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¶ 1 FEATURE COMMENT: The Whole Buffet: Contractors' Obligations And Sources' Rights Under The Federal Acquisition Supply Chain Security Act

For the past five years, the Federal Government has been a very picky eater when addressing supply chain vulnerabilities in federal procurements. On its plate has been a selection of political priority entrees and hot-button side-dishes, spiced with political rhetoric and finished with pop culture condiments. Seemingly lacking has been any real nutrition; little evidence that lawmakers intended to confront the reality of threats faced by the U.S. For example, the Government's prohibition on ByteDance covered applications (the "TikTok ban") clearly reflects the skepticism that many in the American public feel towards TikTok, which carries a great deal of cultural cache. However, to anyone who is familiar with the multiplicity of Chinese software applications and IT software and hardware, like a tray of dried-out chicken fingers, the Bytedance ban reflected a narrow understanding informed more by popular culture than an informed appraisal of cyber threats. It would suffice in a pinch, but it would never be satiating.

To remedy the a la carte approach to banning software and hardware in and on federal systems, on Dec. 21, 2018, Congress passed the Strengthening and Enhancing Cyber-Capabilities by Utilizing Risk Exposure Technology Act ("SECURE Technology Act" or "the Act"). Title II of the Act covered Federal Acquisition Supply Chain Security and is called the "Federal Acquisition Supply Chain Security Act of 2018" (FASCSA). Among other things, FASCSA established a Federal Acquisition Security Council (FASC) represented by eight different agencies. The FASC was tasked with overseeing the development of supply chain risk management standards, guidelines, and practices by the National Institute of Standards and Technology (NIST). The FASC would also provide guidance to agencies for how best to address supply chain risks using acquisition vehicles. Most importantly, the FASC was given the authority to provide guidance on the issuance of orders requiring the removal of certain "covered articles" from executive agency information systems with which agencies are required to comply. Moreover, the Act gave agency administrators the authority to issue emergency exclusions "to address an urgent national security interest" after a joint recommendation from the chief acquisition and chief information officers (or agency officials performing functions similar to those). 41 USCA § 4713.

For contractors, the Act stirred the pot by directing lawmakers to create three new Federal Acquisition Regulation clauses that, as of Dec. 4, 2023, are finding their way into contracts:

- 52.204-28, Federal Acquisition Supply Chain Security Act Orders—Federal Supply Schedules, Government-wide Acquisition Contracts, and Multi-Agency Contracts
- 52.204-29, Federal Acquisition Supply Chain Security Act Orders—Representation and Disclosures
- 52.204-30, Federal Acquisition Supply Chain Security Act Orders—Prohibition

As described in greater detail below, these clauses will require process and procedural changes in the way contractors review and make sourcing decisions. In light of the dynamic risk environment in which exclusion orders are issued and therefore what supply chain products may find themselves the focus of an exclusion order, the onus is now on contractors to search the System for Award Management (SAM) to obtain a list of items covered by a FASCSA order; depending on how the order may affect a contractor, contractors must conduct an internal or third-party audit of applicable systems for those items. If such items are present, the contractor must disclose that information to the agency and take efforts to exclude such items from the procurement.

In sum, the purpose of the FASCSA and its subsequent operations is to address the ever-changing buffet line of evolving threats that are infecting or may infect federal systems. Contractors who belly up to the Government's table must now be prepared to deal with the changes FASCSA brings, most notably the need to put down one serving spoon and pick up another when food choices change. As reflected below, FASCSA is a complicated act with a lot of moving parts—many of which are still in motion—that will require some culinary agility by both contractors and their vendors.

Appetizers—Understanding the FASCSA Framework—When finalized back in 2021, regulations established by the FASC delineated the procedural approach that civilian, defense, and intelligence agencies must follow when making determinations regarding "Covered Articles" (i.e., products and services) and "Covered Sources" (i.e., federal contractors and suppliers). The FASC regulations specifically addressed the handling of both mandatory and voluntary submissions of information to the FASC, under which federal agencies are mandated to promptly submit information to the FASC after determining there to be "a reasonable basis to conclude a substantial supply chain risk exists in connection with a source or covered article." The regulations went on to provide an avenue for voluntary submissions, which may originate from federal agencies or non-federal entities, including companies or individuals.

More recently, in October 2023, the Federal Acquisition Regulatory Council released an interim rule allowing the Government to bar the delivery or utilization of "covered articles" in the execution of Government contracts. These covered articles, described in greater detail below, generally encompass specific information technology and telecommunications equipment, hardware, systems, devices, software, and services, that could be subject to exclusion or removal orders under FASCSA. A FASCSA order may necessitate the exclusion of covered sources or articles from federal procurement activities, whether as a prime contractor or subcontractor at any tier, and/or the removal of covered articles from federal or contractor information systems. Although as of this writing, neither the FASC nor the order-issuing agencies (Department of Homeland Security, Department of Defense, and the Office of the Director of National Intelligence) have issued FASCSA orders, any such orders are to be posted and disclosed in SAM or, in some cases, specified within the contract and resulting subcontracts.

The focus of the Act can be found most prominently in the definition of "Covered Articles," which draws on definitions from established statutory frameworks governing the use of information technology systems. Those frameworks can be summarized as (1) information technology (including cloud computing services); (2) telecommunications equipment and services provided by "common carriers" under the Communications Act of 1934; (3) the processing of information on a federal or non-federal information system subject to the requirements of the Controlled Unclassified Information (CUI) program; and (4) hardware, systems, de-

vices, software, or services that include embedded or incidental information technology.

Information Technology: The definition of "information technology" stems from 40 USCA § 11101 as follows:

> (A) … [A]ny equipment or interconnected system or subsystem of equipment. . . ***used by the executive agency directly*** or is used by a contractor ***under a contract*** with the executive agency that ***requires the use***—
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> (i) of that equipment; or
>
> (ii) of that equipment ***to a significant extent in the performance of a service or the furnishing of a product*****;** [and]
>
> (C) ***does not include any equipment acquired by a federal contractor incidental to a federal contract.***

(emphasis added). Note that the definition contemplates systems used directly by agencies and systems a contractor is required to use under a contract or that will be used "to a significant extent in the performance of a service or the furnishing of a product." For the second category, contractor information technology systems that are *not* used under a federal contract would not be covered by the source exclusion orders. Additionally, while there is not guidance on the extent to which a restricted source is "used" in providing a service or product, under the clear definition of information technology, any exclusions should not apply to information systems unrelated to the work at issue. For example, a company that owns a facility that utilizes an excluded source's equipment but that does not conduct Government work would not be required to remove that equipment on a contract where that facility does not conduct any work.

Telecommunications Equipment and Services: Notably, the Act is intended to reach and apply to the equipment and services provided by "common carriers," as those terms are defined under the Communications Act of 1934 (47 USCA § 153). Generally speaking, this would include equipment, other than customer premises equipment, used by a carrier to provide telecommunications services, and includes software integral to such equipment (including upgrades).

Controlled Unclassified Information: For the processing of information subject to CUI restrictions, as of the time of writing, contractors who process CUI are required to implement cyber hygiene practices from NIST Special Publication 800-171. However, on Dec. 26, 2023, DOD released a proposed final rule for Cybersecurity Maturity Model Certification 2.0, which establishes a uniform framework for controls required for processing or storing CUI. The Act requires any sources that would fall under the requirements applicable to CUI to be subject to the Act's orders and covered procurement actions.

Embedded or Incidental Information Technology: Lastly, "embedded systems" contemplate an IT element that serves a specific function within an IT system. Such systems in ordinary life include home appliances, assembly lines, robots, or avionics systems. This broad definition makes the exclusions from the Act applicable to certain electronics that include microprocessors and other small, dedicated computer systems that might not fall under a contractor's notion of a typical IT system.

The rule specifies that upon referral to the FASC (or any of its members), a written request from the head of an executive agency or designee, or based on credible information submitted to the FASC, the FASC is required to initiate a process to decide whether to recommend an exclusion or removal order of that Covered Article.

Salad Bar Closed—Exclusion and Removal Orders and "Covered Procurement Actions"—A final decision by the FASC will depend on various nonexclusive factors related to the source or article. The Act contemplates two methods of excluding risky sources to mitigate supply chain risks for covered articles: FASC orders or agency covered procurement actions. Recommendations by the FASC are forwarded to the Secretary of Homeland Security, the Secretary of Defense, and the Director of National Intelligence. Each agency is responsible for exclusions in their re-

spective domains, and they retain the authority to decide whether to issue an order. As discussed below, both means of excluding sources can be challenged by a source informally through a response to a notice or formally at the U.S. Court of Appeals for the District of Columbia Circuit.

FASC Exclusion and Removal Orders: The Act created the FASC comprised of civilian and military agencies empowered to develop criteria for the sharing of information by agencies regarding risks, make recommendations to exclude or remove certain sources from procurements, and issue a final removal order after a source's opportunity to respond. Following the FASC's review of a source's response to a notice of removal or exclusion, if a recommendation is upheld, exclusion orders require the exclusion of "covered articles" from procurement actions; removal orders require the removal of covered articles from agency systems.

The regulations governing how exclusion orders should be promulgated require the FASC to include the following in any recommendation:

(1) Information necessary to positively identify any source or covered article recommended for exclusion or removal;

(2) Information regarding the scope and applicability of the recommended exclusion or removal order, including whether the order should apply to all executive agencies or a subset of executive agencies;

(3) A summary of the supply chain risk assessment reviewed or conducted in support of the recommended exclusion or removal order, including significant conflicting or contrary information, if any;

(4) A summary of the basis for the recommendation, including a discussion of less intrusive measures that were considered and why such measures were not reasonably available to reduce supply chain risk;

(5) A description of the actions necessary to implement the recommended exclusion or removal order; and,

(6) Where practicable, in the FASC's sole and unreviewable discretion, a description of the mitigation steps that could be taken by the source that may result in the FASC's rescission of the recommendation.

41 CFR § 201-1.301(a).

As reflected in the regulations, the decision to exclude a source is not as simple as making ice or a piece of toast. There is expected to be a finesse to it with demonstrated and sufficient consideration put into any decision intended to cut off a source of supply to the Government and, perhaps, limit the competition the Government is required to promote. For example, as stated in § 201-1.301(a)(3), shown above, the FASC exclusion recommendation is expected to include an assessment of the risks of utilizing the source in question. The regulations also include a non-exclusive list of at least eleven "relevant factors" to aid in that assessment. These factors include, for example, the "[f]unctionality and features of the covered article," "the "[o]wnership of, control of, or influence over the source or covered article(s) by a foreign government or parties owned or controlled by a foreign government, or other ties between the source and a foreign government," and "[i]mplications for government missions or assets, national security, homeland security, or critical functions associated with use of the source or covered article." See 41 CFR § 201-1.300(b). Notably, in these "relevant factors" foreign ownership alone is not, in and of itself, a sole basis of an exclusion order, and exclusion on that basis alone would not survive appeal. § 201-1.300(c). Finally, the notice to the excluded source should advise the source that they have the opportunity to challenge the exclusion within 30 days and apprise the source of the judicial review procedures under the Act.

Agency Removal/Exclusion through "Covered Procurement Actions": The Act also contemplates the removal of sources by agencies directly, without the recommendation of the FASC, by authorizing the following "covered procurement actions": (1) the exclusion of a source that fails to meet qualification requirements regarding supply chain risk; (2) the exclusion of a source that fails to achieve an accept-

able rating for an evaluation factor providing for the consideration of supply chain risk in the evaluation of proposals; (3) the determination that a source is not responsible based on considerations of supply chain risk; and (4) the decision to withhold consent for a contractor to subcontract with a particular source or to direct a contractor to exclude a particular source from consideration for a subcontract under the contract. 41 USCA § 4713(k)(4).

A covered procurement action can only be taken after a joint recommendation from the agency's chief acquisition officer and chief information officer and notice to the source, similar to the procedures governing exclusion and removal orders. Note also that the agency has the authority to address "urgent national security interests" without providing notice to sources but still may provide such notice.

Contractors' Entrée— Federal Acquisition Regulation Implementation of FASCSA—In addition to regulations implementing how the FASC issues orders, the FAR Council also promulgated regulations for how agencies should implement those orders. In addition to incorporating key FASCSA definitions, i.e. "covered articles," the FAR sets forth procedures agencies must use to determine how to apply the order to a procurement. See FAR 4.2304. In undertaking its assessment, a critical element is that the agency must determine if the procurement involves a "covered article," the scope of the removal/exclusion order, funding, and the issuing agency. There is also no one-size-fits-all approach to this effort: civilian agencies are required to follow removal/exclusion orders issued by the DHS, DOD subagencies to follow removal/exclusion orders issued by DOD, and the intelligence community agencies follow orders issued by the Director of National Intelligence. Regarding applicable contracts, interestingly, the FAR's implementation of FASCSA does not include a description of exactly what may be included as "covered procurements." But, *in theory*, the FASC should only issue exclusions regarding the following "covered procurements":

1. Solicitations involving performance specifications where an evaluation factor relates to a supply chain risk or where considerations involving supply chain risks form an element of a responsibility determination under the contract.

2. Task or delivery orders in excess of $5,000,000 that require a fair opportunity to be considered and therefore require the disclosure of significant factors and subfactors and their relative importance, so long as the orders include clauses related to supply chain risk.

3. Any contract action where the contract includes a clause related to supply chain risk.

4. Any other category of procurements determined by the FAR Council with advice from the FASC.

41 CFR § 201-1.101. Presumably, the applicable procurements in the FAR, as determined by the FAR Council, would cover provision four above.

The FAR splits applicable procurements between what might be generally described as umbrella contracts—Federal Supply Schedule, Government-wide Acquisition Contracts, and Multi-Agency Contracts—and other procurements. For the former category, the contracting officer can decide whether to apply requirements at the order or contract level, and that decision determines whether Alternate I or II of 52.204-30, "Federal Acquisition Supply Chain Security Act Orders—Prohibition" applies. But what is required of contractors once the clauses are included?

A contractor's FASCSA obligations are outlined in three new FAR clauses that went into effect on Dec. 4, 2023. The newly introduced FAR clauses will apply to all contracts, irrespective of their value, including those falling below the simplified acquisition threshold, contracts or orders for commercial products or services (including commercial off-the-shelf items), and orders under indefinite–delivery, indefinite–quantity contracting vehicles.

52.204-29, Federal Acquisition Supply Chain Security Act Orders—Representation and Disclosures: The representations and disclosures found at FAR 52.204-29 will be required to be inserted in all solicitations; however, its inclusion does not necessarily mean that a FASCSA order applies to the procurement.

Instead, it simply requires that contractors certify to the following:

> [T]hat it has conducted a reasonable inquiry, and that the offeror does not propose to provide or use in response to this solicitation any covered article, or any products or services produced or provided by a source, if the covered article or the source is prohibited by an applicable FASCSA order in effect on the date the solicitation was issued, except as waived by the solicitation, or as disclosed in paragraph (e).

To make this certification, the contractor will be asserting that it has conducted an inquiry designed to uncover any information in the entity's possession about the identity of any covered articles, or any products or services produced or provided by a source, as to whether the item was provided to the Government or used during performance (the definition of a "reasonable inquiry") to ensure that no covered articles will be provided under the contract. For solicitations where no FASCSA order applies, a vendor can certify it is not providing covered articles. To do so, a vendor will have to search for the phrase "FASCSA order" in SAM for covered articles and either list ones it will utilize in the form of a disclosure that may form the basis of a waiver or certify that none will be used.

52.204-30 Federal Acquisition Supply Chain Security Act Orders—Prohibition: Clause 52.204-30 describes what the contractor must do to take proper action on identified FASCSA orders to exclude certain sources. To summarize, the contractor must do the following:

1. Search for the phrase "FASCSA order" in SAM for applicable exclusions.
    - NOTE: The FAR recognizes that this could be a fast-moving train and that sometimes an agency may cite exclusions in a solicitation that do not appear in SAM but shall otherwise apply. Obviously, the contractor is responsible for understanding and abiding by those exclusions, as well.
2. A contractor may ask for a waiver of a FASCSA order issued after award by means of a modification.
    - Doing so requires disclosure of the product or service, name of the covered article subject to the order, the name of the vendor that supplied the order, other item details, and the reason for the waiver.
    - The CO reviews the information and makes a determination of whether to waive the requirements. Award may not be made until a written approval of a waiver is issued.
    - It is not clear how receptive agencies will be to waiver requests, but since the agency may decide to make award to an offeror that does not require a waiver, they should be made cautiously.
3. Contractors must comply with a notice and reporting requirement, including:
    - checking SAM every three (3) months for covered articles.

      If after such a reasonable inquiry it was identified that an excluded item was provided or used, the contractor must submit a report in accordance with provision (c) of the clause, either to DOD's contracting office (*dibnet.dod.mil*) or to the CO for civilian agencies.
4. If a contractor discovers "that a covered article or service produced or provided by a source was provided to the Government or used during contract performance," the contractor must report it to an agency within three business days. The information required to be submitted to the agency is located at provision 52.204-30(c) and includes the requirement to report the use of prohibited items in subcontractors' systems.
5. Note also that if the agency requires the CO to select specific FASCSA orders, they will apply the Alternate I.

52.204-28, Federal Acquisition Supply Chain Security Act Orders—Federal Supply Schedules, Government-wide Acquisition Contracts, and Multi-Agency Contracts: FAR 52.204-28 is to be inserted into all Federal Supply Schedule, GWAC, and Multi-

Agency Contracts where applicable exclusion/removal orders are made at the order level and requires contractors to comply with removal and exclusion orders and associated prohibitions of 52.204-30. In such circumstances, contractors should expect to find 52.204-30, Alternate II, in such request for quotations and notices of intent to place an order. Alternate I of 52.204-30 will be in all such contracts where the exclusion is applied at the *contract* level and 52.204-28 is not included.

Since these exclusions are intended to protect the supply chain at all levels, the appropriate clauses must be flowed down to all tiers of subcontractors, even to those for commercial item contracts. For existing contracts, the law requires all modifications or options to include 52.204-30.

Just Desserts—Challenging FASCSA Exclusion and Removal Orders—Perhaps the most intricate aspect of FASCSA is the manner by which the Government is required to address challenges to the removal of covered articles from the supply chain. There are two distinct paths suppliers may choose to take when challenging an exclusion/removal order or applicable procurement action. The regulations at 41 CFR ch. 201 govern the FASC's issuance of removal orders and provide procedures governing the recommendation, notice to sources, review of sources' objections, and issuances of orders. While this article speaks mostly to contractor requirements, it is important to note that sources wishing to challenge the listing of their product on an exclusion order would challenge that under 41 CFR ch. 201 and 41 USCA § 1323, not the FAR provisions of 48 CFR. Here is a brief overview of that process.

Nonjudicial Challenges of Exclusion and Removal Orders: The most direct route to challenging an exclusion or removal order is by allowing sources to submit information in opposition to a removal listing within 30 days to the Information Sharing Agency. § 4713(b)(2)(C). Any challenge to the exclusion within 30 days would need to provide factual evidence demonstrating that the source is able to mitigate any potential risk of utilizing the source in addition to addressing any of the applicable and express risk factors to which the Government seems wary. See 41 CFR § 201-1.300(b). Sources may also choose to challenge the scope of the prohibition and limit the application of the exclusion (i.e., for one agency versus the entire Government). Notably, the FASC is also required to consider and provide "a description of the mitigation steps that could be taken by the source that may result in the FASC recinding the recommendation." It would be highly recommended that a source directly address and adopt any such mitigation measures to facilitate the rescission of any proposed exclusion of the product. Following the source's submission of an opposition to a decision to exclude a source, the FASC will determine whether the source's opposition justifies rescission of the exclusion, considering the source's mitigation efforts and other factors that may justify rescission.

Judicial Challenges of Exclusion Decisions: Not unlike the supply chain bans against Kaspersky Laboratories and Chinese companies addressed in § 889, it can be expected that supply sources excluded by the FASC or agencies under applicable procurement actions or emergency authorities may wish to formally challenge the Government's decision to exclude them from federal business. But unlike the failed attempts of those companies to challenge those decisions (see *Huawei Techs. USA, Inc. v. U.S.*, 440 F. Supp. 3d 607, 652 (E.D. Tex. 2020); *Kaspersky Lab, Inc. v. U.S. Dep't of Homeland Sec.*, 909 F.3d 446, 453 (D.C. Cir. 2018), where both entities unsuccessfully challenged the legality of the statutes as an unconstitutional bill of attainder), FASCSA explicitly provides a means to challenge the exclusion of a source's products by the FASC or agency administrators from federal procurements in the U.S. Court of Appeals for the District of Columbia Circuit within 60 days. FASCSA § 1327(b)(1). Unlike the challenges to §§ 889 and 1634, which took issue with the laws naming individual entities and therefore constituting due process violations or an unconstitutional bill of attainder, challenges under FASCSA take a more administrative flavor with clear procedures vesting exclusive jurisdiction over exclusion decisions (41 USCA § 1323) and agency administrators' implementation of exclusion orders (41 USCA § 4713) in the D.C. Circuit. The stan-

dard of review for exclusion decisions is similarly express and direct:

> (2) STANDARD OF REVIEW.—The Court shall hold unlawful a covered action taken under sections 1323 or 4713 of this title, in response to a petition that the court finds to be—
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right;
>
> (D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court under paragraph (3); or
>
> (E) not in accord with procedures required by law.

41 USCA § 1327(b). Additionally, the regulation requires the agency to compile an administrative record that includes the following:

> (1) The recommendation issued pursuant to 41 U.S.C. 1323(c)(2);
>
> (2) The notice of recommendation issued pursuant to 41 U.S.C. 1323(c)(3);
>
> (3) Any information and argument in opposition to the recommendation submitted by the source pursuant to 41 U.S.C. 1323(c)(3)(C);
>
> (4) The exclusion or removal order issued pursuant to 41 U.S.C. 1323(c)(5), and any information or materials relied upon by the deciding official in issuing the order; and
>
> (5) The notification to the source issued pursuant to 41 U.S.C. 1323(c)(6)(A).
>
> (6) Other information. Other information or material collected by, shared with, or created by the FASC or its member agencies shall not be included in the administrative record unless the deciding official relied on that information or material in issuing the exclusion or removal order.

§ 201-1.303(b).

An area that remains unclear is whether or how interveners might be involved in a judicial challenge. For example, it remains to be seen whether the D.C. Circuit would allow a producer of an article similar to that being excluded to participate in such a proceeding. Arguably, one could imagine such an intervenor being on either side of the challenge, so it will be interesting to see how or if such inclusions would be entertained by the Court.

Bussing Your Tray and Take Aways—The purpose of a buffet is straight forward: to give diners a heaping variety of choices to be selected and collected by the diner. It's the effective equivalent of a restaurant telling its customers: "Here's food, you do it." That, in a nutshell, is the application of FASCSA. Beyond being a sign of the ongoing protectionism resident in the FAR and the continued weaponization of the supply chain for our trade wars, FASCSA and its implementing clauses demonstrate that the Government is finding it too difficult to juggle its competing priorities of a secure supply chain and open competition. The result: "Here contractors, you do it." And do it they must, if they want to sell to the Government. Contractors must be on the constant lookout to ensure that the products, parts, and pieces they provide to Government customers do not, on a random Thursday in April, suddenly become verboten. How, exactly, this all plays out, the vigor with which the FASCSA clauses are enforced, and the manner in which equitable adjustments for altered supply chains may result, all remain to be seen. In the meantime, contractors will want to ensure that they remain vigilant and agile in their inventory procedures to react when and as needed. If not, they may find that being the sleepy victim of a self-inflicted, buffet-induced food coma may result in more than an upset stomach.

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