

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR-2020-0051, Sequence No. 5]

Federal Acquisition Regulation; Federal Acquisition Circular 2020-09; Introduction

AGENCY: Department of Defense (DoD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of an interim rule.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rule agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) in this Federal Acquisition Circular (FAC) 2020-09. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC.

DATES: For effective date see the separate document, which follows.

FOR FURTHER INFORMATION CONTACT: *Farpolicy@gsa.gov* or call 202-969-4075. Please cite FAC 2020-09, FAR case 2019-009.

RULE LISTED IN FAC 2020-09

Subject	FAR case
Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment	2019-009

ADDRESSES: The FAC, including the SECG, is available via the internet at <https://www.regulations.gov>.

SUPPLEMENTARY INFORMATION: A summary for the FAR rule follows. For the actual revisions and/or amendments made by this FAR case, refer to the specific subject set forth in the document following this summary. FAC 2020-09 amends the FAR as follows:

Prohibition on Contracting With Entities Using Certain Telecommunications and Video Surveillance Services or Equipment (FAR Case 2019-009)

This second interim rule amends the Federal Acquisition Regulation to implement section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232). The first interim rule was published July 14, 2020.

This rule reduces the information collection burden imposed on the public by making updates to the System for Award Management (SAM) to allow 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 burden to the public is reduced by allowing an offeror that responds “does not” in the annual representation at 52.204-26, Covered Telecommunications Equipment or Services—Representation, or in paragraph (v)(2)(ii) of 52.212-3, Offeror Representations and Certifications—

Commercial Items, to skip the offer-by-offer representation for paragraph (d)(2) within the provision at 52.204-24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment. The provision at 52.204-26 requires that offerors review SAM prior to completing their required representations.

This rule applies to all acquisitions, including acquisitions at or below the simplified acquisition threshold and to acquisitions of commercial items, including commercially available off-the-shelf items. It may have a significant economic impact on a substantial number of small entities.

William F. Clark,
Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Federal Acquisition Circular (FAC) 2020-09 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator of National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2020-09 is effective August 27,

2020 except for FAR Case 2019-009, which is effective October 26, 2020.

Kim Herrington,
Acting Principal Director, Defense Pricing and Contracting, Department of Defense.

Jeffrey A. Koses,
Senior Procurement Executive/Deputy CAO, Office of Acquisition Policy, U.S. General Services Administration.

William G. Roets, II,
Acting Assistant Administrator, Office of Procurement, National Aeronautics and Space Administration.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 4 and 52

[FAC 2020-09; FAR Case 2019-009; Docket No. FAR-2019-0009, Sequence No. 2]

RIN 9000-AN92

Federal Acquisition Regulation: Prohibition on Contracting With Entities Using Certain Telecommunications and Video Surveillance Services or Equipment

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are issuing a second interim rule amending the Federal Acquisition Regulation (FAR) to require 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 in the provision implements a section of the John S. McCain National Defense Authorization Act for Fiscal Year 2019.

DATES: *Effective:* October 26, 2020.

Applicability: Contracting officers shall include the provision at FAR 52.204–26, Covered Telecommunications Equipment or Services—Representation—

- In solicitations issued on or after the effective date; and
- In solicitations issued before the effective date, provided award of the resulting contract(s) occurs on or after the effective date.

Comment date: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before October 26, 2020 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2019–009 via the Federal eRulemaking portal at *Regulations.gov* by searching for “FAR Case 2019–009”. Select the link “Comment Now” that corresponds with FAR Case 2019–009. Follow the instructions provided at the “Comment Now” screen. Please include your name, company name (if any), and “FAR Case 2019–009” on your attached document. If your comment cannot be submitted using <https://www.regulations.gov>, call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Instructions: Please submit comments only and cite “FAR Case 2019–009” in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting.

All filers using the portal should use the name of the person or entity submitting comments as the name of their files, in accordance with the instructions below. Anyone submitting business confidential information should clearly identify the business confidential portion at the time of

submission, file a statement justifying nondisclosure and referencing the specific legal authority claimed, and provide a non-confidential version of the submission.

Any business confidential information should be in an uploaded file that has a file name beginning with the characters “BC.” Any page containing business confidential information must be clearly marked “BUSINESS CONFIDENTIAL” on the top of that page. The corresponding non-confidential version of those comments must be clearly marked “PUBLIC.” The file name of the non-confidential version should begin with the character “P.” The “BC” and “P” should be followed by the name of the person or entity submitting the comments or rebuttal comments. All filers should name their files using the name of the person or entity submitting the comments. Any submissions with file names that do not begin with a “BC” or “P” will be assumed to be public and will be made publicly available through <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: *Farpolicy@gsa.gov* or call 202–969–4075. Please cite FAR Case 2019–009.

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Acquisition Regulations System codifies and publishes uniform policies and procedures for acquisitions by all executive agencies. The Federal Acquisition Regulations System consists of the Federal Acquisition Regulation (FAR), which is the primary document, and agency acquisition regulations, which implement or supplement the FAR.

In order to combat the national security and intellectual property threats that face the United States, section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232) 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 statute goes into effect August 13, 2020.

“Covered telecommunications equipment or services,” as defined in the statute, means—

- Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities);
- 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);

- Telecommunications or video surveillance services provided by such entities or using such equipment; or
- 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 Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

To implement section 889(a)(1)(B) of the NDAA for FY 2019, DoD, GSA, and NASA published the first interim rule at 85 FR 42665 on July 14, 2020. The first interim rule added a representation to the provision at FAR 52.204–24(d)(2), Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment, which required offerors to represent on an offer-by-offer basis if the offeror “does” or “does not” use covered telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services, and if it does, require the offeror to provide additional disclosures.

This second interim rule further implements section 889(a)(1)(B). It reduces burden on the public by allowing an offeror that represents “does not” in a new annual representation at FAR 52.204–26(c)(2), Covered Telecommunications Equipment or Services—Representation, or in paragraph (v)(2)(ii) of FAR 52.212–3, Offeror Representations and Certifications—Commercial Items, to skip the offer-by-offer representation within the provision at FAR 52.204–24(d)(2), Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment. Updates to the System for Award Management (SAM) were necessary to add this new annual representation and require offerors 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. These updates to SAM to

reduce the burden of the first interim rule were not available by the effective date of the first interim rule; therefore, these updates are being made in this interim rule.

SAM is used by anyone interested in the business of the Federal Government, including—

- Entities (contractors, Federal assistance recipients, and other potential award recipients) who need to register to do business with the Government, look for opportunities or assistance programs, or report subcontract information;

- Government contracting and grants officials responsible for activities with contracts, grants, past performance reporting and suspension and debarment activities;

- Public users searching for Government business information.

Representations and Certifications are FAR requirements that anyone wishing to apply for Federal contracts must complete. Representations and Certifications require entities to represent or certify to a variety of statements ranging from environmental rules compliance to entity size representation.

Agencies use the SAM entity registration information to verify recipient compliance with requirements. This reduces the duplicative practice of contractors filling out in full all the representations and certifications on an offer-by-offer basis. Instead the representations and certifications may be filled out annually and electronically.

Offerors shall consult SAM to validate whether the equipment or services they are using are from an entity providing equipment or services listed in the definition of “covered telecommunications equipment or services.” The offerors will conduct a reasonable inquiry as to whether they use covered telecommunications equipment or services or any equipment, system, or service that uses covered telecommunications equipment or services.

II. Discussion and Analysis

This second interim rule adds an annual representation to the FAR at 52.204–26, Covered Telecommunications Equipment or Services—Representation, paragraph (c)(2), which requires an offeror to represent, after conducting a reasonable inquiry, whether it “does” or “does not” use covered telecommunications equipment or services, or any equipment, system or service that uses covered telecommunications equipment or services. The commercial item

equivalent is at paragraph (v)(2)(ii) of FAR 52.212–3, Offeror Representations and Certifications-Commercial Items. If an offeror represents it “does not,” the offer-by-offer representation at FAR 52.204–24(d)(2) is not required. If the offeror represents it “does,” or has not made any representation in FAR 52.204–26(c)(2) or 52.212–3(v)(2)(ii), the representation at FAR 52.204–24(d)(2) is required. The FAR 52.204–26 representation is prescribed at FAR 4.2105(c) for use in all solicitations.

The purpose of this change is to limit the requirement to represent at FAR 52.204–24(d)(2) to only offerors that use covered telecommunication equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services.

This interim rule provides procedures at FAR 4.2103 for contracting officers handling offeror representations in the provisions at FAR 52.204–24 and 52.204–26. A contracting officer may generally rely on an offeror’s representation in the provisions at FAR 52.204–24 and 52.204–26 that the offeror does not use any covered telecommunication equipment or services, or use any equipment, system or service that uses covered telecommunications equipment or services, unless the contracting officer has a reason to question the representation. In such cases the contracting officer shall follow agency procedures (e.g., consult the requiring activity and legal counsel).

III. Regulatory Impact Analysis Pursuant to Executive Orders 12866 and 13563

The costs and transfer impacts of section 889(a)(1)(B) are discussed in the analysis below. This analysis was developed by the FAR Council in consultation with agency procurement officials and the Office of Management and Budget (OMB). We request public comment on the costs, benefits, and transfers generated by this rule.

A. Benefits

This rule provides significant national security benefits to the general public. According to the White House article “A New National Security Strategy for a New Era”, the four pillars of the National Security Strategy (NSS) are to protect the homeland, promote American prosperity, preserve peace through strength, and advance American influence.¹ The purpose of this rule is to align with the NSS pillar

to protect the homeland, by protecting the homeland from the impact of Federal contractors using covered telecommunications equipment or services that present a national security concern.

The United States faces an expanding array of foreign intelligence threats by adversaries who are using increasingly sophisticated methods to harm the Nation.² Threats to the United States posed by foreign intelligence entities are becoming more complex and harmful to U.S. interests.³ Foreign intelligence actors are employing innovative combinations of traditional spying, economic espionage, and supply chain and cyber operations to gain access to critical infrastructure, and steal sensitive information and industrial secrets.⁴ The exploitation of key supply chains by foreign adversaries represents a complex and growing threat to strategically important U.S. economic sectors and critical infrastructure.⁵ The increasing reliance on foreign-owned or controlled telecommunications equipment, such as hardware or software, and services, as well as the proliferation of networking technologies may create vulnerabilities in our nation’s supply chains.⁶ The evolving technology landscape is likely to accelerate these trends, threatening the security and economic well-being of the American people.⁷

Since the People’s Republic of China possesses advanced cyber capabilities that it actively uses against the United States, a proactive cyber approach is needed to degrade or deny these threats before they reach our nation’s networks, including those of the Federal Government and its contractors. China is increasingly asserting itself by stealing U.S. technology and intellectual property in an effort to erode the United States’ economic and military superiority.⁸ Chinese companies, including the companies identified in this rule, are legally required to cooperate with their intelligence services.⁹ China’s reputation for

² National Counterintelligence Strategy of the United States of America 2020–2022.

³ National Counterintelligence Strategy of the United States of America 2020–2022.

⁴ National Counterintelligence Strategy of the United States of America 2020–2022.

⁵ National Counterintelligence Strategy of the United States of America 2020–2022.

⁶ National Counterintelligence Strategy of the United States of America 2020–2022.

⁷ National Counterintelligence Strategy of the United States of America 2020–2022.

⁸ National Counterintelligence Strategy of the United States of America 2020–2022.

⁹ NATO Cooperative Cyber Defense Center of Excellence Report on Huawei, 5G and China as a Security Threat.

¹ <https://www.whitehouse.gov/articles/new-national-security-strategy-new-era/>.

persistent industrial espionage and close collaboration between its government and industry in order to amass technological secrets presents additional threats for U.S. Government contractors.¹⁰ Therefore, there is a risk that Government contractors using 5th generation wireless communications (5G) and other telecommunications technology from the companies covered by this rule could introduce a reliance on equipment that may be controlled by the Chinese intelligence services and the military in both peacetime and crisis.¹¹

The 2019 Worldwide Threat Assessment of the Intelligence Community¹² highlights additional threats regarding China's cyber espionage against the U.S. Government, corporations, and allies. The U.S.-China Economic and Security Review Commission Staff Annual Reports¹³ provide additional details regarding the United States' national security interests in China's extensive engagement in the U.S. telecommunications sector. In addition, the U.S. Senate Select Committee on Intelligence Open Hearing on Worldwide Threats¹⁴ further elaborates on China's approach to gain access to the United States' sensitive technologies and intellectual property. The U.S. House of Representatives Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE¹⁵ further identifies how the risks associated with Huawei's and ZTE's provision of equipment to U.S. critical infrastructure could undermine core U.S. national security interests.

Currently, Government contractors may not consider broad national security interests of the general public when they make decisions. This rule ensures that Government contractors make decisions in accordance with public national security interests, by ensuring that, pursuant to statute, they do not use covered telecommunications equipment or services that present national security concerns. This rule will also assist contractors in mitigating supply chain risks (e.g., potential theft of trade secrets and intellectual

property) due to the use of covered telecommunications equipment or services.

B. Risks to Industry of Not Complying With 889

As a strictly contractual matter, an organization's failure to submit an accurate representation to the Government constitutes a breach of contract that can lead to cancellation, termination, and financial consequences.

Therefore, it is important for contractors to develop a compliance plan that will allow them to submit accurate representations to the Government in the course of their offers.

C. Contractor Actions Needed for Compliance

The interim rule published at 85 FR 42665 on July 14, 2020, provides a 6 step process for compliance. This second interim rule updates the requirements for step 1 (regulatory familiarization) and step 5 (representation) by requiring familiarization with the new representation within the provision at 52.204–26 and submitting this new representation.

D. Public Costs and Savings

During the first year after publication of the rule, contractors will need to learn about the new representation in the provision at 52.204–26 and its requirements. The DOD, GSA, and NASA (collectively referred to here as the Signatory Agencies) estimate this cost by multiplying the time required to review the regulations and guidance implementing the rule by the estimated compensation of a general manager.

To estimate the burden to Federal offerors associated with complying with the rule, the percentage of Federal contractors that will be impacted was pulled from Federal databases. According to data from the System for Award Management (SAM), as of February 2020, there were 387,967 unique vendors registered in SAM. As of September 2019, about 74% of all SAM entities registered for all awards were awarded to entities with the primary NAICS code as small; therefore, it is assumed that out of the 387,967 unique vendors registered in SAM in February 2020, 287,096 entities are unique small entities.

We estimate that this rule will also affect businesses which become Federal contractors in the future. Based on data in SAM for FY16–FY19, the Signatory Agencies anticipate there will be an

average of 79,319¹⁶ new entities registering annually in SAM, of which 74%, 58,696, are anticipated to be small businesses.

1. Time To Review the Rule

Below is a list of compliance activities related to regulatory familiarization that the Signatory Agencies anticipate will occur after issuance of the rule:

Familiarization with paragraph (c)(2) of FAR 52.204–26, Covered Telecommunications Equipment or Services—Representation. The Signatory Agencies assume that it will take all vendors who plan to submit an offer for a Federal award 8¹⁷ hours to familiarize themselves with the representation at FAR 52.204–26, Covered Telecommunications Equipment or Services—Representation. The Signatory Agencies assume that all entities registered in SAM, or 387,967¹⁸ entities will complete the representation as it is required in order have a current, accurate, and complete registration in SAM. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be \$294 million (= 8 hours × \$94.76¹⁹ per hour × 387,967). Of the 387,967 entities impacted by this part of the rule, it is assumed that 74%²⁰ or 287,096 entities are unique small entities.

In subsequent years, it is estimated that these costs will be incurred by 79,319²¹ new entrants each year. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be \$60 million (= 8 hours × \$94.76 per hour × 79,319) per year in subsequent years.

The total cost estimated to review the amendments to the provision and the clause is estimated to be \$294 million in the first year after publication. In subsequent years, this cost is estimated to be \$60 million annually. The FAR Council acknowledges that there is substantial uncertainty underlying these estimates.

2. Time To Complete the Representation 52.204–26

For the annual representation at FAR 52.204–26(c)(2), we assume that all entities registered in SAM will fill out the annual representation in order to

¹⁶ This value is based on data on new registrants in SAM.gov on average for FY16, FY17, FY18, and FY19.

¹⁷ The 8 hours are an assumption based on historical familiarization hours and subject matter expert judgment.

¹⁸ According to data from the System for Award Management (SAM), as of February 2020, there were 387,967 unique vendors registered in SAM.

¹⁹ The rate of \$94.76 assumes an FY19 GS 13 Step 5 salary (after applying a 100% adjustment for overhead and benefits to the base rate) based on subject matter judgment.

²⁰ As of September 2019, about 74% of all SAM entities registered for all awards were awarded to entities with the primary NAICS code as small.

²¹ This value is based on data on new registrants in SAM.gov on average for FY16, FY17, FY18, and FY19.

¹⁰ NATO Cooperative Cyber Defense Center of Excellence Report on Huawei, 5G and China as a Security Threat.

¹¹ NATO Cooperative Cyber Defense Center of Excellence Report on Huawei, 5G and China as a Security Threat.

¹² <https://www.dni.gov/files/ODNI/documents/2019-ATA-SFR-SSCI.pdf>.

¹³ <https://www.uscc.gov/annual-reports/archives>.

¹⁴ <https://www.intelligence.senate.gov/sites/default/files/hearings/CHRG-115shrg28947.pdf>.

¹⁵ <https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=96>.

maintain a current, accurate, and complete registration in SAM. It is assumed it will take 1²² hour to complete the annual representation. Therefore, the Signatory Agencies assumed the cost for this portion of the rule to be \$36.8 million (= 1 hour × \$94.76²³ per hour × 387,967²⁴ entities registered in SAM).

In subsequent years, we assume that all entities that register in SAM will continue to complete the representation to ensure their SAM registration is current, accurate, and complete. Therefore, it is assumed that these costs will be incurred by the 387,967²⁵ entities in SAM that are required to represent at least annually. Therefore, the Signatory Agencies calculated the total estimated cost for this part of the rule to be \$36.8 million (= 1²⁶ hour × \$94.76 per hour × (387,967 entities)) per year in subsequent years.

The FAR Council notes that the annual representation will likely reduce the burden on the public in cases where offerors represent “does not” in the annual representation at FAR 52.204–26(c)(2), Covered Telecommunications Equipment or Services—Representation or in paragraph (v)(2)(ii) of FAR 52.212–3, Offeror Representations and Certifications-Commercial Items; offerors can skip the offer-by-offer representation within the provision at FAR 52.204–24(d)(2), Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment.

There is no way for the FAR Council to know how many of the annual representations at FAR 52.204–26(c)(2), Covered Telecommunications Equipment or Services—Representation or in paragraph (v)(2)(ii) of FAR 52.212–3, Offeror Representations and Certifications-Commercial Items, will include a response of “does not”, which would allow offerors to skip the offer-by-offer representation within the provision at FAR 52.204–24(c)(2), Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment.

²² The hours are an assumption based on subject matter expert judgment.

²³ The rate of \$94.76 assumes an FY19 GS 13 Step 5 salary (after applying a 100% adjustment for overhead and benefits to the base rate) based on subject matter expert judgment.

²⁴ According to data from the System for Award Management (SAM), as of February 2020, there were 387,967 unique vendors registered in SAM.

²⁵ This number assumes that 79,319 both enter and exit as registrants in SAM with the average number of entities registered each year are 387,967.

²⁶ The hours are an assumption based on subject matter expert judgment.

52.204–24

In the first interim rule, this provision was required for 100% of the offers submitted. For this interim rule, the FAR Council assumes that 20% of entities will no longer have to complete the offer-by-offer representation in year 1, this would result in a cost savings of \$2.2 billion = (3²⁷ hours × \$94.76 per hour × (20% * 102,792 unique entities × 378²⁸ responses per entity).

In subsequent years, it is assumed that more offerors will respond “does not” in the annual representation and will be able to skip the offer-by-offer representation, however, the FAR Council lacks data to estimate this. The FAR Council believes that many entities will take advantage of this flexibility in order to reduce costs, and more will take advantage of the flexibility over time. Therefore, in subsequent years we believe that there will be more cost savings generated by having an annual representation. In the first interim rule, the FAR Council estimated 26% of new entrants would need to complete the offer-by-offer representation. We assume that this rule will reduce this fraction by half. This implies that in year 2 and beyond 50% of the burden calculated in the first interim rule (\$2.2 billion per year) will be eliminated due to the entities each year responding “does not” in the annual representation and skipping the offer-by-offer representations. Therefore, the cost savings is estimated to be \$1.1 billion.

The total cost savings of the above Public Cost Estimate by adding the annual representation in Year 1 is at least (Savings – Cost: \$2,200M – 331M Cost): \$1.6 billion.

The total costs of the above Cost Estimate Savings by adding the annual representation in Year 2 is at least (Savings – Cost: \$1,100M – \$97M): \$1,003 million.

The total costs savings estimate per year by adding the annual representation in subsequent years is at least (Savings – Cost \$1,100M – \$97M): \$1,003 million.

The following is a summary of the total public cost savings of this rule calculated in perpetuity at a 3 and 7-percent discount rate:

²⁷ The hours are an assumption based on subject matter expert judgment for an offer-by-offer representation.

²⁸ The responses per entity is calculated by dividing the average number of annual awards in FY16–19 by the average number of unique entities awarded a contract (38,854,291 awards/102,792 unique awardees = 378).

Summary (billions)	Total costs
Present Value (3%)	– \$34.3
Annualized Costs (3%)	– 1.0
Present Value (7%)	– 15.1
Annualized Costs (7%)	– 1.1

The FAR Council acknowledges that there is substantial uncertainty underlying these estimates, including elements for which an estimate is unavailable given inadequate information. As more information becomes available, including through comment in response to this notice, the FAR Council will seek to update these estimates which could increase or decrease the estimated net savings.

E. Government Cost and Savings Analysis

The FAR Council anticipates significant impact to the Government as a result of implementation of section 889(a)(1)(B) of the NDAA for FY 2019. This rule seeks to reduce the overall burden.

The primary cost to the Government will be to review the new annual representation (52.204–26(c)(2)) in SAM. However, there are anticipated savings from the reduction in the number of offer-by-offer representations (52.204–24(d)(2)).

52.204–26

For the annual representation at FAR 52.204–26(c)(2), we assume that the Government will need to review the annual representation at 52.204–26(c)(2) when the representation at 52.204–24(d)(2) has not been completed by the offeror. It is estimated 80 percent of offers received will include a completed offer-by-offer representation; therefore, an estimated 20 percent of offers received will rely on the annual representation. The average total number of awards per fiscal year is 38,854,291.²⁹ The number of offers received for a solicitation that results in an award varies from one to hundreds. A conservative estimate is 3 offers per award. Therefore, the Signatory Agencies estimate the total number of offers the Government receives in a year is 116,562,873. As previously stated, it is estimated that 20 percent of offers received will rely on the annual representation, or 23,312,575 (= 116,562,873*20%). At 5 minutes (.083 hour) per review the total cost for year 1 and all subsequent years is estimated to be \$183.4 million (= 38,854,291 × 3 × 20% × .083 × \$94.76³⁰).

²⁹ Based on FY16–19 FPDS data.

³⁰ The rate of \$95.76 assumes an FY19 GS 13 Step5 salary (after applying a 100% adjustment for

52.204–24

In the first interim rule, this provision was required for 100% of the offers submitted. For this interim rule, the FAR Council assumes that 20% of entities will no longer have to complete the offer-by-offer representation in year 1, this would result in a cost savings of *\$2.2 billion* = (20% × 3³¹ hours × \$94.76 per hour × 102,792 unique entities × 378³² responses per entity) because the Government would have to review less representations for 52.204–24.

In subsequent years, it is assumed that fewer offerors will respond “does” in the annual representation and will be required to complete the offer-by-offer representation, however, the FAR Council lacks data to estimate this. The FAR Council believes that many entities will take advantage of this flexibility in order to reduce costs, and more will take advantage of the flexibility over time.

This implies that in year 2 and beyond 50% of the burden calculated in the first interim rule (\$2.2 billion per year) will be eliminated due to the entities each year responding “does not” in the annual representation and skipping the offer-by-offer representations. Therefore, the cost savings is estimated to be *\$1.1 billion*.

The total cost savings of the above Government Cost Estimate by adding the annual representation in Year 1 is at least (Savings – Cost: \$2,200M – 183.4M Cost): *\$2 billion*.

The total cost savings of the above Government Cost Estimate Savings by adding the annual representation in Year 2 is at least (Savings – Cost: \$1,100M – \$183.4M): *\$0.9 billion*.

The total Government cost savings estimate per year by adding the annual representation in subsequent years is at least (Savings – Cost \$1,100M – \$183.4M): *\$0.9 billion*.

The following is a summary of the estimated Government costs savings calculated in perpetuity at a 3 and 7-percent discount rate:

Summary (billions)	Total costs
Present Value (3%)	–\$31.6
Annualized Costs (3%)	– .9
Present Value (7%)	– 14.1
Annualized Costs (7%)	– 1.0

overhead and benefits to the base rate) based on subject matter judgement.

³¹ The hours are an assumption based on subject matter expert judgment for an offer-by-offer representation.

³² The responses per entity is calculated by dividing the average number of annual awards in FY16–19 by the average number of unique entities awarded a contract (38,854,291 awards/102,792 unique awardees = 378).

F. Analysis of Alternatives

The FAR Council could take no further regulatory action to implement this statute. However, this alternative would not provide the more efficient implementation and enforcement of the important national security measures accomplished by this rule as detailed above in section C. As a result, we reject this alternative.

IV. Specific Questions For Comment

To understand the exact scope of this impact and how this impact could be affected in subsequent rulemaking, DoD, GSA, and NASA welcome input on the following questions regarding anticipated impact on affected parties.

- What additional information or guidance do you view as necessary to effectively comply with this rule?
- What challenges do you anticipate facing in effectively complying with this rule?

V. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

In the first interim rule, the FAR Council determined that it would not be in the best interest of the Federal Government to exempt contracts and subcontracts in amounts not greater than the SAT, commercial item contracts, and contracts for the acquisition of COTS items, from the provision of law. As the second interim rule makes only administrative changes to the process of collecting information, and does not affect the scope of applicability of the prohibition, those determinations remain applicable. This rule adds a representation to the provision at FAR 52.204–26, Covered Telecommunications Equipment or Services—Representation, in order to implement section 889(a)(1)(B) of the NDAA for FY 2019, which 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 on or after August 13, 2020, unless an exception applies or a waiver has been granted.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to acquisitions at or below the SAT. Section 1905 generally limits the applicability of new laws when agencies are making

acquisitions at or below the SAT, but provides that such acquisitions will not be exempt from a provision of law under certain circumstances, including when the FAR Council makes a written determination and finding that it would not be in the best interest of the Federal Government to exempt contracts and subcontracts in amounts not greater than the SAT from the provision of law.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including Commercially Available Off-the-Shelf Items

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial items, and is intended to limit the applicability of laws to contracts for the acquisition of commercial items. Section 1906 provides that if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items.

Finally, 41 U.S.C. 1907 states that acquisitions of COTS items will be exempt from a provision of law unless certain circumstances apply, including if the Administrator for Federal Procurement Policy makes a written determination and finding that would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items from the provision of law.

C. Determinations

In issuing the first interim rule, the FAR Council determined that it is in the best interest of the Government to apply the rule to contracts at or below the SAT and for the acquisition of commercial items, and the Administrator for Federal Procurement Policy determined that it is in the best interest of the Government to apply that rule to contracts for the acquisition of COTS items. The changes made in this rule are administrative changes to the process of collecting required information, and do not alter those determinations.

VI. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of

harmonizing rules, and of promoting flexibility. This rule has been designated a “significant regulatory action” under E.O. 12866. Accordingly, the OMB has reviewed this rule. This second interim rule is a major rule under 5 U.S.C. 804.

VII. Executive Order 13771

This rule is subject to the requirements of E.O. 13771. The final rule designation, as regulatory or deregulatory under E.O. 13771, will be informed by the comments received from this interim rule. Details of estimates of costs or savings can be found in section III of this preamble.

VIII. Regulatory Flexibility Act

For the first interim rule, DoD, GSA, and NASA performed an Initial Regulatory Flexibility Analysis (IRFA).

Although the second interim rule would on aggregate reduce burdens, DoD, GSA, and NASA expect that this rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* An Initial Regulatory Flexibility Analysis (IRFA) has been performed, and is summarized as follows:

The reason for this second interim rule is to further implement section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232) by allowing offerors to represent annually whether they use any covered telecommunications equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services.

The objective of the rule is to provide an information collection mechanism that relies on an annual representation, thereby reducing the burden of providing information, in some cases, that is required to enable agencies to determine and ensure that they are complying with section 889(a)(1)(B). The legal basis for the rule is section 889(a)(1)(B) of the NDAA for FY 2019, which 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, on or after August 13, 2020, unless an exception applies or a waiver has been granted.

To estimate the burden to Federal offerors associated with complying with the rule, the percentage of Federal contractors that will be impacted was pulled from Federal databases. According to data from the System for Award Management (SAM), as of February 2020, there were 387,967 unique vendors registered in SAM. As of September 2019, about 74 percent of all SAM entities registered for all awards were awarded to entities with the primary NAICS code as small; therefore, it is

assumed that out of the 387,967 unique vendors registered in SAM in February 2020, 287,096 entities are unique small entities. We assume that all entities registered in SAM will fill out the annual representation because they are required to fill it out to have a current, accurate, and complete SAM registration.

The solicitation provision at 52.204–26 is prescribed for use in all solicitations. The second interim rule adds a representation at paragraph (c)(2) which requires each vendor to represent, at least annually, that it “does” or “does not” use covered telecommunications equipment or services, or any equipment, system or service that uses covered telecommunications equipment or services. Offerors shall consult the System for Award Management (SAM) to validate whether the equipment or services they are using are from an entity providing equipment or services listed in the definition of “covered telecommunications equipment or services.” The offerors will conduct a reasonable inquiry as to whether they use covered telecommunications equipment or services or any equipment, system, or service that uses covered telecommunications equipment or services.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

It is not possible to establish different compliance or reporting requirements or timetables that take into account the resources available to small entities or to exempt small entities from coverage of the rule, or any part thereof. DoD, GSA, and NASA were unable to identify any alternatives that would reduce the burden on small entities and still meet the objectives of section 889.

The Regulatory Secretariat Division has submitted a copy of this IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy may be obtained from the Regulatory Secretariat Division upon request. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2019–009) in correspondence.

IX. Paperwork Reduction Act

As part of the first interim rule, the FAR Council was granted emergency processing of a collection currently approved under OMB control number 9000–0201, Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment.

In the first interim rule, the burden consisted of an offer-by-offer

representation at FAR 52.204–24(d)(2) to identify whether an offeror does or does not use covered telecommunications equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services, and a report of identified covered telecommunications equipment and services during contract performance, as required by FAR 52.204–25. In this second interim rule, the burden consists of a representation at FAR 52.204–26(c)(2) to identify whether an offeror does or does not use covered telecommunications equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services, and a representation at FAR 52.204–24(d)(2) to identify whether an offeror uses any equipment, system, or service that uses covered telecommunications equipment or services for each offer, unless the offeror selects “does not” in response to the provision at FAR 52.204–26(c)(2) (or its commercial item equivalent at paragraph (v)(2)(ii) of FAR 52.212–3).

With this second interim rule, this existing collection is being revised to reflect a reduction in burden.

With this change in who must complete a representation at FAR 52.204–24(d)(2), the FAR Council has estimated the number of responses required by this provision will drop from 38,854,291 to 31,083,433. With this decrease in responses needed, the burden for 52.204–24(d)(2) is expected to decrease from \$11,045,497,845 to \$8,836,398,333.

The representation added by this rule at 52.204–26(c)(2) is estimated to average 1 hour (the average of the time for both positive and negative representations) per response to review the prohibitions, conduct a reasonable inquiry, and complete the representation. The representation at FAR 52.204–24(d)(2) is estimated to average 3 hours (the average of the time for both positive and negative representations) per response to review the prohibitions, conduct a reasonable inquiry, and either provide a response of “does not” or provide a response of “does” and complete the additional detailed disclosure.

As part of this interim rule, the FAR Council is soliciting comments from the public in order to:

- Evaluate whether the proposed revisions to this collection of information are necessary for the proper performance of the functions of the FAR Council, including whether the information will have practical utility;

- Evaluate the accuracy of the FAR Council’s estimate of the burden of the revised collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond including through the use of appropriate collection techniques.

Organizations and individuals desiring to submit comments on the information collection requirements associated with this rulemaking should submit comments to the Regulatory Secretariat Division (MVCB) not later than October 26, 2020 through <http://www.regulations.gov> and follow the instructions on the site. This website provides the ability to type short comments directly into the comment field or attach a file for lengthier comments. If there are difficulties submitting comments, contact the GSA Regulatory Secretariat Division at 202–501–4755 or GSARegSec@gsa.gov.

Instructions: All items submitted must cite Information Collection 9000–0201, Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment. Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting.

X. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that notice and public procedure thereon is unnecessary.

This 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. Since section 889 of the NDAA for FY 2019 was signed on August 13, 2018, the FAR Council has been working diligently to implement the statute, which has multiple effective dates embedded in section 889. Like many countries, the United States has increasingly relied on a global industrial supply chain. As threats have increased,

so has the Government’s scrutiny of its contractors and their suppliers. 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. It is worth noting this rule follows a succession of other FAR and DOD rules dealing with supply chain and cybersecurity that were further described within section VI of the first interim rule published on July 14, 2020, at 85 FR 42665.

Changes necessary to the System for Award Management (SAM) to reduce the burden of the first interim rule were not available by the effective date of the rule, so in order to decrease the burden on contractors from the first rule and increase the effectiveness of the rule, the FAR Council is publishing this second interim rule on section 889(a)(1)(B).

Implementing this rule as soon as the SAM representation is available will reduce the burden on the public and the Government to comply with the critical national security regulation. Publication of a proposed rule would delay the reduction of burden and the achievement of the national security benefits that are expected from this second interim rule.

For the foregoing reasons, pursuant to 41 U.S.C. 1707(d), the FAR Council finds that urgent and compelling circumstances make compliance with the notice and comment and delayed effective date requirements of 41 U.S.C. 1707(a) and (b) impracticable, and invokes the exception to those requirements under 1707(d).

While a public comment process will not be completed prior to the rule’s effective date, the FAR Council has taken into account feedback solicited through extensive outreach already undertaken, the feedback received through the two rulemakings associated with section 889(a)(1)(A), and the feedback received so far from the first interim rule published on July 14, 2020, at 85 FR 42665. The FAR Council will also consider comments submitted in response to this interim rule in issuing a subsequent rulemaking.

List of Subjects in 48 CFR Parts 1, 4, and 52

Government procurement.

William F. Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 4, and 52 as set forth below:

- 1. The authority citation for 48 CFR parts 1, 4, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

- 2. In section 1.106 amend the table by adding in numerical order FAR segment entry “52.204–26” and its OMB control numbers to read as follows:

1.106 OMB approval under the Paperwork Reduction Act.

* * * * *				
FAR segment		OMB control No.		
*	*	*	*	*
52.204–26	9000–0199 and	9000–0201	
*	*	*	*	*

PART 4—ADMINISTRATIVE AND INFORMATION MATTERS

- 3. Amend section 4.2103 by revising paragraph (a)(1) to read as follows:

4.2103 Procedures.

(a) * * *

(1)(i) If the offeror selects “does not” in paragraphs (c)(1) and/or (c)(2) of the provision at 52.204–26 or in paragraphs (v)(2)(i) and/or (v)(2)(ii) of the provision at 52.212–3, the contracting officer may rely on the “does not” representation(s), unless the contracting officer has reason to question the representation. If the contracting officer has a reason to question the representation, the contracting officer shall follow agency procedures.

(ii) If the offeror selects “does” in paragraph (c)(1) of the provision at 52.204–26 or paragraph (v)(2)(i) of the provision at 52.212–3, the offeror will be required to complete the representation in paragraph (d)(1) of the provision at 52.204–24.

(iii) If the offeror selects “does” in paragraph (c)(2) of the provision at 52.204–26 or paragraph (v)(2)(ii) of the provision at 52.212–3, the offeror will be required to complete the representation in paragraph (d)(2) of the provision at 52.204–24.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 4. Amend section 52.204–24 by revising the date of provision and the introductory text to read as follows:

52.204–24 Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment.

* * * * *

Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment (Oct 2020)

The Offeror shall not complete the representation at paragraph (d)(1) of this provision if the Offeror has represented that it “does not provide covered telecommunications equipment or services as a part of its offered products or services to the Government in the performance of any contract, subcontract, or other contractual instrument” in paragraph (c)(1) in the provision at 52.204–26, Covered Telecommunications Equipment or Services—Representation, or in paragraph (v)(2)(i) of the provision at 52.212–3, Offeror Representations and Certifications—Commercial Items. The Offeror shall not complete the representation in paragraph (d)(2) of this provision if the Offeror has represented that it “does not use covered telecommunications equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services” in paragraph (c)(2) of the provision at 52.204–26, or in paragraph (v)(2)(ii) of the provision at 52.212–3.

* * * * *

- 5. Amend section 52.204–26 by—
- a. Revising the date of the provision;
- b. In paragraph (a), removing “has” and adding “and “reasonable inquiry” have” in its place; and
- c. Revising paragraph (c).

The revisions read as follows:

52.204–26 Covered Telecommunications Equipment or Services—Representation.

* * * * *

Covered Telecommunications Equipment or Services—Representation (OCT 2020)

* * * * *

(c) *Representations.* (1) The Offeror represents that it [] does, [] does not provide covered telecommunications

equipment or services as a part of its offered products or services to the Government in the performance of any contract, subcontract, or other contractual instrument.

(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 any equipment, system, or service that uses covered telecommunications equipment or services.

* * * * *

- 6. Amend section 52.212–3 by—
- a. Revising the date of the provision;
- b. In paragraph (a) adding the definition “Reasonable inquiry” in alphabetical order;
- c. Removing from paragraph (v) introductory text “of Public” and adding “and section 889 (a)(1)(B) of Public” in its place; and
- d. Revising paragraph (v)(2).

The revisions and addition read as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

Offeror Representations and Certifications—Commercial Items (Oct 2020)

* * * * *

(a) * * *

Reasonable inquiry has the meaning provided in the clause 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.

* * * * *

(v) * * *

(2) The Offeror represents that—

(i) It [] does, [] does not provide covered telecommunications equipment or services as a part of its offered products or services to the Government in the performance of any contract, subcontract, or other contractual instrument.

(ii) After conducting a reasonable inquiry for purposes of this representation, that it [] does, [] does not use covered telecommunications

equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services.

* * * * *

[FR Doc. 2020–18772 Filed 8–26–20; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket No. FAR–2020–0051, Sequence No. 5]

Federal Acquisition Regulation; Federal Acquisition Circular 2020–09; Small Entity Compliance Guide

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of DOD, GSA, and NASA. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rule appearing in Federal Acquisition Circular (FAC) 2020–09, which amends the Federal Acquisition Regulation (FAR). An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding this rule by referring to FAC 2020–09, which precedes this document. These documents are also available via the internet at <https://www.regulations.gov>.

DATES: August 27, 2020.

FOR FURTHER INFORMATION CONTACT: Farpolicy@gsa.gov or call 202–969–4075. Please cite FAC 2020–09, FAR case 2019–009.

RULE LISTED IN FAC 2020–09

Subject	FAR case
* Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment	2019–009