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February 2, 2024

Ms. Marissa Ryba
Procurement Analyst
General Services Administration

Electronic Submission: www.regulations.gov, FAR Case 2020-011

Re: Request for Comment on FAR Case 2020-011, Implementation of Federal Acquisition Supply Chain Security Act Orders

Dear Ms. Ryba:

The National Defense Industrial Association (NDIA) appreciates the opportunity to provide comments on the interim rule for implementing the Federal Acquisition Supply Chain Security Act orders.

NDIA is the nation's oldest and largest defense industry association, representing nearly 1,750 corporate and over 65,500 individual members from small, medium, and large contractors, a majority of which are small businesses. Our members engage daily with the federal government's national and homeland security apparatuses. They are well-versed in the array of cybersecurity requirements and implementation challenges.

NDIA applauds the Federal Acquisition Security Council (FASC) for continuing to formalize the protocols and processes they will use to implement the requirements of the authorizing Act and for continuing to create a more transparent, stringent, and consistent approach to addressing supply chain risk in federal acquisition. In addition to the specific comments provided below, we would offer the following general comments in response to the request published in the Federal Register on November 29, 2023, for the interim rule for FAR Case 2020-011, effective December 4, 2023. NDIA continues to support the major tenets of the authorizing act focused on identifying risks in the federal acquisition supply chain, providing information and details to the industrial base about those risks, supporting the mitigation of those risks, and establishing processes for the identification and mitigation of risks with suppliers and contractors so that they can continue to perform on their contracts with the federal government.

It is our hope that establishing and formalizing these processes as part of the FAR will help provide comfort to those who have perceived a lack of government structure around identifying and mitigating acquisition supply chain risk and help address the lack of consistency in legislative and executive branch initiatives seeking a similar objective. We also are hopeful that a regulation can provide contractors with a more reliable and efficient process to ensure that they are offering goods and services that have mitigated and minimized, as much as possible, risks that may derive from the supply chain.

Examples of initiatives that seek to address perceived acquisition supply chain risks and are deserving of FASC attention to correct outstanding issues and policy gaps include the regulatory actions that

resulted from the passage of Section 889 of the FY19 National Defense Authorization Act (NDAA) for video teleconferencing technologies (FAR Case 2019-002 and FAR Case 2019-009) and Section 5949 of the FY23 NDAA for certain semiconductor components. Both provisions include a prohibition on the government contracting for or obtaining any covered equipment, components, or services and a prohibition on contracting with any entity that uses covered equipment, components, or services.

Unfortunately, a number of elements of these statutory requirements went unaddressed in the subsequent regulatory promulgations for covered equipment, including a list of prohibited sources that extended to affiliates and subsidiaries. Since that time, regulators have been unable to clarify what, if any, additional companies have been identified as affiliates or subsidiaries of the prohibited sources, making it difficult, if not impossible, for industry to thoroughly identify all prohibited sources. These concerns extend to the implementation of Section 5949, creating similar prohibitions for covered semiconductors and components and the corresponding sources of supply. Addressing these gaps and lack of clarity for federal acquisition supply chain sources and products or components would seem to fit well into the authority of the FASC, and NDIA members would encourage and welcome their further engagement to create greater specificity and clarity for these requirements.

There is also concern about the impact and disruption to contractor proposals and award timelines that will occur after FASC orders are issued. While our members concur with the underlying intent, they believe that the FASC must take into account the impact their actions will have on planned and ongoing agency procurement programs and the delays and additional costs their actions will drive into government acquisition and mission programs. Such delays and disruptions to government acquisitions will most likely alter the calculation for bidders and contract performance, as vendors would need to reassess their entanglement with any items that are the subject of a FASC order, and they should be afforded adequate allowance of additional time to make necessary adjustments to proposals or performance, including price adjustments. In order to mitigate this impact, industry would support an advance notification from the FASC in the form of “warning orders” that could enable industry to more effectively posture and react to actual FASC orders. As an example, the rule could include language to the effect: “Without advance notice of exclusion orders, the award of contracts at the affected/issuing agencies will be delayed while contractors react and conduct their inquiries.” Notifications to industry using an affirmative “push” notification (vs. passively monitoring SAM.gov) could also ensure timeliness, efficiency, and consistency, which would provide enhanced confidence related to national security matters and inject more stability into the acquisition process.

It should also be noted that the interim rule includes, under “Covered Article” at (iii), information subject to regulations to protect Controlled Unclassified Information or CUI. NDIA would reiterate the government has never finalized its criteria for determining what items are or are not CUI and has not put into place effective mechanisms to identify and mark CUI for users in the industrial base. Without the government completing those efforts, it will be challenging for the FASC and industry to effectively understand and implement these requirements and the resultant orders. We would take this opportunity to once again encourage the responsible government stakeholders to address this shortcoming in CUI adoption. Without these finalizing efforts, industry is concerned about the inability of all parties to effectively protect data as intended.

Finally, the rule does not provide, and the FASC does not currently maintain, a single source for information regarding covered prohibited entities or items for contractors and subcontractors to reference and to facilitate the tracking of compliance requirements. We would strongly urge that the FASC create and maintain such a singular source for exclusion information that is not a controlled access federal website.

NDIA supports the process authorized under the FASCA that provides a mechanism for the identification of components, equipment, and sources that are of concern and providing a way for contractors to be made aware of these concerns and to offer mitigation and remediation actions to remain eligible to contract with the federal government. Such a process is essential to making sure that contractors can effectively mitigate risk in the federal acquisition supply chain and ensure that the contracting process sustains a viable source of supply for goods and services to serve the federal government mission.

Questions for the FASC to address as part of their promulgation:

- Could the FASC provide industry with several representative examples of FASC exclusion orders in order to be able to identify what information is included and what additional information may need to be added to derive benefit from the orders for contractors?

- Is the FASC actively considering excluding any products at the time of the effective date of the rule, and if so, how can industry be made aware of that consideration at the earliest possible opportunity? If industry can get ahead of FASC order consideration for purposes of developing and providing proposals and contract scoping activities, that advance knowledge could help deliver substantial cost reduction or even avoidance and mitigate delays in contract award and performance.

- Once an order is issued/posted to SAM.gov, what action is the USG taking to ensure that the order is listed on all solicitations issued subsequent to that posted date?

- To ensure consistency, industry would like to better understand what factors or elements a PCO should or must consider when:
  - deciding whether or not to pursue a waiver;
  - assessing a contractor estimate to implement the order that would involve “rip and replace” options versus pursuing a waiver; and
  - reviewing the contractor mitigation plan for adequacy.

Industry would appreciate more details about the scope of FASCSA orders on the following subjects:

- **Legal Entity Identification –** It is critical that any FASCSA exclusion order expressly identify the legal entity name, “doing business as” name of the producer or distributor of a prohibited covered article.

- **Affiliate/subsidiaries –** For efficiency, consistency, and transparency, and referencing the problems with previous efforts noted above to exclude sources for items, we would request the FASC publish

a list of all known affiliates and subsidiaries of targeted entities when the scope of the FASCSA order includes affiliates and subsidiaries.

- **Limited Period of Reporting –** The FASC should limit "use" reporting regarding applicable FASCSA orders (i.e., FASCSA orders incorporated into a contract) to instances when use is discovered during contract performance and after a "no use" representation was made. This would align this FASCA rule with the language in FAR Case 2019-002.

- **Reporting Timeline Impracticability –** The three- and ten-day reporting timelines for the impact of post-solicitation FASCSA orders are impracticable. Instead, the FASC should identify more realistic timelines that can practically be implemented and with which contractors can comply.

Exclusions aligned with other existing rules:

- Given that FASCSA seems to closely follow the provisions of FAR Case 2019-002 and FAR Case 2019-009, we would recommend that the interim rule be revised to include the same exclusion for telecom equipment that cannot route or redirect data. The FASC should also proactively seek other items that may fall under the scope of an order to determine if there are ways to limit applicability and exclude some items based on functionality or other criteria.

NDIA would ask that the promulgation include clarification around the following issues:

- **The Definition of Covered Article** includes (i) information technology (including cloud computing services), (ii) telecommunications equipment and services, (iii) processing of information on Federal or non-Federal information systems subject to Covered Unclassified Information (CUI), and (iv) hardware, systems, devices, software, or services that include embedded or incidental information technology. It is not clear what items are covered by (iii) and (iv) that are not already covered by (i) and (ii), so we would request that examples be provided to illustrate these categories.

- **The final rule should limit reporting under a "look back" provision to the period of performance under the contract.** To the extent reporting is required under 52.204-30(c)(3)(i), industry believes the reporting obligation only extends to where a prohibited source or covered article is believed to be in use/being provided "during contract performance" of a current contract, and that closed or completed contracts are out-of-scope. Such a clarification could substantially reduce the burden of compliance and reporting for subject contractors, so confirmation of the time limits is helpful.

- **As noted above, when** an exclusion order is issued after the date of solicitation and impacts a competition already underway, competitors should be afforded adequate opportunity to reassess and revise their offerings to address the order and revise performance parameters, including offered price. Similarly, in contracts that have already been awarded and that are in the period of performance, industry believes the modification process to the contract would be executed under the appropriate "Changes Clause," and that impact on program cost and schedule would be subject to a request for equitable adjustment procedure, as applicable. The final rule should clearly indicate which actions would be expected and how awardees and competitors can effectively adjust under the subject contract.

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NDIA appreciates the opportunity to comment on the interim rule. Should you have any questions or wish to discuss these comments in greater detail, please contact Michael Seeds, NDIA's Senior Director of Strategy & Policy, at mseeds@ndia.org. Thank you again for the opportunity to provide NDIA's perspectives and feedback on this proposal.

Sincerely,

National Defense Industrial Association