Before the
Federal Acquisition Regulation Council
U.S. General Services Administration
Washington, DC

In re: Federal Acquisition Regulation:
Prohibition on Contracting With Entities Using
Certain Telecommunications and Video Surveillance
Services or Equipment; (FAR Case 2019-009)

85 FR 42665
Docket ID: FAR-2019-0009

COMMENTS OF
INTERNET ASSOCIATION

Internet Association (IA) represents over 40 of the world's leading internet companies and supports policies that promote and enable internet innovation, including commercial cloud solutions. Our companies are global leaders in the drive to develop lower cost, more secure, scalable, elastic, efficient, resilient, and innovative cloud services to customers in both the private and public sectors. IA welcomes the opportunity to provide input to the federal government's update to the Federal Acquisition Regulation (FAR) in implementing Section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232) (Sec. 889 Part B) and recognizes the drafters for their similarly productive engagement in implementing Section 889(a)(1)(A) (Sec. 889 Part A).

IA supports the principles and concepts associated with establishing and maintaining a safe, secure, and trustworthy national infrastructure as it relates to information and communication technology systems. Considering how important online platforms and the equipment that underpins them are right now in terms of helping federal government and contractor employees communicate and share important information with their teammates as they telework, Sec. 889 Part B has an important role to play. In order to maintain the benefits that come from the global reach of many of the American companies that make up the Defense Industrial Base (DIB) as well as the federal contractor community as a whole, increased clarity around the ways in which this broadly and widely applicable regulation will be implemented is necessary.

Limit Applicability Of "Use" And "Uses" To Domestic Instances Only. The drafters recognized the potential for businesses of all sizes to have an international presence. This can be in the physical sense for contractors who have brick-and-mortar facilities overseas to the digital sense where a business may have employees traveling in foreign countries. In some of those cases, it may be impractical or even impossible to avoid using covered telecommunications equipment or services because, just as the drafters recognized, they "are prevalent and alternative solutions may be unavailable."

We recommend that this rule be interpreted such that it is only applicable to the U.S. Expanding beyond those borders would be so broad that it could result in the government losing access to even the most essential mission support capabilities. This includes domestically-based government employees and

facilities and those that are overseas. Even further to the point, an expansion of this rule to be applicable outside the U.S. could lead to a broader and more general inability for both the government and industry supporting government efforts to innovate in any meaningful manner.

Explicitly Indicate That The Rule Excludes Backhaul, Roaming, And Interconnection Arrangements. It would be inconsistent and inequitable to interpret Sec. 889(a)(2)(A) in such a way that it would allow "the head of an executive agency" to enter into a contract with "an entity to provide a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements" but not permit a contractor to do so themselves. Considering the fact that Sec. 889(a)(2)(A) applies to all of "paragraph (1)," with no reasonable implication that Sec. 889 Part B would be excluded from that section, there is no reading of the statute, plain language or otherwise, that would indicate it would apply to contractors any differently than the government.

The statute provides for circumstances where the government would require such services while understanding that the risk of data exfiltration with their use is very high. There is no reason why responsible contractors should be barred from offering the government such services. Similarly, for work performed that is unassociated with a government contract, there is no reading of the statute that would indicate a contractor should be barred from using such services themselves. As a result, we respectfully request that the drafters make it clear that contractors may offer and use backhaul, roaming, and interconnection arrangements.

Streamline And Standardize The Waiver Process. We appreciate the provision allowing agency heads to waive the requirements up to August 13, 2022 in certain circumstances. However, considering that waivers are going to be limited mostly to those instances where continuity of operations and mission success are dependent on the issuance of the waiver, the ability of both a contractor and the government to quickly obtain the waiver will be paramount. Because of this point, we recommend that certain administrative hurdles that currently exist, including the requirement to conduct market research prior to initiating a waiver process as well as the notification requirements and the associated timelines, be removed.

Similarly, with at least one waiver already issued, we recommend that the process to obtain future waivers use the same or a similar process, with the steps that were followed clearly outlined in detail, allowing expectations to be set and managed appropriately as a result. Similarly, other processes can be built on this standardized and existing process to support future waivers that are to be issued for procurements under the micro-purchase threshold or goods and services being provided through a Governmentwide Acquisition Contract (GWAC).

Maintain The Definition Of "Offeror" Currently In The Interim Rule. The definition of "offerors" that currently exists in the interim rule implements Sec. 889 Part B is as was intended and is expected by the plain language of the statute. With the rule specifically barring the government from entering "into a contract (or extend or renew a contract) with an entity that uses" the prohibited equipment (see Page 132 STAT. 1917), the focus is directly on the contractor servicing the federal government. Even further to the point, the language in Report 115-874 states that legislators were targeting "any subsidiary or affiliate of such [covered] entities" (see page 918), indicating clearly that legislators would have included the other entities that are unrelated to the contract but related to the contractor should they have desired applicability of the rule to be extended as such.

Further to the point, as the interim rule currently in place now establishes, applicability of this rule extends to a contractor's internal equipment and services, whether used to service the government or not, as well as their own internal contractor community, whether those contractors are used to service the government or not. This effectively completely removes the covered equipment and services from the federal supply chain. Expanding it to the scope currently being considered by the FAR Council, covering completely unrelated entities to those doing business with the government would have a chilling effect on competition. Companies that provide the latest emerging technologies and techniques available in the marketplace would have to decide between servicing the global economy or the federal government. Additionally, the expansion of this definition would impose a massive burden on industry when performing the "reasonable inquiry" required, as most would not have reasonably anticipated the inclusion of these unrelated entities from publicly available language. We recommend the FAR Council maintain the existing definition and the scope of “offeror” not be expanded to include entities unrelated to the federal supply chain.

Exclude Certain Government Purchase Card Transactions. The intention of Sec. 889 Part B has been established through the plain language of the statute as a mechanism to protect the nation's security by mitigating the ability of foreign actors to perform espionage on government and commercial organizations, as well as American citizens in general, through the supply chain. The monumental undertaking is made clear in the interim rule's own language, making it clear that "[t]he prohibition will apply to all FAR contracts, including micro-purchase contracts," many of which are paid for through the use of a Government Purchase Card (P-Card). This one-size-fits-all approach is misdirected, though, as it would require compliance by vendors who are awarded procurements for items such as staplers, printer paper, paper towels, toilet cleaner, gloves, masks, personal protective equipment, and other low or no risk purchases made by government employees using their P-Cards.

These are not the types of transactions that present the avenues through which bad actors could perform the sort of nefarious activities the drafters of Sec. 889 Part B were seeking to protect our nation against. In fact, many of the vendors who provide the types of items that would now require certification or a waiver of Sec. 889 Part B applicability are not equipped to or able to afford to perform the required reviews, nor will their business model ever support such a financial burden. As a result, this kind of broad applicability stifles competition, especially in newly accessible types of government markets such as e-commerce markets, to the point that the government would not only overpay for many of these basic items, equipment, and services, but would find their ability to procure such requirements in the face of a national disaster or emergency severely and unacceptably reduced.

We request that the FAR Council clarify that Sec. 889 Part B does not apply to P-Card transactions, as these types of procurements are for low or no risk items that the prohibition was not intended to cover.

Ensure Exclusion Of Commercial Customers From Applicability Of The Rule. We recognize the broad applicability of Sec. 889 Part B to a government contractor’s equipment and services used by a contractor for their work, whether directly related to a government contract or not. Similarly, we recognize the intent of the applicability of this rule to extend to a prime contractor’s subcontractors. However, it must be made clear the rule is not intended to apply to a contractor's commercial customers as well. The application of this rule in such a broad fashion would create a situation where organizations have to choose between servicing the government or being competitive in the global economy.

Furthermore, because of the sheer reach of the U.S. government, applying this rule in such a manner would be disastrous. If a reasonable inquiry must include reviewing documents and information related to the equipment and services used by commercial customers, it would potentially decimate the ability of contractors to compete in any fashion, let alone to serve as global leaders. While we presume the drafters do not intend for Sec. 889 Part B to extend to a contractor's commercial customers, we respectfully request that this exclusion of commercial customers be clarified explicitly.

Update The Required Representation To Better Align With The Statute. We appreciate that the drafters recognized the qualifying language present in the statutory language of Sec. 889 Part B, restricting the use of "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**" (emphasis added) by copying it from the statute into the new language added in FAR 39.101(f)(2). Similarly, we appreciate that the language in FAR 52.204-24(b)(2) also cites this language, indicating that the purpose of the provision is to prohibit the government from contracting "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**" (emphasis added).

However, the representation outlined in FAR 52-204-24(d)(2) and required of contractors is missing the emphasized and essential text. The resulting representation not only differs from the statutory language and legislative history as it relates to the intended purpose of Sec. 889 Part B, but it also results in a Contracting Officer from having to determine whether or not an offeror's proposed solution includes covered equipment or services that are, in fact, "a substantial or essential component of [the] system, or as critical technology as part of [the] system" rather than the contractors themselves.

In order to maintain consistency with the language of the statute as well as the corresponding amendments to the FAR, the following should replace the language in FAR 52-204-24(d):

> (2) After conducting a reasonable inquiry, for purposes of this representation, the Offeror represents that—
>
> It [ ] does, [ ] does not use covered telecommunications equipment or services, or 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**. The Offeror shall provide the additional disclosure information required at paragraph (e)(2) of this section if the Offeror responds "does" in paragraph (d)(2) of this section.

Considering the significance of some of the outstanding issues and questions that remain with this interim rule as it is currently being applied, the severe economic consequences of some of the changes being considered, and the lack of clarity around essential components required for complying with this monumentally impactful provision, we respectfully request that the FAR Council consider delaying implementation until the interim rule has been finalized and a compliance mechanism and process has

been clearly established. To do otherwise would result in a severe economic penalty to the DIB and federal contractor ecosystem.

IA appreciates this opportunity to provide feedback to FAR Case 2019-009. We look forward to continuing to work with the FAR Council staff to implement this rule such that the intended objectives are achieved.