



U.S. CHAMBER OF COMMERCE

October 15, 2019

Janet M. Fry
Director
Federal Acquisition Policy Division, Office of Government-Wide Policy
General Services Administration
1800 F Street, N.W.
Washington, D.C. 20405

Subject: FAR Case 2018-017—Interim Rule, *Federal Acquisition Regulation: Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment*

Dear Ms. Fry and Colleagues:

The U.S. Chamber of Commerce appreciates the opportunity to comment on the interim rule (IR/the rule) *Federal Acquisition Regulation: Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment*. The IR—issued by the Department of Defense (DoD), the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA)—amends the Federal Acquisition Regulation (FAR) to implement section 889(a)(1)(A) of the John S. McCain National Defense Authorization Act for FY 2019 (P.L. 115-232).¹

The Chamber does not attempt to comment on every aspect of the rule. Instead, we advocate for greater flexibility in reporting, a standard way to make representations, and more clarity concerning the scope of covered equipment and services.

IR BASICS

What's (mostly) covered

According to the IR, section 889(a)(1)(A) prohibits agencies 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 a critical technology as part of any system.” The rule went into effect on August 13, 2019.*

The promulgation of the IR bypassed some of the time usually allotted for notice and comment proceedings.² Section 889 and the rule currently target a handful of companies and their covered equipment. However, section 889/the IR include vague provisions that grant U.S. national security officials the ability to weave additional equipment and services into the procurement ban at practically any time.³ Such ambiguity regarding the rule’s processes and expected outcomes can create major difficulties for private parties that look to smartly comply with new contracting requirements.

* For the sake of simplicity, this letter will refer to covered telecommunications equipment, systems, or services collectively as covered equipment. Also, terms like contractor, offeror, and provider are used interchangeably.

New acquisition requirements provided in the IR

According to DoD et al., the IR provides a new solicitation provision and contract mandates. The provision at FAR 52.204-24 requires offerors to represent whether their bids include covered equipment and, if so, explain its use. Representations (self-certifications) are also required for orders on indefinite delivery schedules. The clause at FAR 52.204-25 prohibits contractors from providing any “equipment, system, or service” that uses covered equipment as a considerable or main component of any system, including critical technology, unless a waiver applies. What’s more, contractors must report any covered equipment discovered during contract performance. This applies equally to subcontractors.

DoD et al. note that the IR applies to all acquisitions, including acquisitions at or below the simplified acquisition threshold and acquisitions of commercially available off-the-shelf (COTS) items. Rule writers recognize that the new procurement requirements may have a meaningful economic impact on a considerable number of small businesses.⁴

THE RULE SHOULD PROVIDE OFFERORS GREATER FLEXIBILITY IN REPORTING AND MORE CLARITY ABOUT COVERED EQUIPMENT

The scope of the covered equipment that the IR captures is broad and expected to grow. The rule and its underlying law represent a new government-wide prohibition concerning the purchase of covered equipment provided by specific foreign companies. The acquisition ban also captures COTS items, which are typically excluded from federal procurement rules. Indeed, the breadth of the IR’s requirements create significant obligations for federal contractors. The rule subjects businesses to an untested compliance regime, raising understandable concerns from many in industry about the effectiveness of their due diligence programs. The Chamber urges DoD et al. to take the following issues into account as they modify the rule.

Reporting timelines need added flexibility

The IR notes that in the event covered equipment is discovered by a contractor, including a subcontractor, the offeror shall report the discovery to its agency contracting officer *within one business day*. Such a quick turnaround seems difficult and unrealistic. While the Chamber understands the government’s desire for swift reporting, given national security concerns, contractors need a reasonable amount of time to investigate and determine with relative confidence that the equipment in question is actually covered under section 889 and the rule.

The IR also calls on contractors to alert agency officials *within 10 business days* regarding additional mitigation actions that are being undertaken by the offeror, or recommended to the government, vis-à-vis-the covered equipment. Related, a contractor must describe the activities it is taking to prevent the future use of covered equipment. These requirements are not simple tasks, and they can be even more challenging for small businesses that often operate with comparatively limited resources.

The Chamber urges agency officials to grant contractors greater flexibility in reporting activities that are required under the IR. In the Chamber’s experience, commercial providers want to meet contracting requirements with as much veracity and efficiency as possible. They also want to avoid rushes to judgment that can be precipitated by narrow reporting requirements.

Representation requirements should be standardized

The Chamber believes that the rule should provide for standardized language regarding making representations. A model form, for example, could be used by offerors to voluntarily self-certify they *will or will not* provide covered equipment to the government in the performance of a contract or a related solicitation. A standard document should include citations to relevant statutes and regulations. Indeed, the government has provided standardized approaches to meeting certifications in other situations (e.g., the Buy American Act).⁵ In sum, the inclusion of a uniform document could contribute to greater accuracy and consistency in the representations and disclosures that contractors and subcontractors are called on to make.

Scope of covered equipment needs clarifying

Section 889 prohibits agencies from procuring covered equipment. It went into effect on August 13, 2019. The underlying law and the IR feature ambiguous provisions that create uncertainty for businesses that seek to comply with the new contracting rules. First, section 889(f)(3)(C) includes telecommunications or video surveillance services provided by the entities named in sections 889(f)(3)(A) and 889(f)(3)(B), including their subsidiaries or affiliates, which are not named. Second, section 889(f)(3)(D) permits U.S. national security officials to cover many kinds of equipment that they reasonably believe to be “an entity owned or controlled by, or otherwise connected to, the government of [China].” Such open-ended language could result in many entities’ equipment being brought under the authority of the IR.

Third, owing to the global nature of companies’ supply chains, some of the entities named here offer products (or product components) and/or services that fall into one or more categories, which adds to the complexity of implementing and/or complying with the rule. Fourth, the Chamber urges policymakers to ensure that the section 889/IR procurement prohibition does not drift to include nonfederal sales or the use of covered equipment by a federal contractor that is not related to agency work.

FY 19 NDAA (P.L. 115-232, 132 STAT. 1918

(f) DEFINITIONS.—In this section:

(3) COVERED TELECOMMUNICATIONS EQUIPMENT OR SERVICES.—The term “covered telecommunications equipment or services” means any of the following:

(A) Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities).

(B) For the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, 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).

(C) Telecommunications or video surveillance services provided by such entities or using such equipment.

(D) Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country [China].

Hence, the Chamber would welcome working with rule writers to help contractors better understand the scope of covered equipment.

The Chamber welcomes the opportunity to comment on the IR. We partner with the government in both combating national security threats posed by malicious actors and advocating for international trade policies that benefit consumers and businesses, including small contractors that provide a wide array of cutting-edge products and services to the federal government. If you have any questions or need more information, please do not hesitate to contact Christopher Roberti (croberti@uschamber.com, 202-463-3100) or Matthew Eggers (meggers@uschamber.com, 202-463-5619).

Sincerely,



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Senior Vice President, Cyber, Intelligence,
and Security



Matthew J. Eggers
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Endnotes

¹ www.federalregister.gov/documents/2019/08/13/2019-17201/federal-acquisition-regulation-prohibition-on-contracting-for-certain-telecommunications-and-video

www.congress.gov/115/plaws/publ232/PLAW-115publ232.pdf

² *Federal Register* (FR) 40219.

³ John S. McCain National Defense Authorization Act for FY 2019 (P.L. 115-232), 132 STAT. 1917–1918.

⁴ www.federalregister.gov/documents/2019/08/13/2019-17200/federal-acquisition-regulation-federal-acquisition-circular-2019-05-introduction ; see, too, FR 40216–40219.

⁵ See, for example, www.womblebondnickinson.com/sites/default/files/2018-04/Buy%20American%20Act%20Certificate.pdf; <https://hollandhart.com/files/Buy-American-Act-Common-Non-compliance.pdf>. The U.S. Chamber of Commerce does not necessarily endorse these documents.