



September 24, 2020

Mr. Timothy F. Soltis
Deputy Controller
The White House Office of Management and Budget

Sent electronically: Timothy.F.Soltis@omb.eop.gov
CC: GrantsTeam@omb.eop.gov

Subject: Revisions to 2 CFR 200 *Guidance for Grants and Agreements*; Federal Register/ Vol. 85, No. 157; August 13, 2020 Regarding 200.216

Dear Mr. Soltis,

On behalf of COGR and its members, we again want to express our appreciation for the hard work that many federal leaders have contributed to the revisions to the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR Part 200). We understand and share the national security concerns about threats to the U.S. relating to foreign influence and exploitation particularly on the part of China. However the implementation of the prohibitions on the purchase and use of certain telecommunications and video surveillance equipment in the recently released revisions to 2 CFR part 200, as required by Section 889 of the 2019 National Defense Authorization Act (NDAA), is creating some confusion. We continue to review the various provisions included in the August 13, 2020, Uniform Guidance (UG) and may submit additional comments at a future date, but the focus of this communication is on sections 200.216 and 200.471.

The prohibitions included in the 2019 NDAA section 889 relate to certain telecommunications and video surveillance equipment and services and apply to both contracts and grants. Although the contract and grants prohibitions are similar, they are not the same.

The first contracting prohibition (889(a)(1)(A)) is on using federal funds to procure the covered equipment and services. The second contracting prohibition (889(a)(1)(B)) is on contracting with an entity that uses covered telecommunications equipment or services “as a substantial or essential component of any system.” The grant prohibition (889(b)) is on using grant funds to procure or obtain the covered equipment, services or systems and has been incorporated into the most recent revisions to the Uniform Guidance (UG) (200.216, pp. 49515-6; p. 49543; 200.471, p. 49570).

The prohibitions became effective August 13, 2020.

Our member institutions are beginning to see implementing language in both contracts and grants that appear inconsistent with the language of the NDAA, particularly in the case of grant terms and conditions and/or agency interpretations of the prohibition on use of grant funds. COGR believes that this is due to the apparent inconsistency in the new UG language, and that a clarification to such language is needed to avoid potential confusion. The UG II.A. states (p. 49515) that Federal award recipients are prohibited from using government funds “to enter into contracts (or extend or renew contracts) with entities that use covered telecommunications equipment or services.” However, 200.216 prohibits non-Federal entities “**from obligating or expending loan or grant funds to** (1) procure or obtain, (2) extend or renew a contract to procure or obtain, or (3) enter into a contract (or extend or renew a contract) to procure or obtain, equipment, services, or systems that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as a critical technology as part of any system.” COGR asks that UG II.A be revised so that the prohibition matches the prohibition as intended by the NDAA.

In addition to the need for revised language, we note that the UG does not define “substantial or essential component” or “critical technology” (the FAR definitions are at FAR 4.2101). Section 200.471, which covers the allowability of telecommunications costs, makes costs associated with the prohibited purchases and use unallowable costs. Interpreting 200.471 in the context of the new definition of telecommunications cost (cost of using communication and telephone technologies such as mobile phones, land lines, and internet) is creating further confusion. In particular, when or should mobile phones, landlines or internet be interpreted to be substantial or essential components or critical technology?

The updated UG not only fails to define key terms needed to ensure compliance with the prohibitions, but the impact on institutions with subrecipients under federal grants also is unclear, particularly in the case of international subrecipients in locations where the entire national infrastructure for telecommunications may be built using the now prohibited equipment. Will there be a federal-wide waiver process available to agencies for allowing such use under these circumstances? If not, federally funded projects will be precluded from partnering with important entities in entire countries.

We urge OMB to clarify that the 200.216 prohibition applies to purchasing or other expenses associated with the covered equipment, services or systems but does not prohibit award recipients from entering into contracts or subawards with users of such equipment, services or systems. We believe that this is an accurate and appropriate implementation of the NDAA. Otherwise, we fear we are likely to continue to see inconsistent and conflicting agency interpretations. We also suggest the UG include a reference to the FAR 4.2101 definitions or include a definition of these terms for

the purposes of 2 CFR 200 which is consistent with the FAR definitions. Finally, clarifications as to how these terms impact subrecipients would be very much appreciated.

Please contact Robert Hardy, Director of Research Security and Intellectual Property Management at rhardy@cogr.edu if you have any questions or would like to discuss further. We would welcome the opportunity.

Sincerely,

A handwritten signature in blue ink that reads "Wendy D. Streit". The signature is written in a cursive style with a large, looping initial "W".

Wendy D. Streit
President