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September 9, 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 August 26, 2020. It was published in the *Federal Register* as an interim rule on August 27, 2020. 85 Fed. Reg. 53126. The rule has an effective date of October 26, 2020. The agencies are holding a comment period on the interim final rule until October 26, 2020.

According to the agencies, the interim final rule requires an offeror to represent annually, after conducting a reasonable inquiry, whether it uses covered telecommunications equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services. The new annual representation implements a section of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636 (Aug. 13, 2018).

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* or 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. §§ 553(b)(3)(B), 808(2). Here, although the agencies did

not specifically mention CRA's 60-day delay in effective date requirement, the agencies found good cause to waive notice and comment procedures and incorporated a brief statement of reasons. Specifically, the agencies determined they had good cause because the rule is meant to mitigate risks across the supply chains that provide hardware, software, and services to the U.S. Government and further integrate national security considerations into the acquisition process. The agencies stated that, like many countries, the United States has increasingly relied on a global industrial supply chain. According to the agencies, as threats have increased, so has the U.S. Government's scrutiny of its contractors and their suppliers. The agencies further stated that underlying these efforts is the concern a foreign government will be able to expropriate valuable technologies, engage in espionage with regard to sensitive U.S. Government information, and/or exploit vulnerabilities in products or services.

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, reading "Shirley A. Jones". The signature is fluid and cursive, with the first name "Shirley" being more prominent and the last name "Jones" following in a similar 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) estimated the interim final rule would create a total public cost savings of \$34.3 billion at present value at a discount rate of 3 percent and \$15.1 billion at present value at a 7 percent discount rate. The agencies further estimated the interim final rule would create a total government cost savings of \$31.6 billion at present value at a discount rate of 3 percent and \$14.1 billion at present value at a 7 percent discount rate.

(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 (1) the reasons for the action; (2) the objectives of, and the legal basis for, the interim final rule; (3) a description and an estimate of the small entities to which the interim final rule will apply; (4) a description of the projected reporting, recordkeeping, and other compliance requirements of the interim final rule; (5) relevant federal rules that may overlap, duplicate, or conflict with the interim final rule; and (6) 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 on small entities.

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

The interim final rule did not discuss the Act. In their submission to us, the agencies indicated that they did not prepare a written statement under the Act.

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

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

The agencies waived notice and comment procedures for good cause. They determined they had good cause because the rule is meant to mitigate risks across the supply chains that provide hardware, software, and services to the U.S. Government and further integrate national security considerations into the acquisition process. The agencies stated that, like many countries, the United States has increasingly relied on a global industrial supply chain.

According to the agencies, as threats have increased, so has the U.S. Government's scrutiny of its contractors and their suppliers. The agencies further stated that underlying these efforts is the concern a foreign government will be able to expropriate valuable technologies, engage in espionage with regard to sensitive U.S. Government information, and/or exploit vulnerabilities in products or services. The agencies are holding a comment period until October 26, 2020.

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

The agencies determined the interim final rule contains information collection requirements (ICRs) subject to the Act. The ICR revises an existing information collection, entitled "Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment" and is associated with Office of Management and Budget (OMB) Control Number 9000-0201. The total aggregate burden estimate for this ICR is \$8,836,398,333.

Statutory authorization for the rule

The agencies promulgated the final rule pursuant to sections 2302 *et seq.* of title 10; section 121 of title 40; and section 20113 of title 51, United States Code.

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

The agencies determined the interim final rule was economically significant and submitted it to OMB for review.

Executive Order No. 13,132 (Federalism)

In their submission to us, the agencies did not address the Order.