



September 14, 2020

Submitted Electronically: www.regulations.gov

General Services Administration
Regulatory Secretariat Division (MVCB)
1800 F Street, NW, 2nd Floor Washington, D.C. 20405

Re: Comments on FAR Interim Rule: Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment (FAR Case 2019-009), 85 Fed. Reg. 42665 (July 14, 2020)

To Regulatory Secretariat Division:

On behalf of ZTE Corporation (“ZTE”), a publicly-traded corporation founded in 1985 and a global leader in telecommunications and information technology, we are writing to provide comments on FAR Case 2019-009, Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment. Importantly and as an initial matter, ZTE respects the U.S. Government in protecting its national security, and we appreciate the opportunity to provide input on the impact of the Interim Rule on ZTE and ZTE’s customers.

As currently implemented, the Interim Rule’s representation requirement of FAR 52.204-24(d)(2) and undefined terms such as “use”, “route”, and “redirect”, are causing some companies to remove ZTE equipment and services that do not violate the prohibitions of the National Defense Authorization Act of 2019 (“NDAA”) from the supply chain. Specifically, NDAA Section 889(a)(1)(B) prohibits executive branch agencies from executing 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.” (emphasis added). This statutory prohibition, however, does not “cover telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.” NDAA Section 889(a)(2)(B). In implementing these statutory provisions, the Interim Rule mandates disclosure by an offeror of a much broader list of equipment, systems or services than is required by the statutory prohibition and does not define terms critical to interpreting the statute such as “use”, “route”, and “redirect”.

First, FAR 52.204-24(d)(2) requires an offeror to represent whether the company uses “covered telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services” without regard to whether the use is “as a substantial or essential component.” We respectfully submit that the language of NDAA Section 889(a)(1)(B) is clear and as such it cannot be expanded beyond its plain meaning to

create a representation requirement that is broader than the prohibition required by the statute.¹ As the U.S. Supreme Court has explained, “If the intent of Congress is clear, that is the end of the matter; for [a] court, as well as [an administering] agency, must give effect to the unambiguously expressed intent of Congress.”² A regulatory agency can fill a gap in statutory meaning if “the statute is ambiguous.”³ However, an interpretation at odds with the plain meaning of a statute is not permissible.⁴

The creation of this representation requirement that is much broader than the statutory prohibition is not only not permissible under current law, but is directly impacting ZTE and our customers and suppliers. Entities that indicate that they do use ZTE equipment or services, but that the equipment or services is not a substantial or essential component of the use face significant delays as they wait for an interpretation by the government on whether the use would violate the statutory prohibition. As a result of the potential delay created by this government determination, we understand that some federal contractors may unwillingly remove ZTE equipment and services from their supply chain to be able to check “does not use” on the representation.

Second, the Interim Rule does not define several important terms, including, but not limited to “use”, “route”, and “redirect.” Companies are struggling to create reasonable definitions and without standardized definitions, contractors will implement a multitude of different and inconsistent interpretations. It is unclear, for example, whether ZTE equipment or services that could, but do not, route or redirect user data traffic, are covered. In addition, we understand that federal contractors have different interpretations of whether the sale of a ZTE product to a third party, even when the federal contractor does not use the ZTE product, would constitute “use” for the purpose of the representation.

As the Final Rule is drafted, ZTE respectfully requests that the FAR 52.204-24(d)(2) be narrowed to match the statutory restriction by adding “as a substantial or essential component” to the representation. ZTE also requests that clear definitions be added for terms such as “use”, “route”, and “redirect”.

¹ *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018).

² *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984).

³ *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124 (2016).

⁴ *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. at 842-843).

Thank you for the opportunity to provide these comments. We would be happy provide additional information that may be useful as you consider finalizing the Interim rule.

Sincerely,

A handwritten signature in black ink, appearing to read "Shen Nan". The signature is fluid and cursive, with the first name "Shen" being larger and more prominent than the last name "Nan".

Shen Nan
Senior Vice President, Chief Legal Officer
And Acting Chief Compliance Officer
ZTE Corporation