September 14, 2020

General Services Administration

Regulatory Secretariat Division

1800 F Street NW, 2nd Floor

Washington, DC 20405

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

On behalf of the Computing Technology Industry Association (CompTIA), the largest information technology association with over 2,500 members, we respectfully submit our consensus positions on Section 889(a)(1)(B).

CompTIA is a member of CODSIA[1] and as such fully supports the CODSIA filing on Section 889(a)(1)(B). There are a few areas where we would like to amplify and supplement the CODSIA messaging.

Modify the Contractor Representation to Reflect the Prohibition under Section 889(a)(1)(B) and Provide for a Mitigation Period

Section 889(a)(1)(B) prohibits agencies from contracting with entities that use "any equipment, system, or service that uses covered telecommunications equipment or services ***as a substantial or essential component of any system, or as critical technology as part of any system***."[2] (Emphasis added). Notwithstanding the statute's plain language qualifying the "use" prohibition, the representation under FAR 52.204-24(d)(2) is broader than the underlying prohibition. The representation asks if the offeror "does [or] does not use covered telecommunications equipment or services,

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

[2] We note that many terms in the Interim remain undefined such as system or entity and would urge that definitions be developed that provide flexibility to the contracting community to comply with the policy purposes of the Interim Rule while facilitating effective compliance.

or use any equipment, system, or service that uses covered telecommunications equipment or services." It is not qualified by the statutory condition that the procurement prohibitions apply only if offeror uses the covered telecommunications equipment or services as "a substantial or essential component of any system, or as critical technology as part of any system."

As the drafters recognized by delegating to contractors the responsibility to undertake a "reasonable inquiry," contractors are best positioned to evaluate the information in their possession about the use of covered equipment or services across their systems. The same is true for contractors' ability to determine if any such equipment or services are either a substantial or essential component of any contractor system, or are being used as critical technology for any contractor system. Shifting this assessment to contracting officers and requiring agencies to assess and understand contractor systems and the components thereof, including myriad contractor systems that are unrelated to their federal contracts, will result in delay and likely will cause many contractors to go through the waiver process unnecessarily, potentially depriving the agency of the contractors' solutions. It also places contractors at a competitive disadvantage, even if their solutions do not contravene the statutory prohibition. Similarly, contractors are best positioned to undertake the technical analysis necessary to determine if an exception under Section 889(a)(2) applies.

In addition, the interim rule should recognize that even if a contractor checks "does" in response to the required representations that the procurement prohibition should not take effect until a definitive determination has been completed that establishes the technology at issue comprises a substantial or essential component of any contractor system or is critical technology or is not subject to an exception or eligible for a waiver. The process for reaching this determination should explicitly require that the Government PCO engage with the contractor before taking any procurement action based on the representation, including providing the contractor the reasonable opportunity to respond to any assessments by the PCO regarding the use of potentially covered technology. In order to effectively identify and mitigate the potential security threats presented by covered technology, it will be essential to allow contractors to assess and mitigate such technology without triggering de facto debarment from federal contracting – a draconian sanction that will in many cases result in unfairly punishing US companies and US workers and depriving the government of competitive solutions.

Define "Reasonable Inquiry" Narrowly for Representation Requirements

We commend the drafters for taking steps to reduce the information collection burden Sec. 889(a)(1)(B) imposes on contractors by making updates to the System for Award Management (SAM) to allow contractors to represent annually whether they use covered equipment. We also appreciate that the rule allows contractors to represent that they do not use covered equipment if a "reasonable inquiry" does not identify or reveal their use. "Reasonable inquiry" is defined in the rule to mean "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." Because the rule notes a "reasonable inquiry" is intended to uncover information that is "in the entity's possession," we interpret this phrase as describing internal sources of what telecommunications or video surveillance equipment or services the company uses, through a search of contracts and/or other records.

We object to any interpretation or comments intended to expand the scope of the "reasonable inquiry" requirement, which would place a substantial burden on government contractors to the point of being impracticable. In order to ensure that the requirements are practicable across government contractors, the definition should retain the critical qualifications that a "reasonable inquiry" is limited to information "in the entity's possession" and exclude the "need to include an internal or third-party audit." A "reasonable inquiry" should be limited to a review of information in the prime contractor's possession regarding whether covered equipment is being used in its supply chain. A "reasonable inquiry" would not include a proactive review of third-party suppliers beyond information that is currently available to the prime contractor.

Similarly, the statute and the interim rule each make clear that the prohibition in Section 889(a)(1)(B) does not directly apply to, and therefore does not flow down to, subcontractors or suppliers. Thus, a subcontractor's use of the proscribed equipment or services is relevant only when its provision of supplies and services to a prime contractor results in the prime contractor's "use" of proscribed equipment or services. It would be beneficial therefore if the final rule confirmed that "examining relationships with any subcontractor or supplier for which the prime contractor has a Federal contract" means that prime contractors are expected to examine information in their possession about the telecommunication equipment and services provided by subcontractors to assess whether that amounts to use by the prime contractor. The alternative—an intrusive and complex assessment of subcontractors' and suppliers' supply chain—runs counter to the definition of "a reasonable inquiry" and the FAR Council's determination that Part B does not flow down to subcontractors.

Do not require a proactive review of third-party suppliers beyond information available to the prime contractor

While the drafters have determined the rule's representation requirement does not flow down to subcontractors, the text of Sec. 889(a)(1)(B), which prohibits agencies from entering into 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," should not be interpreted to apply to the entity's whole supply chain but rather limited to the equipment or services the entity itself uses. The rule's definition of "reasonable inquiry" only concerns the entity's own records, not those of the entity's suppliers or subcontractors. The drafters should confirm that a prime contractor's "reasonable inquiry" does not include an inspection of its subcontractors' or suppliers' records, which

would otherwise be unknown to the prime contractor and unavailable as subcontractors and suppliers are under no legal obligation to proffer such information. Additionally, because the Part B prohibition in FAR 52.204-25(b)(2) does not apply to, or flow down to, subcontractors, the reporting requirement stated in FAR 52.204-25(d) should also not flow down in the Final Rule.

Expending the rule to require a proactive review of all "subcontractors or suppliers for which the prime contractor has a Federal contract" to ensure that they are aware of the requirements or, in the case of suppliers with access to customer data, obtain certification that they do not use covered equipment in their supply chains, would place a tremendous burden on government contractors looking to comply with the requirements of Sec. 889(a)(1)(B). Government contractors have relationships with thousands of suppliers, many of whose services are wholly unrelated to the government contracts in question (*e.g.*, food service vendors, office supply vendors), and may have limited or no access to information about equipment being used by those suppliers. The burden of requiring a proactive assessment from suppliers from a cost perspective outweighs the marginal benefits from a security perspective. At best, such an interpretation would impose substantial costs across most government contractors, which would increase the cost of services rendered and stifle competition in the government contracting space. At worst, it could render the rule wholly impracticable for many key government contractors and jeopardize agencies' access to myriad products and services. Again, the end result may punish US companies and workers with de facto debarment for security risks that may be theoretical or minimal. To balance the objectives of security with these other considerations, the "reasonable inquiry" requirement should focus on information that is readily available to the prime contractor that would indicate covered equipment is being used by one of their suppliers.

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

Currently, the rule defines "offeror" to mean "the entity that executes the contract." However, the FAR Council is considering an expansion of this definition to encompass an entity's affiliates, subsidiaries and parents that are domestic concerns through finalization of this rulemaking that would take effect August 13, 2021. We recommend that the definition remain as is because: (i) the current definition of entity is consistent with how entity is construed for Sec. 889(a)(1)(A), which has been in effect for Part A since 2019, not to mention the manner in which numerous other FAR provisions apply to contractor "entities"; (ii) any "affiliate" equipment or service being "used" by the prime "entity" would already be captured under the current interim rule and thus covers the congressional intent; and (iii) the policy purposes of the interim rule would not be served by expanding its application to international operations unrelated to contractors' actual use Thus, we recommend the drafters not adopt this expansion and keep the definition of "offeror" as is.

We appreciate your attention to these comments and hope they prove useful. CompTIA stands ready to work with all federal government stakeholders to find common ground

that will emphasis national security imperatives while ensuring the continuation of a healthy commercial industrial base. If you have any questions or need any additional information, please do not hesitate to contact David Logsdon, Staff Director, CompTIA Federal Procurement Council who can be reached at (202) 682-4440 or dlogsdon@comptia.org