protection of the general public, but it could incorrectly be interpreted to include members of the general public who enter private property. Because of that, we propose the following definition: *Public safety* means surveillance equipment or services for the protection of the general public and not connected to a specific contractor site. Surveillance must be of a public area or government building. Public safety does not include surveillance performed for the protection of a private facility, individuals entering that facility, or individuals within the facility.
- The term **“critical infrastructure”** is not defined within the regulation, and it takes on slightly different meanings when consulting with various governmental bodies/regulations. The Section believes the National Institute for Standards and Technology (“NIST”) is best suited to define this term and urges the FAR Council to consider the term as defined in NIST Special Publication 800-30: *Critical infrastructure*, under which that term means “system and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.” We also understand that contractors may seek more granular guidance and suggest identifying the NIST Cybersecurity Framework’s *Critical Infrastructure Resources*<sup>6</sup> as a resource.

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<sup>6</sup> Note that the NARA CUI Registry also addresses critical infrastructure. <https://www.archives.gov/cui/registry/category-list>. Given the varied places in which definitions may be found, the lack of a clear definition of this term increases the risk of inconsistent treatment or identification of coverage and therefore increases the potential for unintended gaps in coverage.

- The term “other national security purposes” is understandably flexible. However, the Section believes that the rule should direct agencies to provide specific advance notice to the contractor of such purposes.

More specific definitions will provide contractors and those responsible for enforcing this rule a better understanding of the equipment and services covered by this rule.

#### **4. Keep the Definition of “Reasonable Inquiry” But Elaborate With Next Steps in Compliance Plan**

The Final Interim Rule defines “reasonable inquiry,” and the Section appreciates the inclusion of this definition. In reviewing the Final Interim Rule, the Section recommends that the FAR Council consider the additional, following issues.

Companies have developed differing approaches to a “reasonable inquiry.” The Section has learned that some contractors may not be comfortable relying on information in their possession as part of a “reasonable inquiry” and have surveyed suppliers or flowed down the representation in FAR 52.204-24(d)(2), notwithstanding the fact that the rule states that the representation only applies at the prime contractor level, because of the risk of the ambiguity of what is considered as information in their “possession.” Other contractors may take a different approach, given that the representation is at the prime level. These different approaches create the risk of different standards, security gaps, disparate impacts on competition, and disparate impacts on enforcement.

Because it would be burdensome on industry to revise the definition of “reasonable inquiry” weeks or months after it went into effect and was relied upon by contractors, any changes to the rule should be focused on identifying reasonable, risk-based compliance steps and examples that contractors should consider in deciding whether and to what extent they should expand upon their inquiry. For example, the risk-based compliance steps could be formulated for use depending on the nature of the contract and the risks involved. This would reduce the risk of omissions or equipment/services that escape discovery without imposing retroactive changes. Any additional steps should provide contractors with the flexibility to develop a compliance plan suitable for their businesses and involvement in government contracting.

#### **B. The Government Should Better Define the List of Chinese Affiliates Implicated by the Rule**

The Section recommends that in developing its final rule, the Government develop the list of Chinese affiliates implicated by the rule. The statute places this obligation on the Government, and Government identification is the most reasonable way to implement the rule. It is uniquely within the Government’s power to most effectively identify covered companies, in coordination with various federal agencies that are taking action on companies that pose security

threats, from the Department of Homeland Security to the Department of Commerce. Indeed, the Government has identified the below companies:

- Huawei Technologies Company
- ZTE Corporation
- Hytera Communications Corporation
- Hangzhou Hikvision Digital Technology Company
- Dahua Technology Company

Uniform, current, and easily accessible guidance concerning the affiliates of these companies—and other companies the Government identifies in the future--will be important for industry and contracting officers to have as well.

The Section acknowledges the difficulties inherent in the fact that these companies may change their names. But contractors are not in a better position to identify or locate related affiliates or affiliates whose names have changed. Indeed, the Section posits that the various Government agencies dealing with the threats posed by these entities are in a better position to identify the affiliates that should be covered by the rule. Government sharing of information and assistance to contractors to aid in the identification of covered companies and affiliates will be crucial, as will allowing sufficient time for industry to eliminate any newly-identified companies and affiliates from their supply chains.

If there is no common source defining the subsidiaries or affiliates the Government considers to be included within the definition of covered telecommunications equipment or services, this creates an information asymmetry as different contractors identify different lists, subsidiaries and affiliates based on unequal access to information or research techniques. As a result, the “reasonable inquiries” regarding the use of covered equipment and services will be based on different starting points and will be of inconsistent quality. This is important because each of the five Chinese companies listed in the current definition of covered telecommunications equipment or services appears to have dozens of subsidiaries and affiliates, depending on the currency, accuracy, and completeness of the available information. *See* Prohibited Agreements with Subsidiaries and Affiliates of Huawei Technologies Company and ZTE Corporation published by the University of Maryland IT Service Desk, which relied upon 2017 Annual Reports and other business databases, available at [https://umd.service-now.com/itsupport/?id=kb\\_article\\_view&sysparm\\_article=KB0014132&sys\\_kb\\_id=28015b70db0e3849382f1a51d96193f](https://umd.service-now.com/itsupport/?id=kb_article_view&sysparm_article=KB0014132&sys_kb_id=28015b70db0e3849382f1a51d96193f).

The Government is in the best position to promote the interests of Congress and the policy of Section 889 by identifying and publishing for the contracting community a common set of affiliates and subsidiaries of the five Chinese companies that are included within the current definition of covered telecommunications equipment or services.

As a matter of consistency and efficiency, the FAR Council should address the information asymmetry in the current regulations and clauses implementing Section 889 (including the recent Final Interim Rule, 85 Fed. Reg. 42665, July 14, 2020) by establishing a common source of information regarding its understanding of the affiliates and subsidiaries of the covered entities. The FAR Council could do this by clarifying that contractors and subcontractors may rely upon the list of excluded parties in SAM for entities excluded from receiving awards for “covered telecommunications equipment or services,” in accordance with the procedure of FAR 52.204-25(c) and FAR 52.204-26(b). Alternatively, the FAR Council could add a definition to these clauses or establish another method to provide a common source of information about which entities are considered affiliates and subsidiaries of the five Chinese companies listed in the current definition of covered telecommunications equipment or services. For example, the Government could maintain a website with the companies and affiliates’ names that would be updated frequently and could be accessed by contracting officers, contractors, and their suppliers. If there are concerns with alerting malefactors that their equipment or services have been identified, there might be specific provision for sharing certain information with contractors using such equipment or services.

**C. The Section Recommends that the FAR Council not Expand the Scope of FAR 52.204-24(b)(2) and 52.205-25(b)(2) to Affiliates**

The Interim Final Rule states that 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.” 84 Fed. Reg. at 42673. The Section recommends that the scope of the prohibitions not be expanded in this manner.

As an initial matter, we note that such an expansion would exceed the authority granted by Section 889(a)(1)(B), which prohibits executive agencies from entering into a contract (or extending or renewing a contract) “with an entity that uses” covered telecommunications equipment or services. If Congress had intended to prohibit agencies from entering into contracts with an entity “whose affiliates, parents, or subsidiaries use” covered telecommunications equipment or services, it would have so stated. Under well-established principles of corporate law, affiliates, parents, and subsidiaries are distinct legal entities and often have separate management and operations. While there may be overall common control at the level of the parent, the parent is merely a shareholder of its subsidiaries and often is not the legal entity seeking to enter into a contract with the Government. As a general matter, affiliates do not have the direct power to control each other. A subsidiary does not have the direct power to control its parent or other shareholders. Because the plain language of Section 889(a)(1)(B) is limited to the entity with whom the Government seeks to establish (or renew or extend) a contractual relationship, the FAR Council will exceed the authority granted by Congress if it seeks to apply



the prohibition of Section 889(a)(1)(B) to entities that have “affiliates, parents, and subsidiaries” that are using covered telecommunications equipment.

The FAR Council recognized this limitation on its authority when it declined to flow down the prohibition of Section 889(a)(1)(B) to subcontractors. As the FAR Council explained:

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.

84 Fed. Reg. at 42665. Elsewhere, the FAR Council correctly noted “[t]he 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.” 84 Fed. Reg. at 42667.

As a matter of corporate law, this reasoning is equally applicable to “affiliates, parents, and subsidiaries” of the prime contractor as it is to subcontractors. Just like subcontractors, an agency “does not directly ‘enter into a contract’ with” any of a prime contractor’s “affiliates, parents, and subsidiaries.” Thus, just as the FAR Council has concluded that the prohibition of Section 889(a)(1)(B) does not apply to a prime contractor’s subcontractors, the FAR Council should not extend the scope of this prohibition to a prime contractor’s affiliates, parents, or subsidiaries.

Not only is such an extension beyond Congress’s intent, it is also impracticable in many, if not most, circumstances. Especially in mid-size or large corporate families, the affiliates, parents, and subsidiaries often have separate telecommunications and video surveillance equipment, systems, and services. The prime contractor is unlikely to have either access to information or the ability to control the telecommunications equipment or services of its affiliated entities. Without the necessary insight into the telecommunications technology utilized by its affiliates, parents, or subsidiaries, prime contractors would have to seek voluntary cooperation or voluntary agreements. Affiliated entities within a larger corporate family often have different business plans and interests that do not align. Just because two entities are

affiliated does not mean that the non-Federal contracting entity will be willing to incur the time and expense necessary to share information about its telecommunications and video surveillance resources or be willing to make necessary adjustments to comply with Section 889(a)(1)(B). As a result, many entities with affiliates, parents, or subsidiaries will not be able to comply with the use prohibition if it is expanded in scope, and executive branch agencies will be unable to enter into contracts or extend or renew existing contracts with valued partners. This would be exacerbated if the entities have foreign affiliates, parents, or subsidiaries. Because Congress did not intend Section 889(a)(1)(B) to apply to contractors who have affiliates, parents, and subsidiaries who use covered telecommunications equipment or services, but who otherwise themselves comply with the use prohibition, and because such an expansion is impracticable and will reduce the number of contracting entities eligible to compete, the FAR Council should decline to expand the scope of the use prohibition in this manner.

This FAR Council's consideration of a potential expansion supports the conclusion that the current interim final rule does not apply to such related entities. Accordingly, a reading of the rule that supports some line-drawing between related entities makes sense. The Council should further consider whether such line-drawing might make sense not only on a legal entity basis, but also on a CAGE code, DUNS number, or even a site basis. The Section acknowledges that such line-drawing will be inappropriate where systems across entities or units are connected or are capable of connecting. Such an approach could help make the cost of implementing the rule more manageable.

The FAR Council asks a pertinent question: "If the scope of the 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?" The answer to this question – informed by industry input – is that the impact would be significant. To be required to make representations on behalf of a large corporate "family," including multiple entities that do not contract with the U.S. Government, would not only add to the cost of complying with the rule, but also would call into question whether compliance is even achievable. For example, a domestic affiliate operating internationally may be required to enter into access arrangements with the local telecommunications provider which built its networks on covered equipment, and the domestic affiliate has no ability to force a foreign country to rip and replace its infrastructure. There is also no practical difference between an international affiliate and domestic affiliate operating in those foreign countries. In addition, to the extent that those affiliated companies do not do business with, or related to, the U.S. Government (even indirectly as a subcontractor), there would be little or no benefit to be gained by forcing contractors to incur such costs. Small businesses asked to answer on their own behalf would have decisions to make that are no less difficult, such as whether to divide into separate commercial and federal entities, not offer certain capabilities or products, or to leave the federal marketplace altogether. Allowing individual businesses or business units (on a legal entity or other basis, as long as the entities' or units' systems are not connected or are not capable of being connected) to certify in their individual capacities could avoid this burdensome result.

**D. The Section Recommends that the FAR Council Consider the Unequal Compliance Burden on Small Business Enterprises.**

The Federal Acquisition Circular 2020-08 and its Small Entity Compliance Guide recognize that “[t]his rule applies to all acquisitions, including acquisitions at or below the simplified acquisition threshold and to acquisitions of commercial items, including commercially available off-the-shelf items. It may have a significant economic impact on a substantial number of small entities.”<sup>7</sup> In spite of that recognition, the FAR Council did not go far enough to clarify that a reasonable inquiry of use really should only pertain to the “use” by the first level prime entity and it does not apply to affiliates or related entities. The explanation given by the Director, Office of Government-wide Acquisition Policy, is that the purpose of implementing this interim rule is to “protect Government information and information and communication technology systems.”<sup>8</sup>

Small businesses are less likely to have extensive in-house information technology expertise. In fact, many such companies themselves rely on commercial items and Commercial Off-the-Shelf items to build their internal systems or rely on third-party service providers to assist with information technology systems and services. If the purpose of Section 889 is to protect Government information, then the Government is in the best position to control what information it discloses to its contractors and service providers. Unless a small business is selling the subject telecommunications and video equipment or providing it within its deliverables under a government contract (banned in Part A of Section 889), then it does not serve the stated purpose for the small business to have to inquire of all of its service providers whether they use the banned items supporting the small business (especially for business unrelated to its federal government contracts sales), if such services could not compromise government deliverables.

In their May 4, 2020 letter addressed to the Acting Director of OMB, Senators Rubio and Cardin raised these issues as well. They specifically asked that any implementing regulation provide “these small firms with a clear path toward compliance and a reasonable time frame” in which to achieve compliance.<sup>9</sup> As it took almost two years for the regulatory implementation to be issued for Part B, it is reasonable that small businesses would not have the resources and expertise to be able to fully implement the Part B requirement in the approximate month provided after the Final Interim Rule was issued and became effective.

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<sup>7</sup> See <https://www.govinfo.gov/content/pkg/FR-2020-07-14/pdf/2020-15294.pdf>

<sup>8</sup> *Id.*

<sup>9</sup> See [https://www.rubio.senate.gov/public/\\_cache/files/d3b3bb65-0118-465f-9f28-9bb685d5f17a/53960B476FF1C8E8D3CD56BFE6EB356F.05.04.2020-omb-letter-ndaa-sec.-889-implementation-final.pdf](https://www.rubio.senate.gov/public/_cache/files/d3b3bb65-0118-465f-9f28-9bb685d5f17a/53960B476FF1C8E8D3CD56BFE6EB356F.05.04.2020-omb-letter-ndaa-sec.-889-implementation-final.pdf)

**E. The Section Recommends that the FAR Council Revise FAR 52.204-25(c) to Provide Clarity and Better Reflect the Statutory Exceptions.**

Section 889(a)(2) provides that nothing in the Section 889(a)(1) prohibition shall be construed to:

(A) 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

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

Section 889(a)(2). The Final Interim Rule tracks these statutory provisions verbatim in the new FAR 52.204-24(b).

*Clarify the Applicability of Section 889(a)(2)(A)*

By its terms, the exception at Section 889(a)(2)(A) only applies to procurements by an executive agency and does not extend to prime contractors or their subcontractors. The same is true of FAR 52.204-24(b)(i). The Final Interim Rule expressly confirms this, noting that exception (a)(2)(A):

***applies only to a Government agency*** that is contracting with an entity to provide a service ... ***[and] does 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.

85 Fed. Reg. 42668-69 (emphasis added). Unfortunately, the reference to procurements by an executive agency is easily overlooked and often leads prime contractors and their subcontractors/suppliers to assume they fall within the exception. In order to promote consistent application of the exception at all levels, the Section recommends that the FAR Council revise FAR 52.204-24(b)(i) to more clearly and prominently describe the scope of the Section 889(a)(2)(A) exception. A suggested revision is set forth below.

*Update FAR 52.204-25 to Accurately Reflect Section 889(a)(2)(B)*

As noted, Section 889(a)(2)(B) states that nothing in the prohibitions in Section 889(a)(1) shall be construed to “cover telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.” The new FAR 52.204-24(b)(2) adopts this language verbatim.

In contrast, FAR 52.204-25 takes a more indirect approach and can be read as altering Congress's express carve-out of the types of telecommunications equipment in question. More particularly, FAR 52.204-25(b)(2) provides that the prohibition on use applies "unless an exception at paragraph (c) of this clause applies." But FAR 52.204-25(c) was not altered to reflect the use prohibition under Section 889(a)(1)(B). It still contains the language developed to implement Section 889(a)(1)(A), which relates solely to what is being provided to the Government. As a result, FAR 52.204-25(c) can be read as excepting the specific types of covered telecommunications equipment and services only when they are being *provided* directly to the Government, versus also excepting any use of such equipment or services by the prime contractor. Section 889(a) does not support such an outcome. Indeed, Section 889(a)(2) makes clear that the exceptions apply to *both* prohibitions in 889(a)(1): "**Nothing** in paragraph (1) shall be construed to 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." This inconsistency appears to result from the failure to update FAR 52.204-25(c) to reflect 889(a)(1)(B)'s taking effect.

The Section recommends the following revision to FAR 52.204-25(c):

"This clause does not prohibit contractors from ~~providing~~—

(1) **Providing the Government** a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; ~~or~~

(2) **Providing the Government** telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handle; or

(3) **Using** telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handle, **or using a system or service that uses such telecommunications equipment** that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handle."

#### **F. The Section Recommends that the Time Period for the Reporting Requirement be Extended**

The language in FAR 52.204-25(d) as applied to contractor reporting of prohibited use could be a challenge for industry because of the much broader requirements in Section 889(a)(1)(B) that have now been implemented in the FAR. The Section is concerned that it may be unrealistic to expect notification for all affected contracts to be accomplished *within 1 business day* to the extent contractors discover equipment usage that affects their entire enterprises. Large and mid-tier companies could have hundreds of impacted contracts and thus would have to devote significant time and resources to reporting, which would take valuable

time away from developing plans to remove and replace equipment. In addition, the parallel requirement to report prohibited use to the DIBNet site seems unnecessary absent an indication of a cyberattack related to prohibited equipment especially because the main purpose of the DIBNet is to inform the Government and not educate industry. The reporting requirement should be extended to three days, at a minimum.

#### **G. The Section Recommends More Flexibility in the Waiver Process**

Consistent with federal law, the FAR Council should consider ways to provide for more flexibility and time for contractors to fully implement a compliance plan, which the FAR Council itself acknowledges will take a year to develop.

As written, the Final Interim Rule makes waivers difficult to receive by design and puts contractors requesting waiver at a competitive disadvantage. The Final Interim Rule for contractors was published on July 14, less than a month before its effective date. Prior to that date, the statutory requirement *only* applied to the U.S. Government and its ability to contract and lacked definitions as well as implementation guidance. The Section respectfully submits that more flexibility is required.

The Government risks losing innovation and access to disruptive capabilities by setting high barriers to entry to government contracting with limited time to comply and limited flexibility. Contractors are required to treat each prohibited use discovered in the same manner regardless of the real-world cyber risk to systems or whether there can be an opportunity to discuss with the Government whether the risk is acceptable. Cybersecurity professionals are accustomed to identifying, balancing, and mitigating risks every day. The Section respectfully submits that the Final Interim Rule should acknowledge risk management principles and provide flexibility in the waiver process.

Based on the foregoing, the Section recommends that the FAR Council consider immediate changes to ease implementation burdens. In light of the year that the FAR Council recognizes it will take to achieve compliance, the Section recommends that the FAR Council take action quickly to provide agencies with the authority to grant contractors provisional waivers of up to a year as long as the contractor asserts it has a remediation plan that is achievable within that time period and commits to implementing it. If possible, agency heads should be empowered to grant waivers on a class basis. This would strongly encourage contractors to take a robust risk-based approach without potentially risking being ineligible for future contracts and extensions (*i.e.*, putting themselves out of business).

### **III. CONCLUSION**

The Section appreciates the opportunity to provide these comments on the early engagement process and is available to provide additional information or assistance as you may require.

Sincerely,  
/s Susan Warshaw Ebner  
Chair, Section of Public Contract Law

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