

Interim Rule Requires Contractors to Secure Supply Chains Involving Covered Articles and Sources Subject to FASC Exclusion and Removal Orders

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WHAT: A new interim rule prohibits contractors from delivering or using covered articles and sources that are subject to exclusion or removal orders issued under the Federal Acquisition Supply Chain Security Act of 2018 (FASCSEA). These exclusion or removal orders will be made at the recommendation of the Federal Acquisition Security Council (FASC), which has the authority to recommend the exclusion of specific technologies and manufacturers from federal procurements and the removal of covered items from federal or contractor information systems during performance. The FASC issued a final rule in 2021 to establish procedures for its operations, which we covered here. This interim rule is aimed at safeguarding the federal supply chain by eliminating technology that foreign adversaries could exploit for malicious cyber activities.

The interim rule creates three new Federal Acquisition Regulation (FAR) clauses—FAR 52.204-28, -29, and -30—which must be incorporated into all relevant solicitations and contracts, including those below the Simplified Acquisition Threshold (SAT), those for commercial products or services, and those for commercially available off-the-shelf (COTS) items.

- *FAR 52.204-28, Federal Acquisition Supply Chain Security Act Orders-Federal Supply Schedules, Governmentwide Acquisition Contracts, and Multi-Agency Contracts:* Notifies contractors that during performance, they are required to comply with FASCSEA orders and if required by a FASCSEA order, must remove

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covered articles or products/services upon notification by a contracting officer. This clause is required in solicitations and contracts relating to Federal Supply Schedules (FSS), Governmentwide Acquisition Contracts (GWACs), and multi-agency contracts, specifically when FASCSCA orders are to be applied at the task or delivery-order level.

- *FAR 52.204-29, Federal Acquisition Supply Chain Security Act Orders-Representation and Disclosures:* Prohibits offerors from providing or using any covered article at issue in a FASCSCA order. This clause also contains a certification that the offeror has conducted a “reasonable inquiry” into its supply chain to ensure compliance and does not intend to provide or use any prohibited items. If the offeror cannot make this representation, it can disclose that information so the Government can consider issuing a waiver.
- *FAR 52.204-30, Federal Acquisition Supply Chain Security Act Orders-Prohibition:* Prohibits contractors from providing or using covered articles or products/services governed by a FASCSCA order during the performance of a contract unless a waiver is granted. This clause also requires contractors to review SAM.gov every three months to determine if new FASCSCA orders impact their supply chains. If a FASCSCA order applies to a product in their supply chain, contractors must promptly report it to the contracting officer, detailing actions they will take to mitigate the use of the prohibited item. These requirements must be extended to all subcontracts, including those for commercial products and services. Subcontractors do not have to comply with the requirement to monitor SAM.gov.

WHEN: The interim rule goes into effect on December 4, 2023, and contracting officers will begin incorporating the new FAR clauses into solicitations, contract awards, and contract options or extensions of performance after that date. Comments on the interim rule are due the same day.

WHAT DOES IT MEAN FOR INDUSTRY: This interim rule is a crucial development in the ongoing efforts to enhance supply chain security in the federal procurement process, although it will require contractors to regularly monitor for the issuance of new FASC orders. The wide-reaching interim rule applies to all federal contracts, including those below the simplified acquisition threshold and commercial acquisitions. It also requires the flowdown of the prohibition to subcontractors. Existing indefinite delivery, FSS, Multiple Award Schedule, and GWAC contracts are also impacted, as contracting officers are required to modify them within six months of December 4, 2023, to include the relevant FAR provisions.

The full impact of the interim rule is unknown because the FASC has not yet recommended any removal or exclusion orders, and we do not know the number or scope of orders that will be issued in the future. What we do know is that the impact will be significant, with the Regulatory Impact Analysis for the interim rule estimating that half of all contractors will be affected by a FASC exclusion order at some point. To comply with the forthcoming December 4, 2023 interim rule, contractors must diligently implement robust supply chain management procedures, designate vigilant compliance oversight, establish the capability for “reasonable inquiry,” integrate relevant FAR provisions into subcontract agreements, and collaborate with information technology experts to closely monitor SAM.gov for compliance with FASCSCA orders.

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Wiley's cross-functional teams in Government Contracts, Telecom, Media & Technology, and National Security will continue to monitor these issues and provide advice to clients on compliance questions.

Michael Warren, a Law Clerk at Wiley Rein LLP, contributed to this alert.