



Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment (Section 889)

July 30, 2020

Section 889 and the Threat

- On August 13, 2018, Congress passed the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year 2019
 - Section 889 of the NDAA includes two prohibitions regarding certain telecommunications and video surveillance equipment and services (telecom)
- According to the National Counterintelligence and Security Center and the 2019 Worldwide Threat Assessment of the Intelligence Community, Chinese intelligence and security services may use Chinese information technology firms and their equipment as routine and systemic espionage platforms
- The increasing reliance on foreign-owned or controlled equipment and services, and reliance on those that present national security concerns, creates vulnerabilities in U.S. supply chains

Section 889 Part A

- Effective **August 13, 2019**, the Government may not obtain (through a contract or other instrument) certain telecommunications equipment or services produced by the following companies or their subsidiaries and affiliates:
 - Huawei Technologies Company
 - ZTE Corporation
 - Hytera Communications Corporation
 - Hangzhou Hikvision Digital Technology Company
 - Dahua Technology Company

THE GOVERNMENT CANNOT OBTAIN PROHIBITED TELECOM

Section 889 Part B

- Effective **August 13, 2020**, the Government may not contract with an entity that uses telecommunications equipment or services, as a substantial or essential component of any system, or as critical technology as part of any system, produced by any of the Chinese companies listed on slide 3
 - Use is “regardless of whether that use is in performance of a Federal contract”
- Section 889 Part B applies to **every sector**: no matter what your company makes or sells, come August 13, 2020, **all** systems your company uses must be checked for prohibited telecommunications equipment and services

CONTRACTORS CANNOT USE PROHIBITED TELECOM

Interim FAR Rules -- Parts A and B

- Added Section 889 Parts A and B to the FAR ([FAR 4.2102](#))
- The FAR clarified that Section 889 Parts A and B also apply to:
 - Commercial items ([FAR 12.301\(d\)\(6\)](#))
 - Micro-purchases ([FAR 13.201\(j\)](#))
- The FAR now includes:
 - A representation provision ([FAR 52.204-24](#))
 - A SAM representation provision ([FAR 52.204-26](#))
 - Another interim FAR rule is anticipated to add Section 889 Part B requirements, pending technological update to SAM.gov
 - A reporting clause ([FAR 52.204-25](#))

Representation Provision (-24)

- Representation provision in all solicitations ([FAR 52.204-24](#)):
 - Representation based on “reasonable inquiry”
 - An inquiry designed to uncover any information in the entity’s possession about the identity of the producer or provider of prohibited telecom used by the entity; there’s no need for an internal or third-party audit
 - Requires offerors to **represent** whether they will or will not provide prohibited telecommunications equipment or services to the Government (FAR 52.204-24(d)(1))
 - Requires offerors to **represent** whether they do or do not use prohibited telecommunications equipment or services, regardless of whether that use is in performance of a Federal contract (FAR 52.204-24(d)(2))

Annual (SAM) Representation (-26)

- Annual (SAM) representation provision in all solicitations ([FAR 52.204-26](#)):
 - Requires entities to **represent** whether they do or do not provide prohibited telecommunications equipment or services to the Government (FAR 52.204-26(c)(1))
 - Eventually will require entities to **represent** whether they do or do not use prohibited telecommunications equipment or services, regardless of whether that use is in performance of a Federal contract (FAR 52.204-26(c)(2))
- Once SAM is updated, if an entity **represents** in SAM that it **does not provide** and **does not use** prohibited telecommunications equipment or services, it will only need to re-represent annually (it does not respond to [FAR 52.204-24](#) when submitting offers)

Reporting Clause (-25)

- Reporting clause in all new and existing contracts ([FAR 52.204-25](#)):
 - Requires contractors and subcontractors to **notify** the Government if they identify that prohibited telecommunications equipment or services are **used during contract performance** (FAR 52.204-25(d)(1))
 - This reporting requirement was not changed by the Section 889 Part B FAR rule that goes into effect on August 13, 2020

Waivers

- The Director of National Intelligence may waive Section 889 for “national security interests”
- Agency-granted waivers (delayed implementation):
 - Agency heads may, on a one-time basis for each contractor, delay the effect of Section 889 Part A through August 13, 2021
 - Agency heads may, on a one-time basis for each contractor, delay the effect of Section 889 Part B through August 13, 2022
 - The statute and FAR rule impose additional restrictions to prevent agency-granted waivers from being a means of bypassing the prohibitions

Agency-Granted Waivers

- To grant waivers, each agency must designate a senior agency official for SCRM and participate in the FASC's information-sharing environment
- Each waiver must include:
 - A compelling justification for additional time needed
 - A full and complete laydown of, and a phase-out plan to eliminate, the covered telecom from the offeror/contractor
 - An ODNI determination that granting the waiver will not adversely affect U.S. national security
 - 15-day advanced notification to the FASC and ODNI
- Agencies must notify Congress within 30 days of issuance of a waiver

Things to Think About

- The Section 889 Part B FAR rule includes a six-step process for industry to follow, which can be grouped into three categories:
 - Determine what equipment and services to check
 - Regulatory Familiarization
 - Corporate Enterprise Tracking
 - Determine how to check equipment and services
 - Education
 - What to do if prohibited equipment or services are found
 - Cost of Removal (if the entity independently decides to)
 - Cost of Requesting a Waiver
- Representation (the penultimate step in the FAR rule) was discussed on slides 6 and 7

Determine What to Check

- Section 889 Part B is about the presence and use of telecommunications equipment and services, **no matter the industry sector**
- What equipment and services need to be checked to determine whether they include any prohibited components?
 - Under Part A, any equipment or services **provided to the Government**
 - Under Part B, any equipment or services **used by the entity**
 - Are overseas elements of your business, affiliates, parents, and subsidiaries part of the same entity?
 - What about equipment an employee uses while working from home or an employee-owned cellular phone?
 - What about equipment used in the development of software?

Determine How to Check

- What are the best processes and technology to use to identify prohibited equipment and services?
 - Are there automated solutions (e.g., scripts that can identify electronic signatures of prohibited software)?
 - What are the latest technology and best practices to gain visibility into use, across your entire company, of telecommunications equipment or services?
 - How do you identify whether equipment your company uses is prohibited if the equipment is owned or provided by another company, especially if the other company may resist providing information?
 - A reasonable inquiry only requires information already in the entity's possession

What if Equipment is Prohibited?

- When a company identifies prohibited equipment or services, what are the steps to take to replace the equipment or services?
 - What do companies do if their factory or office is located in foreign country where prohibited equipment is prevalent and alternative solutions may be unavailable?
 - What are some best practices (e.g., sourcing strategies) or technologies that can assist companies with replacing prohibited equipment?
 - How long will it take to remove and replace prohibited equipment or services that your company uses?
- Remember, agency (non-ODNI) waivers require a full and complete laydown of the presence of prohibited equipment and a phase-out plan

How to Comment

- Comments may be submitted at [regulations.gov](https://www.regulations.gov)
 - Search for “FAR Case 2019-009”
 - Select corresponding “Comment Now” link
 - Follow instructions provided
- Once processed, all comments will be publicly viewable on [regulations.gov](https://www.regulations.gov)
- Comments may be submitted anonymously

Questions Included in the FAR Rule

- There are numerous questions in the FAR rule, including:
 - How much do you estimate it would cost if you decide to cease use of prohibited telecom to come into compliance with the rule?
 - How long will it take if you decide to remove and replace prohibited telecom that your company uses?
 - Are there specific use cases where it would not be feasible to cease use of equipment, system(s), or services that use prohibited telecom?
 - Will this impact your willingness to offer goods and services to the Federal Government?
- Provide comments on how this FAR rule impacts your company's operations and ability to support the Federal Government

Additional Questions for Industry

- What impacts do you see for your major Federal customers?
- Do you have any recommendations for how the Federal Government can best mitigate supply chain risks going forward (e.g., threats that prompted Section 889) while minimizing burden on contractors?
 - How should the Government update its approach?
 - Are there technological solutions or industry best practices the Government should consider?
 - Are there approaches the Government currently uses that are not effective?
- Provide comments on how this FAR rule impacts your company's operations and ability to support the Federal Government

