

January 19, 2024

Ms. Marissa Ryba
Procurement Analyst
General Services Administration
1800 F Street, NW
Washington, DC 20405

Re: FAC 2023-006; FAR Case 2020-011; Federal Acquisition Regulation: Implementation of Federal Acquisition Supply Chain Security Act (FASCSA) Orders

Dear Ms. Ryba,

The Information Technology Industry Council (ITI) is pleased to submit these comments on the referenced interim rule regarding the implementation of FASCSA orders. In general, we support this interim rule as it standardizes implementation of these orders in furtherance of a risk-based approach. We have provided some recommendations for further improving the process and ensuring sensitive and proprietary information is protected, as well as ensuring fairness, transparency, and clarity in how these requirements are implemented in the federal acquisition process.

ITI is the premier global advocate for technology, representing the world's most innovative companies. Founded in 1916, ITI is an international trade association with a team of professionals on four continents. We promote public policies and industry standards that advance competition and innovation worldwide. Our diverse membership and expert staff provide policymakers the broadest perspective and thought leadership from technology, hardware, software, services, and related industries.

ITI's members provide a wide array of cutting-edge technologies to the federal government, including best-in-class commercial information technology (IT). Our members implement rigorous security standards and safeguards for products offered to both commercial and government customers. ITI has long advocated for the government to adopt a risk-based approach to both cybersecurity and supply chain risk management, such as by relying on the Federal Acquisition Security Council (FASC) to issue targeted exclusion orders that take into account both context and actual threat information.

ITI urges the FAR Council and the FASC to ensure a complete and thorough review and consideration of all comments received in response to this interim rule. While we understand and support the government's efforts to identify, track, and address risks as soon as possible, we believe any government action on this issue must be informed by a careful review of industry feedback. Our comments below focus on recommendations for ensuring appropriate consideration of industry comments as well as the overall successful implementation of the interim rule.

I. Ensure the government appropriately considers and incorporates public feedback.

Although ITI recognizes and appreciates the need to move forward with addressing supply chain security risks through FASCSA orders, we are concerned that the current process of issuing an interim rule with an effective date of December 4, 2023 did not allow for sufficient time for the government to review, adjudicate, and incorporate valuable industry feedback once the interim rule became effective. We

appreciate the opportunity to provide comments before February 2, 2024, but we strongly encourage the government to conduct a thorough review of public comments and revise the final rule appropriately.

We also support delaying the issuance of FASCSA orders until the FASC has had sufficient time to consider feedback from industry gathered through this comment period and until at least the effective date of the final rule. This approach will help ensure the FASC issues orders pursuant to an effective process that successfully addresses supply chain security risks long-term and enables contractors to appropriately manage compliance with FASCSA orders.

II. Adopt a reasonable implementation period for newly issued FASCSA orders.

Today's most innovative technologies are generally developed and produced through complex, global supply chains. Depending on the scope of covered articles, products, and services covered by a FASCSA order, it could take months for a contractor to identify an appropriate, reliable alternative source(s) of supply. The FASC should understand that, depending on the covered article, product, or services category, finding alternate sources of supply could take more than one year.

As currently drafted, the interim rule does not prescribe an implementation period for FASCSA orders. We urge the government to allow for a reasonable implementation period for new FASCSA orders—ideally a minimum of 12 months. This time period is especially necessary when outside certification is required to find a new supplier, vet it, negotiate new terms and conditions, etc. when required to comply with a FASCSA order. Additionally, we note that compliance with the new government requirements regarding implementing FASCSA orders will involve a learning curve, and the government should allow a reasonable time for compliance.

On balance, a more thoughtful or graduated implementation period for FASCSA orders centered on the covered article, product, or service impacted will better ensure compliance and could minimize the need for waivers. If at least a 12-month implementation timeframe across all covered article, product, and services categories is unachievable, then we recommend it be retained for at least some categories (e.g., packaging for semiconductors). Additionally, to ensure the U.S. Government is able to act more quickly for particularly troubling concerns, the U.S. Government could include a means to reduce the 12-month time period in emergency situations or exigent circumstances with written approval of the Head of the Contracting Activity or the FASC. This would enable some predictability for contractors (by retaining the 12-month period as a default) while giving the U.S. Government the flexibility to demand a shorter time period in justified circumstances.

III. Ensure appropriate measures for safeguarding sensitive and proprietary information.

While FASCSA orders can serve as a valuable tool for moving the government toward a risk-based approach for supply chain security, there is also a risk of unintended consequences if orders expose contractors' proprietary or sensitive information to the general public. We recommend implementing security measures and access controls that balance information sharing with protecting contractor information. Additionally, we recommend the government limit the information shared on SAM.gov to the bare minimum necessary to identify covered articles, products, and services, with opportunities for impacted contractors to receive additional information directly from the FASC.

IV. Provide affirmative alerts and notifications for contractors for new FASCSA orders.

The interim rule requires contractors to review SAM.gov once per quarter to identify new FASCSA orders. However, it also states that when "an offeror submits a new offer in response to a contract

solicitation containing the new [FASCSA order], the offeror will represent, after conducting a reasonable inquiry, that the offeror does not propose to provide or use any prohibited covered articles or products or services subject to a FASCSA order.”

The rule requires more clarity on avoiding situations where contractors are unable to bid simply because they are unable to conduct the requisite reasonable inquiry. Many offerors receive and respond to new solicitations and contracting opportunities multiple times each day. To conduct a reasonable inquiry and effectively represent that each offer does not provide or use a covered article, product, or service, the contractor must not only devote resources to continuously monitoring SAM.gov, but must devote additional resources to conduct that reasonable inquiry in an abbreviated time period. To assist contractors in managing the volume of offers that must contain this representation, ITI urges the government to push out affirmative alerts and notifications, ideally using existing SAM.gov alerting functionality, for contractors when a new FASCSA order is issued and ample time before it becomes effective (see above). This will significantly ease the administrative and resource burden for contractors while helping promote compliance and ensuring the government maintains access to a continuous supply of the goods and services it needs.

V. Increase the timelines for providing notice and reporting to the government.

As discussed above, today’s most innovative technologies are generally produced with the benefit of complex, widely distributed supply chains. When a new FASCSA order is issued, the interim rule does not limit the supply chain tiers that must be reviewed by a contractor to determine whether a covered article, product, or service is used. This may require extensive review efforts to ensure compliance with the order. We encourage the government to consider limiting reporting requirements to direct suppliers, rather than flowing down reporting requirements to lower-tier suppliers that do not have privity of contract with the government and which themselves may not be able to obtain information from their own supply chains.

Because FASCSA orders are dynamic and may be issued at any time, the current timelines for providing notice and reporting to the government are too short and essentially require continuous monitoring of SAM.gov to ensure compliance. For example, whenever a new FASCSA order is issued, the contractor must identify the order in SAM.gov and immediately begin reviewing its supply chains to determine whether a covered article, product, or service is used. If a covered article, product, or service is identified, the contractor must determine whether the covered item was provided under or used in performance of a government contract at present and to speculate whether it could be in the future. If identified, the contractor must then report the instance to the relevant government entity within three business days of identifying the covered article, product, or service. The contractor must then submit follow-on information to the government within ten business days of identifying the covered article, product, or service.

Unless a contractor has devoted resources to continuously monitoring SAM.gov, it may not immediately learn of the issuance of a new FASCSA order. This could impact the contractor’s ability to comply with the interim rule’s short timelines for notice and reporting requirements, especially if the contractor is then required to review a complex and extensive supply chain, including Commercially available-Off-The-Shelf (COTS) suppliers that are less familiar with more detailed U.S. Government contract clauses. We urge the government to work with contractors to develop a more reasonable timeline for providing notice and reporting, which may vary based on individual industries, sectors, contracts, etc.

VI. Confirm that the scope of required “supply chain risk” monitoring applies to covered articles, products, or services provided to the government and excludes purely commercial articles and sources.

As currently drafted, the interim rule requires contractors to monitor “supply chain risk” associated with “covered articles.” Both terms are defined in the interim rule. It is our view that FAR 52.204-30(c)(2), which focuses on a “covered article or product or service produced or provided by a source subject to the FASCSA order(s) [that] was provided to the Government or used during contract performance,” applies the FASCSA order prohibitions and reporting requirements to only those articles, products, and services that are provided to the government or used in performance of the contract. We ask the government to clarify this interpretation and confirm that FASCSA-related supply chain risk monitoring and reporting requirements do not apply to supply chains that are outside the covered articles, products, and services used for government contract performance.

This issue is especially critical where commercial supply chains are leveraged for covered articles, products, or services used during government contract performance. Covered articles, products, or services requiring alternate sources of supply to government contracts compliance (e.g., Buy American Act, Trade Agreements Act) already entail supply chain enhancements for the government that are not propagated across commercial sales. Injecting “supply chain risk” monitoring outside supply chains intended for government end use would significantly increase the costs of supply chains commercial in nature, which seems patently outside the scope of the stated objectives of the interim rule.

VII. Consideration of COTS suppliers and waiver for nonavailability.

The interim rule applies to all contracts, including contracts for COTS solutions. We understand the national security need to ensure risky or suspect products and services are not delivered to the U.S. Government. Of concern is the ability to find and procure compliant COTS parts if FASCSA orders will be extremely broad or numerous. We strongly encourage the government to consider application to COTS products and services only as needed based on the unique circumstances of each individual FASCSA order. Additionally, the U.S. Government should consider a waiver provision for non-availability which can be approved by the cognizant contracting office. This will ensure continuity of supply should the risk be low on particular covered articles, products, and services for the U.S. Government.

VIII. Ensure appropriate contractual avenues for implementing actions required to comply with the interim rule.

FAR 52.204-30(b)(4) expressly states that a FASCSA order issued after the date of solicitation applies to the contract only if added by amendment to the solicitation or modification of the contract. Accordingly, it is our understanding that when new FASCSA orders are issued that are applicable to an existing contract, the government must modify the contract to include the FASCSA order and requirements for remediation/replacement, which would allow an opportunity for an equitable adjustment and other contractual modifications (e.g., adjustment to delivery dates) as appropriate. We ask that the government confirm this process will occur and that contractors will be permitted to access all available contractual remedies when implementing FASCSA orders.

IX. Clarify FASC Procedures and Timeline.

Clarification is also needed regarding relevant implementation protocols, procedures, and timelines. For example, if an agency or contractor seeks a waiver of a FASCSA order, how long does the agency that issued the order have to consider the waiver request? It is our view that if a waiver request concerning a covered article, product, or service is under review, the use of that article or source should be permitted

until a determination is made regarding the waiver. Finally, the final rule should clarify the process for informing contractors that an agency has submitted a waiver request regarding a particular FASCSA order.

Thank you for your consideration of our comments. Should you need additional information, please contact me at mpetersen@itic.org.

Very Respectfully,

A handwritten signature in black ink that reads "Megan Petersen". The signature is written in a cursive style with a long, sweeping tail on the letter "n".

Megan Petersen
Vice President, Public Sector Policy and Counsel
Information Technology Industry Council (ITI)