Government Contracts

# Sweeping New Interim Rule Further Implements Ban on Targeted Telecommunications and Video Surveillance Companies

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A new interim rule (Interim Rule) implementing Congress's ban on five Chinese telecommunications and surveillance equipment companies becomes effective on August 13, 2020.[1] That rule prohibits federal agencies from issuing new contracts or extending or renewing existing contracts to contractors that *use* identified telecommunications or video surveillance equipment and services from five Chinese suppliers, including Huawei Technologies, ZTE, Hytera Communications, Hangzhou Hikvision Digital Technology, and Dahau Technology (covered telecommunications equipment and services).

For the past year, federal contractors have been subject to rules implementing the ban, but those rules—which implemented only one part of the Congressional ban—focused exclusively on the sale of banned products and services to the federal government. Now that the Interim Rule includes mere use by a federal contractor of the banned products and services (regardless of whether that use is for a government contract), many more contractors will feel the full impact of the ban. To continue doing business with the federal government, contractors will need to implement measures to identify banned items and services, conduct reviews of internal systems that might include covered telecommunications equipment and services, and ensure prohibited technologies are not otherwise supporting operations. Because the Interim Rule applies to all FAR prime contracts, including those below the simplified acquisition threshold and for the acquisition of commercial off-the-shelf (COTs) items, its impact will be substantial.

While the Interim Rule is broader than prior bans, it is more limited in scope. The Interim Rule applies only to the contractor entity, and not its supply chain or parent company. It is further limited by a reasonable inquiry standard, as will be described in further detail below.

With the recent release of this new Interim Rule, federal contractors will soon be subject to broader restrictions and reporting requirements regarding the ban on covered telecommunications products and services. This alert recommends strategies to ensure compliance going forward after examining how the latest Interim Rule expands government contractor requirements.

**Purpose of the New Interim Rule**

The purpose of the sweeping requirements in the new Interim Rule is two-fold. First, the ban "seeks to avoid the disruption of Federal contract systems and operations that could in turn disrupt the operations of the Federal Government, which relies on contractors to provide a range of support and services."[2] Second, the ban recognizes the risk of "exfiltration of sensitive data from contract systems arising from contractors' use of covered telecommunications equipment or services."[3]

The regulations imposed by the FAR Council seem broader than the statutory ban itself. The primary focus of the statutory ban appears to be on (i) video surveillance equipment and (ii) telecommunications equipment that can "route or redirect user data traffic or permit visibility into [] user data or packets that such equipment transmits or otherwise handles." *See* Section 889(a)(2)(B). However, the FAR Council defines the term "Covered telecommunications equipment or services" to include ***any*** telecommunications or video equipment services produced or provided by not only the five

companies mentioned above, but by "any other company, including affiliates and subsidiaries, owned or controlled by the People's Republic of China."

**Section 889 "Part A" Requirements and FAR Implementation**

In August 2019, the US Department of Defense (DoD), the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) (collectively, the *FAR Council*) issued a set of interim regulations implementing Section 889 (a)(1)(A) (or Section 889 Part A) as distinguished from Section 889(a)(1)(B) (Part B).[4]

Section 889 Part A applies only to what a contractor provides to the government under a government contract. Unless an exception applies, Part A prohibits the government from acquiring or obtaining covered telecommunications equipment or services as a substantial or essential component of any system. Specifically, the FAR's implementation of Section 889 Part A prohibits agencies from procuring or obtaining, directly or through subcontracts, 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.[5]

In terms of mechanics, Part A requires contractors to represent that they will or will not provide covered telecommunications equipment under each contract (FAR 52.204-24). If the contractor answers that it will provide such equipment or services, then it must disclose a variety of information about the equipment or services (such as part number, function, and other information to permit the agency to determine if the "substantial or essential component" test or other exception applies). Part A also requires the contractor to make an immediate disclosure if it identifies any covered telecommunications equipment or services during performance (FAR 52.204-25(d)).

In making Part A representations, contractors must conduct sufficient due diligence to ensure that they will not, in fact, provide covered telecommunications equipment or services to the government under a contract. To make an accurate Part A representation, contractors must take active steps to validate their supply chains, which may include contacting all suppliers of equipment and services to find out the origin of certain equipment or services that it may use. Contractors must also become knowledgeable about the banned companies affiliates, which may operate under a name other than those of the banned companies.

In December 2019, in response to industry concerns, the FAR Council eased the burden of how often a contractor needed to report on its use of the banned covered telecommunications products and services.[6] Under a newly created FAR 52.204.26, the FAR Council allowed offerors to represent on an annual basis that they "do not" use such covered telecommunication equipment and services in order to skip the "offer-by-offer" representation originally imposed.

**Section 889 "Part B" Requirements and FAR Implementation**

On July 14, 2020, the FAR Council issued an interim rule (the Interim Rule) to add more sweeping requirements imposed by Section 889 (a)(1)(B) (Part B).

Unlike Part A, Part B of Section 889 only applies to the "entity" that contracts with the government and is not flowed down the supply chain.

Part B prohibits the government from entering into 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." In other words, contractors must evaluate and monitor all telecommunications equipment or services used anywhere within the company, even if the use is strictly limited to the company's commercial business.

In terms of mechanics, Part B requires contractors to conduct a "reasonable inquiry" before a contractor represents whether it does or does not use covered telecommunications equipment or services. FAR 52.204-24(d)(2).

> "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 rule warns that failure to submit an accurate representation "constitutes a breach of contract that can lead to cancellation, termination, and financial consequences" and therefore "it is important for contractors to develop a compliance plan that will allow them to submit accurate representations to the Government in the course of their offers."

As set forth in the FAR Council preamble, contractors are encouraged to develop a "risk-based" compliance plan, which includes the following elements: (1) regulatory familiarization; (2) corporate enterprise tracking; (3) education; (4) cost of removal; (5) representation to the government; and (6) cost to develop a phase-out plan or submission of waiver information.

**Next Steps**

We encourage contractors to consider taking the following actions in anticipation of the August 13, 2020 effective date for the interim rule. If this review might benefit from being conducted under privilege, contractors should consider the assistance of outside counsel.

1) Create and periodically update a list of banned items, including items that may be "white-labelled" (sold under another brand name).

2) Conduct a review of your internal systems that are known or suspected to use Huawei, ZTE, or other covered telecommunications equipment and services, including:

- Review of all computer systems;
- Review all company issued smart phones or other handheld devices;
- Review all internal telecommunication networks, including any wireless systems;
- Review all security surveillance and security systems; and
- Review any other technologies that record, store, and/or transmit data.

3) Conduct a review of your suppliers or service-providers who may utilize such equipment or services to support your operations.

4) If you identify prohibited technologies within or supporting your operations, you should then take steps to determine:

- Is the item a "substantial or essential component" of a "critical technology"?
- What is the estimated cost and effort to remove the item?

5) Document your review plan and results.

6) Develop a protocol for refreshing/updating the review process and results on a regular basis.

7) Develop a set of controls such that any representation or certification to the government regarding compliance is expressly linked to the most recent review results.

**Conclusion**

Federal contractors have for the past year felt the burden of complying with the already-instituted Congressional ban of covered telecommunications products or services imposed by Section 889 of the FY 2019 NDAA. With the addition of this new Interim Rule, which sweeps in ***any covered use*** by a prime contractor of banned covered telecommunications products and services, a far greater burden is imposed, especially for entities with only a small number of commercial or COTS government contracts. And of course, new regulatory obligations and representations increase the risk of potential False Claims Act allegations should a company knowingly fail to meet these requirements.

Industry associations have urged for a delay in the August 13, 2020 implementation of the Interim Rule. Despite not being flowed down to subcontractors, the complexities imposed by the Interim Rule could be technically challenging with consequences extending beyond prime contractors. Moreover, the FAR Council has stated that it is considering expanding the prohibitions of the Interim Rule to a prime contractor's affiliates, parent, and subsidiaries by August 13, 2021. Public comments are due by September 14, 2020. We will be closely tracking developments and stand ready to assist.

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[1] 85 Fed. Reg. 42665.

[2] 85 Fed. Reg. 42665.

[3] *Id*.

[4] 84 Fed. Reg. 40,216.

[5] *Id*.

[6] 84 Fed. Red. 68314.

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