October 15, 2019

General Services Administration
Regulatory Secretariat Division (MVCB)
1800 F Street NW, 2nd Floor
Washington, DC 20405

Re: Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment (FAR Case 2018–017)

Via email: www.regulations.gov
RIN 9000-AN83

To Whom It May Concern:

On behalf of the Professional Services Council, HUBZone Contractors National Council, Montgomery County Chamber of Commerce GovConNet Council, and Women Impacting Public Policy, we are pleased to submit the following comments on the interim final rule "Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment" (FAR Case 2018–017), implementing section 889(a)(1)(A) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year 2019 (Pub. L. 115–232), published in the *Federal Register* on Tuesday, August 13, 2019.

Our associations support efforts to protect national security interests, critical technologies and contractor supply chains from potential threats. Our member companies are committed to implementing supply chain risk management policies that continuously prioritize, assess and address any threats or vulnerabilities to their cyber and supply chain security.

That said, we are disappointed in the timing of this regulation. While not a surprise given the NDAA's statutory deadline for the prohibition on covered telecommunications equipment or services to take effect, the impacted community was provided only three days to view the rule. The interim regulation was released on its effective date. As a result, the rule provided no time for agencies to adequately prepare, to adjust their contract writing systems, and to ensure the prohibition takes effect in the most seamless and efficient manner. It further provided no time for contractors to investigate their supply chains or prepare for the required flow down actions. More importantly, companies were required to make a representation regarding their supply chain from day one without time to prepare.
It is important to point out that while this regulation will add significant and new costs and other burdens for the contractor community, addressing the prohibitions will disproportionately impact small businesses in the federal marketplace.

For example, without necessary clarification to the definitions listed below, particularly with regard to the coverage for affiliates and subsidiaries, and a specific list of covered prohibited equipment and services, each company will have to independently determine all products, components of products, and services of all companies connected to the named companies. This will be a time-consuming, burdensome and costly exercise that must occur before the company can begin to determine if any covered telecommunications equipment or service is used in their supply chain. The time and costs associated with implementing this prohibition will be significant across the federal marketplace—but the lack of resources and scale may leave many small businesses with few options but to risk non-compliance or contract performance, or decline to participate in procurements.

While the prohibition is now in effect, we believe that the government can and should take a number of specific actions discussed below to achieve a less burdensome and more seamless implementation:

1) We urge the government to act expeditiously to implement an annual certification through the System for Award Management (SAM) database, as referenced in the supplemental information accompanying the rule:

> *"In order to reduce the information collection burden imposed on the public, DoD, GSA, and NASA are currently working on updates to the System for Award Management to allow offerors to represent annually whether they sell equipment, systems, or services that include covered telecommunications equipment or services. Only offerors that provide an affirmative response to the annual representation would be required to provide the offer-by-offer representation in their offers for contracts and for task or delivery orders under indefinite delivery contracts."*

Many of our associations' companies, and others in the federal market, may not be impacted by this regulation's prohibition on the covered telecommunications equipment and services, but will be impacted by the administration of implementing this prohibition. For these companies, a one-time, annual certification, rather than offer-by-offer representation, would dramatically reduce the administrative burden on, and the compliance costs for, both the government and federal contracting community.[1]

A single certification will further save time and allow contracting officers and agencies to focus on the waiver requests and the required laydown or description of covered telecommunications equipment or services (See FAR 4.2104(a)(1)(ii)) and phase-out plans for offerors that have identified the presence of such covered equipment or services in their supply chain.

[1] Even with an annual certification, however, if a federal agency orders or becomes aware of the presence of covered telecommunications equipment, the contractor must notify SAM and make the required disclosure.

2) We are concerned about the flowdown burden. The Clause at 52.204-25 does not have a specific mandatory flowdown provision but both the representation and contract clause address the prohibition on the government acquiring covered telecommunications equipment or services via contract or subcontract. In addition, the interim rule adds the prohibition in FAR 52.204-25 to the list of applicable provisions in the Clause at 52.244-6, "Subcontracts for Commercial Items."

Thus, since the rule is structured to prohibit the government from acquiring prohibited products or services without the waiver or a valid exception, and each offeror must make an affirmative representation whether it will (or will not) provide covered telecommunications equipment or service, each actual or interested offeror has no choice but to flow down the essence of the enumerated representation to all of its subcontractors and vendors, and to take proactive action to inquire across the offeror's entire supply chain about the existing of such equipment and services, regardless of the level. In addition, each actual or interested offeror must also plan to continuously update that information to fulfill the reporting obligations under FAR 52.204-25(d).

As a result, this algorithmic increase in the number of entities that are required to inspect and report on whether any covered equipment or services are provided (or affirm that no such covered equipment or service is provided) compels a process that allows offerors adequate time to knowingly make the correct representation as part of a government solicitation and during contract performance. Many of the recommendations we make elsewhere in these comments, particularly regarding the publication of a list of covered equipment and services, would significantly reduce the burden on all offerors and contractors.

3) We urge the government to better clarify and ensure a consistent application of the rule's circular definition of "substantial or essential." As provided for in the definition provision:

> *"Substantial or essential component means any component necessary for the proper function or performance of a piece of equipment, system, or service."*

We understand that this definition is intended to convey to industry that not every telecommunications equipment and service is covered by the prohibition and must be removed from the supply chain. That said, this definition, coupled with the authority of individual agencies to determine if a component meets these criteria, lacks certainty for offerors and contractors and could result in inconsistent application of the coverage and of waivers across the government. Our associations urge the government to clarify this critical definition and also ensure consistent application government-wide to avoid confusion among the contractor community (including between similar contracts) as to what specific components or services are covered by the prohibition.

4) We are further concerned with the definition of covered telecommunications equipment or services and urge the government to specifically identify and publish a list of all of the covered products and services.

While the rule includes four criteria that will determine if the product or service is covered, the government should publish a list of the specific products and services that it knows to be covered, rather than simply cite the manufacturer as in the current interim rule and require every contractor to independently try to verify coverage.

For example, the first criteria states: *"Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate),"* while the second states: *"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)."*

We recognize this will be an extensive list of both the subsidiaries and affiliates and the products and services covered. We therefore recommend that the government issue a more definitive list of the companies and the products and services so each individual contracting officer and each company does not have to take on the administrative burden of producing its own list that may or may not include every product or service that government intends to cover. Without such a list, many companies—including and especially small businesses who lack the resources to investigate each and every subsidiary and affiliate's product or service—are at risk of non-compliance despite their best efforts and intentions.

The fourth listed criterion is: "*Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of National Intelligence or the Director of the Federal Bureau of Investigations, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country."*

Again, our associations believe that contractors and contracting officers must be provided with a specific list of products and services covered by this criterion to avoid confusion and unintended non-compliance. We urge the government to detail the processes and procedures used to determine what products and services will be added as determined by the Secretary, and how companies will be notified about any new additions to the covered telecommunications equipment and services list.

A description of this process—as well as the process by which new, additional products or services and new, additional affiliates and subsidiaries are added to the prohibition—would be beneficial for the government and the contractor community. A seamless process is necessary for the government to be able to move at the speed of security and relevancy. Issuing a new government-wide regulation every time a product or service, or new affiliated company is determined to be covered, will not address the

threats or risks in a timely manner and will likely impose additional burdens on contracting officers and the contractor community.

5) We recommend that the government expand information regarding the waivers and exceptions, and the processes used to communicate the waivers and exceptions, as described in FAR 4.2102 and 4.2104.

Our associations believe the government should clarify the communications procedures for the companies granted a waiver under 4.2104 to ensure that the lack of communications does not unnecessarily delay the contracting process. Specifically, the government needs to ensure that contracting officers have contractor-specific waiver information or have a verification process in place that will not add administrative burdens and increase procurement administrative lead times.

We are also concerned regarding the exceptions listed in 4.2102 and the process by which contracting officers and contractors will verify that the service and equipment identified meet the criteria for the listed exceptions. This issue again highlights the need for a specific list of the affiliates and subsidiaries and the products and services that the government considers are covered by the prohibition.

Further, paragraph (c) of the "*Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment*," includes a simple “will” or “will not” provide covered telecommunications equipment or services representation. There is no ability for the contractor to convey that they have sought or received a waiver from the head of the agency at that time. Clarification is required here to ensure companies are not unjustly excluded from the procurement based on an inability to convey the status of a waiver request or determination.

6) Additionally, we request that the government define “other contractual instruments” as used in 52.204-25(e) Clause. Is this a refence to the rule’s applicability to commercial items? Does the rule apply to cooperative agreements and other transaction authorities?

A specific definition would help ensure that contracting officers are applying the prohibition as intended and consistently, and that companies making a good faith effort to comply are not penalized by the government’s omissions or lack of clarity.

7) Our associations request that the government issue clear guidance to address the modification of current contracts. Our member companies are being required to represent that they “will” or “will not” provide covered telecommunications equipment or services on existing contracts without the required clarity and adequate time for companies to investigate their current supply chain and also address issues that may arise in the future as a result of the changes in their supply chain.

This guidance should address the potential need for any changes to the contract's terms and conditions; the timelines to procure equipment and services from new sources and how changes impact current delivery schedules; adjustments to the processes and the costs associated with modifications; and other issues that impact ongoing contract performance.

8) We are concerned with the authority provided to agencies to deviate from the information collection requirements:

> *"DoD, GSA, and NASA recognize that some agencies may need to tailor the approach to the information collected based on the unique mission and supply chain risks for their agency."*

We understand that each of the agencies have unique mission needs and some tailoring is prudent to address their supply chain risks. However, for companies that do business across the federal government, too much deviation from the criteria will be costly and burdensome. In fact, both the Department of Defense and the General Services Administration have already issued class deviations to their acquisition supplements to address what they perceive to be special circumstances.

Accordingly, we urge agencies to identify and make publicly available any deviations and to work to ensure that any deviation from the common criteria is as minimal as possible so as to impose the least burden on the contractor community.

We appreciate your attention to these comments and look forward to continuing to work with you as the final regulation is issued and implemented. If you have any questions or need additional information, please do not hesitate to let us know. Alan Chvotkin can be reached at (703) 875-8059 or at chvotkin@pscouncil.org.

Sincerely,

Professional Services Council
HUBZone Contractors National Council
Montgomery County Chamber of Commerce GovConNet Council
Women Impacting Public Policy