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ALERT

Long Awaited, Controversial NDAA Section 889 Rule on Huawei, ZTE, and Video Companies Emerges from FAR Council

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On Friday, July 10, 2020, the U.S. Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) released a draft Interim Final Rule, text available here, to implement important restrictions on contractor supply chains related to telecom equipment and services.

DoD, GSA, and NASA are issuing this interim rule amending 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). Section 889(a)(1)(B) prohibits executive agencies from entering into, or extending or renewing, 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, on or after August 13, 2020, unless an exception applies or a waiver is granted. The new rule has been anticipated for some time, amidst great uncertainty for contractors, and it provides important guidance and opportunities for comment on scoping.

The Interim Rule revises the clause at FAR 52.204-24, *Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment*, and the revised clause must be included:

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- In solicitations issued on or after August 13, 2020, and resultant contracts; and
- In solicitations issued before August 13, 2020, provided award of the resulting contract(s) occurs on or after August 13, 2020
- In addition, contracting officers shall modify, in accordance with FAR 1.108(d), existing indefinite delivery contracts to include the FAR clause for future orders, prior to placing any future orders
- The clause will apply to all contracts, including contracts for commercial items, commercially-available off-the-shelf (COTS) products, and micro-purchases, which are less than $10,000.

Background on Section 889

Section 889 Part B covers certain telecommunications equipment and services produced or provided by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of those entities) and certain video surveillance products or telecommunications equipment services produced or provided by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of those entities).

The statute is not limited to contracting with entities that use end-products produced by those companies; it also covers the use of 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 Interim Rule confirms the reach of Section 889 Part B is broader than Part A.

The plain text of Section 889 makes clear that this part is broader than the section that went into effect last year and prohibited the inclusion of covered equipment in products or services provided to the government. The Interim Rule confirms that its prohibition on "use" of covered equipment or services applies "regardless of whether that usage is in performance of work under a Federal contract."

Contractors will have to make a representation in the System of Award Management about compliance.

The Interim Rule explains that "the FAR Council is in the process of making updates to [System for Award Management] SAM requiring offerors to represent whether they use covered telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services within the meaning of this rule."

Contractors unable to comply can still bid on work but the contracting agency will have to seek a waiver.

The Interim Rule helpfully discusses "reasonable" inquiries into the supply chain.

Regulated entities have been struggling with how to approach compliance and what level of auditing or investigation will be needed. The FAR Council seems to anticipate this challenge, and uses a reasonableness standard. The rule "requires submission of a representation with each offer that will require all offerors to

represent, after conducting a reasonable inquiry, whether covered telecommunications equipment or services are used by the offeror." It continues, observing that "[a]n entity may represent that it does not use covered telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services within the meaning of this rule, if a reasonable inquiry by the entity does not reveal or identify any such use. A reasonable inquiry is 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. A reasonable inquiry need not include an internal or third-party audit."

The Interim Rule confirms that compliance obligations flow only to the offeror – the "entity" that is in privity with the government.

It says that "[t[he term offeror will continue to refer to only the entity that executes the contract." Thus, the prohibition "applies at the prime contract level to an entity that uses any equipment, system, or service that itself uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, regardless of whether that usage is in performance of work under a Federal contract."

Notably, "the prohibition for section 889(a)(1)(B) will not flow down to subcontractors because the prime contractor is the only "entity" that the agency "enters into a contract" with, and an agency does not directly "enter into a contract" with any subcontractors, at any tier.

The FAR Council could expand the representation obligation in the future.

The FAR Council is considering as part of finalization of this rulemaking with an effective date no later than August 13, 2021, expanding the scope to require that the prohibitions at 52.204-24(b)(2) and 52.204-25(b)(2) apply to the offeror and any affiliates, parents, and subsidiaries of the offeror that are domestic concerns, and expand the representation at 52.204-24(d)(2) so that the offeror represents on behalf of itself and any affiliates, parents, and subsidiaries of the offeror that are domestic concerns, as to whether they use covered telecommunications equipment or services.

By asking about expanding the applicability of the representation, the FAR Council confirms that it presently reaches only the corporate entity that has a contract with the government.

This is major area for public comment to the FAR Council.

The FAR Council provides guidance on its compliance expectations.

The Interim Rule states that "a robust, risk-based compliance approach will help reduce the likelihood of noncompliance." It expects that in "the first year that 889(a)(1)(B) is in effect, contractors and subcontractors will need to learn about the provision and its requirements as well as develop a compliance plan." The FAR Council assumes certain key steps would be part of a "compliance plan developed by any entity." In brief such a plan would feature:

- Regulatory Familiarization. Read and understand the rule and necessary actions for compliance
- Corporate Enterprise Tracking. "The entity must determine through a reasonable inquiry whether the entity itself uses 'covered telecommunications' equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. This includes examining relationships with any subcontractor or supplier for which the prime contractor has a Federal contract and uses the supplier or subcontractor's "covered telecommunications" equipment or services as a substantial or essential component of any system. A reasonable inquiry is an inquiry designed to uncover any information in the entity's possession – primarily documentation or other records – about the identity of the producer or provider of covered telecommunications equipment or services used by the entity. A reasonable inquiry need not include an internal or third-party audit."
- The contractor should "[e]ducate the entity's purchasing/procurement, and materials management professionals to ensure they are familiar with the entity's compliance plan."
- Tracking costs, such as for removal or for a phase out plan, if one is developed under a waiver.
- Representations to the government. The entity should inform the government about whether it uses covered telecom equipment or promptly after discovery of use.

Comments on the Interim Rule are due on **September 14, 2020**.

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