



UNITED STATES DEPARTMENT OF COMMERCE
Chief Financial Officer
Assistant Secretary for Administration
Washington, D.C. 20230

PROCUREMENT MEMORANDUM 2020-10

ACTION

MEMORANDUM FOR: Senior Bureau Procurement Officials
Heads of Contracting Offices

FROM: Barry E. Berkowitz
Senior Procurement Executive
and Director for Acquisition Management

SUBJECT: Implementation of the Section 889(a)(1)(B) Prohibition on
Contracting with Entities Using Certain Telecommunications and
Video Surveillance Services or Equipment

Background

Section 889 of the National Defense Authorization Act (NDAA) for Fiscal Year 2019 contains two prohibitions related to Federal contracting:

- The first prohibition, set forth in Section 889(a)(1)(A), took effect August 13, 2019 to prohibit the Government from procuring and obtaining any equipment, system or service that uses covered telecommunications equipment or services from five named Chinese companies and their subsidiaries or affiliates. This prohibition is implemented in FAR 4.2102.
- The second prohibition, set forth in section 889(a)(1)(B), is effective August 13, 2020 to prohibit the Government from contracting with any 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, unless an exception applies, or a waiver has been granted. This prohibition will be implemented in FAR 4.2102.

Purpose

The purpose of this memorandum is to facilitate implementation of the interim FAR rule 2019-009, published on July 14, 2020 that implements prohibitions contained in Section 889(a)(1)(B) of the NDAA for Fiscal Year 2019 and requires Contracting Officers to take specific actions prior to awarding, extending or renewing, contracts, task orders, or delivery orders on or after August 13, 2020.

Interim Rule Requirements

Effective August 13, 2020, Federal agencies are prohibited from contracting with any entity that uses equipment, systems, or services that use covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception applies, or a waiver has been granted.

The interim rule requires offerors, after conducting a reasonable inquiry, to provide a representation regarding use of covered telecommunications equipment or services when submitting an offer. Further, contracts, task orders and delivery orders must contain a clause that requires reporting if use of covered telecommunications equipment or services is discovered during performance of the contract.

Applicability

The interim rule applies to all procurements at all dollar values including commercial items, including COTS items, purchases at or below the simplified acquisition threshold, and micro-purchases. These implementation procedures apply to contracts, task orders, and delivery orders, including orders against basic ordering agreements (BOAs) and calls against blanket purchase agreements (BPAs). These implementation procedures also apply to BPAs and BOAs to facilitate the inclusion of these terms in BPA calls and BOA orders.

Required Actions

Contracting Officers must comply with the following when awarding, extending, or renewing, contracts, task orders, or delivery orders on or after August 13, 2020:

- Contracting officers **shall not** award contracts, or issue task or delivery orders, with an offeror 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, unless an exception at FAR 4.2102(b) applies or a waiver is granted.
- Contracting officers **shall not** exercise an option period or otherwise extend a contract, task order, or delivery order, 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, unless an exception at FAR 4.2102(b) applies or a waiver is granted.
- Contracting officers shall include the provision at FAR 52.204– 24, *Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment*, and the clause at FAR 52.204–25, *Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment* (FAR provision) as prescribed-
 - In solicitations issued on or after August 13, 2020, and resultant contracts, task orders, or delivery orders; and
 - In solicitations issued before August 13, 2020, provided award of the resulting contracts, task orders, or delivery orders occurs on or after August 13, 2020.

- Contracting officers shall, in accordance with FAR 1.108(d), modify-
 - Existing indefinite delivery contracts to include the FAR clause at FAR 52.204–25, *Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment* (FAR clause) for orders issued on or after August 13, 2020, prior to placing any such orders; and
 - Existing contracts, task orders, and delivery orders to include the FAR clause if executing a modification to extend the period of performance, including exercising an option, on or after August 13, 2020.
- Contracting officers shall obtain the required representation and, if applicable, additional disclosures as set forth in the FAR provision prior to executing any of the following contract actions on or after August 13, 2020:
 - Awarding a contract, task order, or delivery order;
 - Executing a modification to extend the period of performance, including exercising an option;
 - Issuing a call against a BPA; or
 - Issuing an order against a BOA.

For BOAs and BPAs:

- To facilitate inclusion of the FAR clause in orders against BOAs and calls against BPAs, contracting officers shall revise all BPAs and BOAs that will have orders or calls issued against them on or after August 13, 2020, to include the FAR clause, prior to placing any such orders.
- To provide vendors with adequate time to complete the representation, contracting officers should consider informing vendors that the Government will not be able to issue calls against BPAs or orders against BOAs on or after August 13, 2020, if the vendors are unable to complete the required representation and, if applicable, additional disclosures set forth in the FAR provision.

FAR 52.204-24, Representation

- The contracting officer shall not award contracts or issue task or delivery orders to an offeror that has represented “does” in the representation at paragraph (d)(2) of the provision at FAR 52.204-24, unless a waiver is granted, or unless the Contracting Officer determines, based on a written assessment provided by the program office or requiring activity after a review of the additional disclosures required by paragraph (e)(2) of the FAR provision, that—
 - The offeror is not using the covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of

any system; or

- An exception at FAR 4.2102(b) applies.
- If the contracting officer is unable to make a determination as described above, then award shall not be made to that offeror unless a waiver is granted.
- If an offeror has represented “does not” in the representation at paragraph (d)(2) of the provision at FAR 52.204-24, the Contracting Officer may rely on the representation, unless the Contracting Officer has an independent reason to question the representation, in which he/she shall consult with the program office or requiring activity and legal counsel on how to proceed.

NOTE: The current representation made by the vendor in the System for Award Management (SAM) pursuant to FAR 52.204-26 only applies to the prohibition at 889(a)(1)(A). The FAR council is working to update SAM to include a representation for the prohibition at 889(a)(1)(B).

FAR 52.204-24, Representation Disclosures

- Offerors that represent that they use covered telecommunications equipment or services must provide, in accordance with paragraph (d)(2) of the provision, a detailed disclosure with separate reporting elements depending on whether the procurement is for equipment, services related to item maintenance, or services not associated with item maintenance, as described in paragraph (e)(2) of the provision. Disclosure information required by FAR 52.204-24(e)(2) is different for equipment, services related to item maintenance, and services not associated with item maintenance, because the information needed to identify whether the prohibition applies vary.
- Contracting Officers, in consultation with the program office or requiring activity, will evaluate the detailed disclosure and follow agency procedures to determine if the use violates the prohibition or whether an exception applies. The contracting officer, in consultation with the program office or requiring activity, will also use this information when determining whether to pursue a waiver. [Departmental waiver and disclosure review procedures are currently being developed]

FAR 52.204-25, Reporting During Contract Performance.

FAR clause 52.204–25 requires that, if the Contractor identifies use of covered telecommunications equipment or services as described in FAR 52.204-25(d)(1) during contract performance, the Contractor must report detailed information to the cognizant Contracting officer describing the use as set forth below:

- Within one business day from the date of such identification or notification: submit the contract number; order number(s), if applicable; supplier name; supplier unique entity identifier (if known); supplier Commercial and Government Entity (CAGE) code (if known); brand; model number (original equipment manufacturer number, manufacturer part number, or wholesaler number); item description; and any readily available information about mitigation actions undertaken or recommended.

- Within 10 business days of submitting the information above: submit any further available information about mitigation actions undertaken or recommended. In addition, the Contractor shall describe the efforts it undertook to prevent use or submission of covered telecommunications equipment or services, and any additional efforts that will be incorporated to prevent future use or submission of covered telecommunications equipment or services.
- If a contractor reports information to the contracting officer, in accordance with the clause at FAR 52.204-25, the contracting officer shall consult with the program office or requiring activity and legal counsel on how to proceed.

FAR 4.2102(b), Exceptions

The statute, at Section 889(a)(2), provides the following exceptions to the prohibition:

- The statute does not prohibit the Head of an executive Agency from procuring with an entity to provide a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements (the interim rule provides definitions for the terms “backhaul,” “roaming,” and “interconnection arrangements”).
- The statute does not cover telecommunications equipment that cannot route or redirect user data traffic or cannot permit visibility into any user data or packets that such equipment transmits or otherwise handles.

FAR 4.2104, Waivers

Section 889(d) permits two limited and structured opportunities for waivers. The interim rule contains the statutory requirements to apply for a waiver and additional requirements as described below.

Section 889 (d)(1) Executive Agency Waiver

- Under certain circumstances, Section 889(d)(1) allows the Head of an Executive Agency to grant a one-time waiver from Section 889(a)(1)(B) on a case-by-case basis that will expire no later than August 13, 2022. The executive agency will decide whether or not to initiate the formal waiver process based on market research and feedback from Government contractors during the acquisition process, in concert with other internal factors.
- The submission of an offer will mean the offeror is seeking a waiver if the offeror makes a representation that it uses covered telecommunications equipment or services, and it is further determined by the Contracting Officer in consultation with the program office or requiring activity that the use is as a substantial or essential component of a system, or as critical technology as part of any system, and that no exception applies.
- Since the formal waiver is initiated by an executive agency and the executive agency may not know if covered telecommunications equipment or services will be used until offers are received, a determination of whether a waiver should be considered may not be possible until offers are received once the contracting officer, in consultation with the program office or requiring activity, has a chance to analyze the representation and disclosures from the offerors. This does not preclude an offeror from submitting this information with their offer,

in advance of a contracting officer decision to initiate the formal waiver request through the head of the executive agency.

- Once an offeror submits its offer, the contracting officer will have to decide, in consultation with the program office or requiring activity, if a waiver is necessary to make an award.

Waiver Initiation and ODNI and FASC Requirements (Prior to Granting a Waiver)

Pursuant to FAR 4.2104(a)(1), the Government official seeking the waiver will submit to the head of the executive agency:

1. A compelling justification for the additional time to implement the requirements under 889(a)(1)(B);
2. A full and complete laydown or description of the presences of covered telecommunications or video surveillance equipment or services in the relevant supply chain; and
3. A phase-out plan to eliminate such covered telecommunications equipment or services from the relevant systems.

In accordance with FAR 4.2104(a)(2), before the Head of an executive agency can grant a waiver to the prohibition, the agency must—

1. Have designated a senior agency official for supply chain risk management, responsible for ensuring the agency effectively carries out the supply chain risk management functions and responsibilities described in law, regulation, and policy [The DOC Chief Information Officer has been designated senior agency official for DOC];
2. Establish participation in an information-sharing environment when and as required by the Federal Acquisition Security Council (FASC) to facilitate interagency sharing of relevant acquisition supply chain risk information;
3. Notify and consult with the Office of the Director of National Intelligence (ODNI) on the waiver request using ODNI guidance, briefings, best practices, or direct inquiry, as appropriate; and
4. Notify the ODNI and FASC 15 days prior to its intent grant the waiver.

FAR 4.2104(a)(4)(ii), Congressional Notification (Not Later than 30 days after Granting a Waiver)

The head of the executive agency shall, not later than 30 days after waiver approval, submit in accordance with agency procedures to the appropriate congressional committees—

1. An attestation by the agency that granting of the waiver would not, to the agency's knowledge having conducted the necessary due diligence as directed by statute and regulation, present a material increase in risk to U.S. national security;
2. The full and complete laydown or description of the presences of covered telecommunications or video surveillance equipment or services in the relevant supply chain, to include a description of each category of covered technology equipment or

services discovered after a reasonable inquiry, as well as each category of equipment, system, or service used by the entity in which such covered technology is found after conducting a reasonable inquiry; and

3. The phase-out plan to eliminate such covered telecommunications or video surveillance equipment or services from the relevant systems.

FAR 4.2104(a)(3), Emergency Procurements

- In the case of an emergency, including a declaration of major disaster in which prior notice and consultation with the ODNI and prior notice to the FASC is impracticable and would severely jeopardize performance of mission-critical functions, the head of an agency may grant a waiver without meeting the notice and consultation requirements under FAR 4.2104(a)(2)(iii) and 4.2104(a)(2)(iv) to enable effective mission critical function or emergency response and recovery.
- The head of the agency granting the waiver for an emergency procurement must: make a determination that the notice and consultation requirements are impracticable due to an emergency condition; and within 30 days of award, notify the ODNI and the FASC of the waiver issued under emergency conditions in addition to the waiver notice to Congress under FAR 4.2104(a)(4). The executive agency must also comply with the requirements at FAR 4.2104(a)(1), 4.2104(a)(2)(i), 4.2104(a)(2)(ii), and 4.2104(a)(4)(ii).

Section 889(d)(2) Director of National Intelligence Waiver

Section 889(d)(2) permits the Director of National Intelligence (DNI) to provide a waiver if the Director determines one is in the national security interests of the United States. The statute does not include an expiration date for the DNI waiver. This authority is separate and distinct from that granted to an agency head as outlined above.

Additional Information

- Use of the prohibited equipment or services is not limited to use in the performance of work under a Federal contract.
- The section 889(a)(1)(B) prohibition does not flow down to subcontractors.
- During the first year that section 889(a)(1)(B) is in effect, contractors will need to learn about the provision and its requirements as well as develop a compliance plan. The FAR Council assumes a six-step process would most likely be part of the compliance plan developed by any entity:
 1. Regulatory Familiarization
 2. Corporate Enterprise Tracking
 3. Education
 4. Cost of Removal (if an offeror independently decides to remove)
 5. Cost to Complete the Representation
 6. Cost to Develop a Phase-out Plan and Submit Waiver Information
- In order to reduce the information collection burden imposed on offerors subject to the rule, DoD, GSA, and NASA are currently working on updates to the System for Award Management to allow offerors to represent annually after conducting a reasonable inquiry.

Only offerors that provide an affirmative response to the annual representation would be required to provide the offer-by-offer representation in their offers for contracts and for task or delivery orders under indefinite-delivery contracts. Similar to the initial rule for section 889(a)(1)(A), that was published as an interim rule on August 13, 2019, and was followed by a second interim rule on December 13, 2019, to update the System for Award Management, the FAR Council intends to publish a subsequent rulemaking once the updates are ready in SAM.

- DAU plans to post a Continuous Learning (CL) Training Module on 889 in mid-August.

FAR 4.2101, Definitions

Backhaul - Intermediate links between the core network, or backbone network, and the small subnetworks at the edge of the network (e.g., connecting cell phones/towers to the core telephone network). Backhaul can be wireless (e.g., microwave) or wired (e.g., fiber optic, coaxial cable, Ethernet).

Covered foreign country - The People's Republic of China.

Covered telecommunications equipment or services – 1) Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation, (or any subsidiary or affiliate of such entities); 2) For the purpose of public safety, security of Government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities); 3) Telecommunications or video surveillance services provided by such entities or using such equipment; or 4) Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

Critical technology – 1) Defense articles or defense services included on the United States Munitions List set forth in the International Traffic in Arms Regulations under subchapter M of chapter I of title 22, Code of Federal Regulations; 2) Items included on the Commerce Control List set forth in Supplement No. 1 to part 774 of the Export Administration Regulations under subchapter C of chapter VII of title 15, Code of Federal Regulations, and controlled— i. Pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology; or ii. For reasons relating to regional stability or surreptitious listening; 3) Specially designed and prepared nuclear equipment, parts and components, materials, software, and technology covered by part 810 of title 10, Code of Federal Regulations (relating to assistance to foreign atomic energy activities); 4) Nuclear facilities, equipment, and material covered by part 110 of title 10, Code of Federal Regulations (relating to export and import of nuclear equipment and material); 5) Select agents and toxins covered by part 331 of title 7, Code of Federal Regulations, part 121 of title 9 of such Code, or part 73 of title 42 of such Code; or 6) Emerging and foundational technologies controlled pursuant to section 1758 of the Export Control Reform Act of 2018 (50 U.S.C. 4817).

Interconnection arrangements - Arrangements governing the physical connection of two or more networks to allow the use of another's network to hand off traffic where it is ultimately delivered (e.g., connection of a customer of telephone provider A to a customer of telephone company B) or sharing data and other information resources.

Reasonable inquiry - An inquiry designed to uncover any information in the entity's possession about the identity of the producer or provider of covered telecommunications equipment or services used by the entity that excludes the need to include an internal or third party audit.

Roaming - Cellular communications services (e.g., voice, video, data) received from a visited network when unable to connect to the facilities of the home network either because signal coverage is too weak or because traffic is too high.

Substantial or essential component - Any component necessary for the proper function or performance of a piece of equipment, system, or service.

Questions

Please direct any questions regarding this Procurement Memorandum to:

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