



September 14, 2020

Dr. Michael E. Wooten
Administrator
Office of Federal Procurement Policy
Office of Management and Budget
Washington, DC 20503

RE: FAR Case 2019-009, *Interim Rule*—Federal Acquisition Regulation: Prohibition on Contracting With Entities Using Certain Telecommunications and Video Surveillance Services or Equipment

Dear Administrator Wooten:

The Security Industry Association (SIA) respectfully submits the following comments on the interim rule 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 2019 (Pub. L. 115-232).

SIA is the leading national trade association representing providers of security solutions. Our membership includes most manufacturers of video surveillance equipment with business operations in the U.S., as well as a significant number of security systems integrators that install and maintain video surveillance systems for end users in both the government and commercial sectors. Among our members are nearly 300 providers of video surveillance products and services including many that provide video surveillance products and services to the federal government.

Section 889(a)(1)(B), known as “Part B,” prohibits agencies from contracting with entities that use covered telecommunications and video surveillance equipment and services provided by certain China-based firms, or an any equipment, system, or service that uses these products, beginning on August 13, 2020.

SIA supports the national and economic security goals that underpin section 889’s limitations on procurement and use of products that could potentially present risks to sensitive information systems and infrastructure. However, endless delays in publishing the rule, then publication of an interim final versus proposed rule, resulted in just weeks for federal suppliers to review the requirements and implement compliance mechanisms. Every federal contractor is affected by these requirements, which are unprecedented both in scope and billions in expected compliance costs. Additionally, the interim rule only partially addresses considerable ambiguities in the law that have led to uncertainty about compliance requirements.

Our Comments. Given the focus of the security industry, the following comments are specific to the video surveillance equipment and services addressed in the rulemaking. Additionally, we do not attempt to address each of the questions requested in the interim rule, many of which are targeted to individual contractors. Instead, we offer collective input from affected member stakeholders that are federal contract holders and/or provide products and services to such entities.

Definition of Terms. The most pressing need in the final rule is clearer meanings of key terms in section 889, where the interim rule does not go far enough. In general, SIA supports definitions for these terms that were first proposed to OMB by a multi-industry group of stakeholders in June 2020¹ (see Recommended Definitions below).

We offer the following comments on elements of the interim rule that impact understanding of these terms.

Do Not Expand the Interpretation of “Offeror.” While the statute did not define “entity,” the interim rule uses the term “offeror,” referring to the entity that executes the contract. Additionally it states the use prohibition *“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.”*

These are very helpful interpretations which make clear that only contract-holding entities (prime contractors) are subject to the prohibition under Part B, aiding accurate representations and straightforward compliance. The interim rule’s treatment of the term “entity” should be retained in any final rule, versus expansion to parents, subsidiaries or affiliates of the offerors, as contemplated by the FAR Council. Such an expansion would have wide-ranging consequences unnecessarily harmful to the business community by increasing compliance burdens and adversely affecting a large number of additional business organizations that may have no connection to the federal government, sensitive information systems or infrastructure, and operate independently, often with separate information systems and processes.

Interpret Prohibited “Use” More Specifically: While the interim rule does not fully clarify what is meant by prohibited entity “use” in the statute, it specifies that the prohibition *“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,”* and adds *“regardless of whether that usage is in performance of work under a Federal contract.”*

It further explains, *“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.”* Elsewhere, the rule states that the “reasonable inquiry” expected of contractors, is to determine whether the “entity itself” uses covered equipment or services.

Some of these clarifications are beneficial to compliance efforts, such as establishing an apparent threshold – use that could allow the “exfiltration of sensitive data from contractor systems.” However, as the interim rule also applies the prohibition to uses outside the performance of a federal contract, this broad interpretation appears to reach activity unrelated to federal work, with no nexus to government systems or contracts, but otherwise part of normal business operations. This is expected to have widespread impact on the federal contracting community across many sectors, as video surveillance equipment manufactured by the Chinese firms listed are some of the most commonly installed in commercial facilities throughout the United States.

¹ https://www.reginfo.gov/public/do/eomeetingrequest?id=wy-7_qN8uVaB2FCYOFGB0snKUij-4qYHggDLMg15udIoMkrK-b7vmQkH5deKsfH3rYn0Q15GmjMlxsV89RRx4Gik6ArRm6Q3ZzVopac

To align with the national security and economic aims of the law, any final rule should define prohibited use more specifically to address scenarios where covered equipment or services could be used in ways related to contract performance that may present a risk to federal networks, facilities, or supply chains, but are not directly included in products or services provided to the government – in which case the procurement prohibition under section (a)(1)(A) would apply.

Part B Scope. SIA notes that questions were raised by security contractors on a webinar hosted by GSA on July 30, 2020, pertaining to whether or not Part B could impact their commercial (non-federal) sales of video surveillance products provided by the manufacturers listed in section 889. An agency official subsequently requested industry feedback via this comment process.

In typical instances involving commercial sales, installation, and servicing of video surveillance equipment at customer sites, the customer is the entity using the equipment and the role of the supplier is limited to these purposes versus the qualifying criteria for covered video surveillance equipment found in section 889(f)(3)(B). These commercial activities cannot reasonably be construed as “use” under a plain reading of the statute and interim rule, and are outside the scope of Part B.

The use purpose criteria were recently highlighted in the “decision tree” posted on Acquisition.gov from the federal Supply Chain Risk Management (SCRM) Review Board² in order to help contractors determine whether a prohibition applies under Part B. For determining specifically whether video surveillance equipment used by a contractor is covered, the document provides the following (excerpt):

*ii. Per (f)(3)(B) of Section 889 - Is the equipment video surveillance and telecommunication equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company or a subsidiary or affiliate **AND** do any of the following purposes of the use of technology apply?*

- 1. Public Safety?*
- 2. Security of Government facilities?*
- 3. Physical security surveillance of critical infrastructure?*
- 4. Other National Security Purposes?*

We note such multi-agency guidance is very beneficial to compliance efforts and SIA encourages further development of such resources. Additionally, specific compliance scenarios that show how a contractor can apply these statutory qualifiers for covered video surveillance equipment would be extremely helpful to our members and their customers.

Authoritative and Comprehensive List of Subsidiaries and Affiliates. To further aid compliance, the final rule should identify a government source that lists subsidiaries and affiliates of the Chinese entities listed in section 889, whose products are also subject to its restrictions. There are a number of sources that list affiliates or subsidiaries of the covered entities, but these are either not authoritative or incomplete. All such subsidiaries and affiliates should also be listed on the System for Award Management (SAM) Excluded Parties List.

² https://www.gsa.gov/cdnstatic/SCRM%20review%20board%20889%20PART%20B%20Rubric_20200901.pdf

SIA supports the objective of section 889 to help mitigate potential cyber risk to sensitive information systems and the federal enterprise. However, given the challenging timeline under which the interim rule was published and implemented, any final rule should fully consider and incorporate industry feedback, including the need to fully define key terms in section 889 as well as new terms that appear in the interim rule. We believe this will foster straightforward and thorough compliance with the law, furthering this objective.

Thank you for consideration of SIA's comments. We stand ready to assist in providing further input or any additional information from the industry that may be necessary.

Respectfully Submitted,



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Recommended Definitions³

Entity

"The term 'entity' does not include any parent, subsidiary or affiliate of such entity."

Use

"The term 'use' means use that is—

- (i) by an entity;
- (ii) in the United States; and
- (iii) in fulfillment of the contract."

System

"The term 'system' means a system used in fulfillment of the contract."

Fulfillment of the contract

The wording "fulfillment of the contract" refers to "[E]quipment, services, or systems are used 'in fulfillment of the contract' if they are required for the performance of services under the contract or the furnishing of a product under the contract."

³ These definitions are taken from an industry paper presented to OMB by the U.S. Chamber of Commerce and a multi-industry group of business organizations in June 2020. https://www.reginfo.gov/public/do/eomeetingrequest?id=wy-7_qN8uVaB2FCYOFGB0snKUIj-4qYHggDLMg15udIoMkrK-b7vmQkH5deKsfH3rYn0Q15GmjMlxsV89RRx4Gik6ArRm6Q3ZzVopac