

Interim Rule Banning Huawei and Other Chinese Telecommunications Equipment and Services to Take Effect on August 13, 2019

August 8, 2019

On August 7, 2019, the U.S. Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) released an interim rule implementing Section 889(a)(1)(A) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (2019 NDAA). The rule, which goes into effect on August 13, 2019, generally prohibits executive agencies from procuring telecommunications equipment and services from Huawei and other Chinese technology companies and imposes strict reporting and other requirements on U.S. government contractors. Interested parties are invited to file comments on the interim rule within 60 days of its publication in the *Federal Register*.

As background, Section 889(a)(1)(A) of the 2019 NDAA prohibits executive agencies from procuring or obtaining, or extending or renewing a contract to procure or obtain, 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. The 2019 NDAA defines “covered telecommunications equipment or services” to include the following:

- Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any of their subsidiaries or affiliates);
- Certain video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology

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Company (or any of their subsidiaries or affiliates);

- Telecommunications or video surveillance services provided by such entities or using such equipment; and
- Telecommunications or video surveillance equipment or services produced or provided by an entity owned or controlled by, or otherwise connected to, the government of a “covered foreign country,” which the interim rule defines as the People’s Republic of China.

For purposes of determining whether any equipment, system, or service uses covered telecommunications equipment or services “as a substantial or essential component of any system, or as critical technology as part of any system,” the interim rule adopts the definition of “critical technologies” in the Foreign Investment Risk Review Modernization Act (FIRRMA). This definition encompasses a wide range of items subject to U.S. export controls, including the new category of emerging and foundational technologies to be controlled under Section 1758 of the Export Control Reform Act of 2018. The interim rule defines “substantial or essential component” as “any component necessary for the proper function or performance of a piece of equipment, system, or service.”

The ban does not apply to any service that connects to the facilities of a third party, such as backhaul, roaming, or interconnection arrangements, or to 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. Additionally, the interim rule allows the head of an executive agency, on a one-time basis and for a period not to extend beyond August 13, 2021, to waive the procurement ban with respect to a government entity (such as a requirements or contracting office) that requests such waiver if the government entity submits a compelling justification for the additional time to implement the ban and a full and complete description of the supply chain landscape and phase-out plan. The Director of National Intelligence may also grant a waiver if the Director determines that doing so would further U.S. national security interests. Importantly, the interim rule does not provide any exceptions for contracts at or below the simplified acquisition threshold (SAT) or for acquisitions of commercially available off-the-shelf (COTS) or other commercial items.

The interim rule requires contractors to submit a representation with each offer confirming whether the offeror will provide covered telecommunications equipment or services to the government in the performance of any contract, subcontract, or other contractual instrument resulting from the solicitation. If the offeror responds affirmatively, it will be required to provide a detailed description and proposed use of the covered telecommunications equipment or services and identify the entity providing or producing them. In an effort to minimize the information collection burden of this requirement, DoD, GSA, and NASA are planning to update the System for Award Management (SAM) to allow offerors to represent annually whether they sell equipment, systems, or services that include covered telecommunications equipment or services, and only offerors that provide an affirmative response will be required to provide an offer-by-offer representation.

The interim rule subjects contractors to strict reporting requirements in the event that the contractor identifies (or is notified by a subcontractor of) any covered telecommunications equipment or services used as a substantial component of any system or as critical technology as part of any system during the performance of

a contract. Specifically, within one business day, the contractor must provide detailed information regarding the contract, order, supplier, equipment, and any mitigation actions undertaken or recommended. Within ten business days of submitting this information, the contractor must provide any further information regarding mitigation and 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 such use or submission in the future.

As noted above, the interim rule implements only the procurement-related restrictions under Section 889(a)(1)(A) of the 2019 NDAA. Additional provisions in the 2019 NDAA prohibit executive agencies from contracting with entities that use covered telecommunications equipment or services and prohibit the use of federal loan or grant funds to procure or obtain them. These provisions are subject to separate rulemaking proceedings and will not become effective until August 13, 2020.