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July 27, 2020

The Honorable Ron Johnson  
Chairman  
The Honorable Gary C. Peters  
Ranking Member  
Committee on Homeland Security and Governmental Affairs  
United States Senate

The Honorable Carolyn B. Maloney  
Chairwoman  
The Honorable James Comer  
Ranking Member  
Committee on Oversight and Reform  
House of Representatives

Subject: *Department of Defense, General Services Administration, National Aeronautics and Space Administration: Federal Acquisition Regulation: Prohibition on Contracting With Entities Using Certain Telecommunications and Video Surveillance Services or Equipment*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Defense, General Services Administration, and National Aeronautics and Space Administration (the agencies) entitled “Federal Acquisition Regulation: Prohibition on Contracting With Entities Using Certain Telecommunications and Video Surveillance Services or Equipment” (RIN: 9000-AN92). We received the rule on July 13, 2020. It was published in the *Federal Register* as an interim rule on July 14, 2020. 85 Fed. Reg. 42665. The rule has an effective date of August 13, 2020.

This interim rule, issued jointly by the agencies, amends the Federal Acquisition Regulation (FAR) to implement section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019. Pub. L. No. 115-232, 132 Stat. 1636, 1917 (Aug. 13, 2018) (section 899(a)(1)(B)). The agencies explain that section 889(a)(1)(B) prohibits executive agencies from entering into, or extending or renewing, 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. The agencies asserted that the rule seeks to avoid the disruption of federal contractor systems and operations that could in turn disrupt the operations of the federal government, which relies on contractors to provide a range of support and services.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* of receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). The 60-day delay in effective date can be waived, however, if the agency finds for good cause that delay is impracticable, unnecessary, or

contrary to the public interest, and the agency incorporates a statement of the findings and its reasons in the rule issued. 5 U.S.C. § 808(2). Here, the agencies explained that due to a number of factors, compliance with the delayed effective date was impracticable. Specifically, the agencies stated that the expansiveness and complexity of section 889(a)(1)(B) required substantial up-front analysis, including meetings with industry. Additionally, the agencies stated that the concentration of available resources on COVID-19 pandemic response significantly delayed the government's ability to finish the rule. The agencies further explained that having a regulation in place to implement section 889(a)(1)(B) by the legislatively established effective date of August 13, 2020, is critically important to avoid confusion, uncertainty, and potentially substantial legal consequences for agencies and the vendor community. Thus, according to the agencies, urgent and compelling circumstances necessitated that this interim rule go into effect earlier than 60 days after publication.

Enclosed is our assessment of the agencies' compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shari Brewster, Assistant General Counsel, at (202) 512-6398.

A handwritten signature in black ink that reads "Shirley A. Jones". The signature is written in a cursive, flowing style.

Shirley A. Jones  
Managing Associate General Counsel

Enclosure

cc: William F. Clark  
Director, Office of Acquisition Policy  
Office of Government-wide Policy  
General Services Administration

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE  
ISSUED BY THE  
DEPARTMENT OF DEFENSE,  
GENERAL SERVICES ADMINISTRATION,  
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION  
ENTITLED  
“FEDERAL ACQUISITION REGULATION: PROHIBITION ON  
CONTRACTING WITH ENTITIES USING CERTAIN TELECOMMUNICATIONS  
AND VIDEO SURVEILLANCE SERVICES OR EQUIPMENT”  
(RIN: 9000-AN92)

(i) Cost-benefit analysis

The Department of Defense, General Services Administration, and National Aeronautics and Space Administration (the agencies) provided a description of the benefits of this interim rule. Specifically, the agencies stated that the rule has national security benefits to the general public by protecting the homeland from the impact of federal contractors using covered telecommunications equipment or services that present a national security concern. The agencies also stated that the rule will assist contractors in mitigating supply chain risks, such as the potential theft of trade secrets and intellectual property, due to the use of covered telecommunications equipment or services. According to the agencies, the costs to the public are the time needed to (1) review the rule; (2) establish a corporate tracking tool and verify covered telecom not used within the corporation or by the corporation, and ensure there are no future buys; (3) complete corporate-wide training on the organization’s compliance plan; (4) remove and replace existing equipment or services to be eligible for a federal contract award; (5) complete the representation under the Federal Acquisition Regulation (FAR); and (6) develop a full and complete laydown and phase-out plan to support waiver requests. For some of these areas, the agencies provided quantitative estimates of the costs for the first year after publication of the rule, and subsequent years. According to the agencies, the costs to the government are that the government will pay more for the products and services it buys and will be unable to meet some mission needs. The agencies provided quantitative estimates for the costs to the government in the first and second years after publication of the rule, as well as subsequent years.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

The agencies prepared an Initial Regulatory Flexibility Analysis. The analysis included the reasons for this interim rule; the objectives of, and legal basis for the rule; a description and estimate of the number of small entities to which the rule will apply; a description of projected reporting, recordkeeping, and other compliance requirements of the rule; relevant federal rules which may duplicate, overlap, or conflict with the rule; and a description of any significant alternatives to the rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the rule of small entities.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

This interim rule did not discuss the Unfunded Mandates Reform Act. In its submission to us, the agencies indicated that they did not prepare a written statement under section 202 of the Unfunded Mandates Reform Act of 1995.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

The agencies did not discuss the Administrative Procedure Act in this interim rule. The agencies stated that they made a determination pursuant to section 1707(d) of title 41, United States Code, that urgent and compelling circumstances made compliance with the notice and comment and delayed effective date requirements for procurement regulations under sections 1707(a) and (b) of title 41, United States Code, impracticable. Specifically, the agencies stated that the expansiveness and complexity of section 889(a)(1)(B) required substantial up-front analysis, including meetings with industry, the first of which occurred in July of 2019, and the most recent occurred in March of 2020. Additionally, the agencies stated that the concentration of available resources on COVID-19 pandemic response in the spring of 2020 significantly delayed the government's ability to finish the rule. The agencies further explained that having a regulation in place to implement section 889(a)(1)(B) by the legislatively established effective date of August 13, 2020, is critically important to avoid confusion, uncertainty, and potentially substantial legal consequences for agencies and the vendor community. The agencies stated they will consider public comments received in response to this interim rule through September 14, 2020, in the formation of the final rule.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

The agencies determined that this interim rule contains information collection requirements (ICRs) under the Act. According to the agencies, the Office of Management and Budget (OMB) previously authorized emergency processing of the collection of information involved in the rule, consistent with 5 C.F.R. part 1320.13. The agencies stated that they intend to provide a separate notice in the *Federal Register* requesting public comment on the information collections contained within this rule under OMB Control Number 9000-0201. The agencies estimated the burden of each ICR.

Statutory authorization for the rule

The agencies promulgated this interim rule pursuant to chapter 137 of title 10, United States Code; section 121(c) of title 40, United States Code; and section 20113 of title 51, United States Code.

Executive Order No. 12,866 (Regulatory Planning and Review)

The agencies determined that this interim rule is economically significant under the Order.

Executive Order No. 13,132 (Federalism)

This interim rule did not discuss the Order. In its submission to us, the agencies indicated that they did not discuss the Order in the preamble to the rule.