

DoD Issues Memorandum Implementing the Interim Rule for Section 889 Part B

July 24, 2020

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As we previously reported, the U.S. Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) recently released an Interim Final Rule to implement important restrictions on contractor supply chains related to telecom equipment and services. This long-awaited rule amended the Federal Acquisition Regulation (FAR) to implement section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232). The interim rule, which revises the clause at FAR 52.204-24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment, will go into effect on **August 13, 2020**.

Yesterday, July 23, 2020, DoD issued a memorandum to facilitate implementation of the interim rule. This memorandum directs contracting officers to not award contracts, issue task orders or delivery orders, or exercise an option period or extend a period of performance with any contractor 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 is granted. New solicitations will also include the revised clauses at FAR 52.204-24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment, and FAR 52.204-25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.

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Notably, and in apparent recognition of concerns raised by industry, the memorandum states that when contracting officers should provide sufficient notice to contractors when executing a modification to extend a period of performance and require compliance with the Interim Rule. The memorandum specifically instructs contracting officers to provide a “sufficient amount of time to both provide notice for exercising the option and to provide contractors with adequate time to comply with the clause and provide the representation.” The memorandum also requires contracting officers to provide contractors notice that orders may not be placed under blanket purchase agreements or basic ordering agreements on or after August 13 without the contractor completing the required representation under FAR 52.204-24. The memorandum also acknowledged guidance provided in the Preamble to Interim Rule noting that 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 focusing on regulatory familiarization, corporate enterprise tracking, education, cost of removal, completion of the representation, and developing a phase out plan or waiver submission information.

Wiley’s National Security team has been engaged on Section 889 issues for years and is helping companies consider compliance strategies. Contact any of the authors for further information or advice.