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Long-awaited Section 889 Part B interim rule issued

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Introduction

After much anticipation, on 14 July 2020, the Federal Acquisition Regulation (FAR) Council issued an interim rule in the Federal Register that will implement Section 889(a)(1)(B) (Part B) of the fiscal year 2019 National Defense Authorization Act (FY19 NDAA), titled *Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment*.[1] Effective 13 August 2020, the interim rule implements a government-wide ban on federal agencies contracting with any entity that uses covered telecommunications equipment or services from certain Chinese entities, including Huawei, ZTE, Hikivision, Hytera, Dahua, and their affiliates.

Similar to prior rulemakings implementing Section 889 (a)(1)(A) (Part A), discussed below, this latest rule closely follows the FY19 NDAA statutory language despite industry requests to narrow the broad scope of coverage. These Part B requirements will apply to all federal contractors no matter their size (i.e., there is no exception for small business contractors), and it applies to government purchases below the micro-purchase threshold and for commercial off-the-shelf items (COTS). The public can submit comments until 14 September 2020 for consideration in the formation of a final rule.

Background

Part A of Section 889 prohibits agencies from procuring, obtaining, or extending, or renewing a contract to procure or obtain "covered telecommunications equipment or services"[2] as a "substantial or

1. 85 Fed. Reg. 42665 (14 July 2020).
2. The rule defines "[c]overed telecommunications equipment or services" to mean any of the following:
   - Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities).
   - For the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities).
   - Telecommunications or video surveillance services provided by such entities or using such equipment.
   - Telecommunications or video surveillance equipment or services produced or provided by an entity that the secretary of defense, in consultation with the director of national intelligence or the director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of the People's Republic of China.

   84 Fed. Reg. 40216, 40217 (13 Aug. 2019).

essential component"[3] of any system, or as "critical technology"[4] as part of any system.

The Part A prohibition took effect on 13 August 2019, and has been implemented by a series of FAR clauses.[5] The current FAR clauses require all contractors to represent whether or they not provide covered telecommunications equipment or services as a part of their offered products or services to the government. The clauses also require all contractors to report the use of any such covered equipment, systems, or services discovered during contract performance.

- FAR 52.204-25, *Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment*, describes the statutory prohibition and is to be included in all solicitations issued on or after 13 August 2019 and where award of a resulting contract occurs on or after 13 August 2019.
- FAR 52.204-24, *Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment*, requires offerors to represent on an offer-by-offer basis whether the offeror will provide any covered telecommunications equipment or services and requires offerors to provide additional disclosures if so.
- FAR 52.204-26, *Covered Telecommunications Equipment or Services-Representation*, was added in December 2019 to reduce the public burden of the case-by-case representations in 52.204-24.[6] This clause requires offerors to represent annually whether they offer to the government equipment, systems, or services that include covered telecommunications equipment or services. Only offerors that provide an affirmative response to the annual representation are required to provide the offer-by-offer representation.

Part B interim rule

The new interim rule implements Section 889 Part B, which prohibits agencies from entering into a contract, or extending or renewing a contract, with an entity 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.

Required representations

Rather than prescribing new FAR clauses, the FAR Council opted to amend the current FAR clauses listed above to also cover the Part B requirements. The rule provides that the government is currently working on updates to the federal System for Award Management (SAM) to allow offerors to make representations annually after conducting a "reasonable inquiry." The FAR Council intends to publish a subsequent rulemaking once updates are ready in SAM.[7]

Section 889 representations only apply to the offeror

The interim rule applies solely to the offeror, and not to any of its subsidiaries or affiliated companies. However, the FAR Council notes that for the development of the final rule it is considering expanding the scope of the Section 889 Part B prohibition and representation to apply to the offeror and the offeror's affiliates, parents, and subsidiaries of the offeror that are domestic concerns. The FAR Council specifically asks industry to comment on this proposal during the public comment period. Notably, the use of the phrase "domestic concerns" implies that even this expanded scope would not apply to foreign subsidiaries or affiliates.

3. The rule defines "substantial or essential component" to mean any component necessary for the proper function or performance of a piece of equipment, system, or service. *Id.* at 40222.
4. The rule defines "critical technology" to mean (1) defense articles or services controlled for under the United States Munitions List of the International Traffic in Arms Regulations; (2) dual-use items controlled for national security, chemical and biological weapons, nuclear proliferation, missile technology, regional stability, or surreptitious listening reasons under the Commerce Control List of the Export Administration Regulations; (3) certain nuclear-related items covered by federal regulations; (4) select agents and toxins covered by federal regulations; or (5) emerging and foundational technologies controlled for under the Export Control Reform Act. *Id.*
5. 84 Fed. Reg. 40216 (13 Aug. 2019).
6. 84 Fed. Reg. 68314 (13 Dec. 2019).
7. 85 Fed. Reg. at 42675.

Foreign application

One area of industry speculation has been the international reach of the rule. The FAR Council recognizes that there could be further costs associated with this rule, including having to relocate a building in a foreign country where there is no market alternative, and the rule includes the following specific question for comment: "What do companies do if their factory or office is located in foreign country where covered telecommunications equipment or services are prevalent and alternative solutions may be unavailable?"[8]

These inclusions suggest that foreign offices and factories may need to become compliant, but there is still uncertainty as to whether this would apply only to domestic corporations and their foreign offices or factories.

"Part B" is not a required flow down to subcontractors

The interim rule provides that the FAR 52.204-25 prohibition under section Part A will continue to flow down to all subcontractors, but, as required by statute, the prohibition for Part B will not flow down 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. Despite the lack of a flow down requirement, the interim rule makes mention of subcontractors and suppliers throughout. In one instance, the interim rule states that "contractors and subcontractors will need to learn about the provision and its requirements as well as develop a compliance plan."[9] Contractors are further encouraged to examine 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.

Ultimately, a prime contractor will still want to understand the compliance status of its subcontractors and suppliers and should ensure it can demonstrate that it conducted a reasonable inquiry of the equipment or services provided by those sources.

Definition of "Use"

Notwithstanding calls by some government officials and contractors, the interim rule's prohibitions require a clear nexus to a government contract, and the FAR Council clarified that the Part B prohibition applies "regardless of whether that usage is in performance of work under a Federal contract."[10] In other words, the rule imposes effectively a flat ban on contracting with any business that uses such equipment or services, regardless of whether the use relates to the performance of a federal contract. The expansive application is reflected by the FAR Council's estimate of the total public cost impact for year one of the rule's implementation to be US$12 billion.

Conducting a "reasonable inquiry"

The interim rule provides industry with some guidance on the government's expectations regarding due diligence in this area. The rule provides 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."[11] A reasonable inquiry is defined in the rule as one 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.

Notwithstanding some guidance in the interim rule, it remains somewhat unclear what constitutes "reasonable." Some companies may interpret "reasonable" as necessitating what amounts to an audit or other affirmative steps to uncover information about their telecommunications equipment or services, while others may read the text literally and conclude that "reasonable" involves merely reviewing what is in one's possession, which requires no additional inquiry from subcontractors or suppliers.

8. *Id.* at 42673.
9. *Id.* at 42669.
10. *Id.* at 42666.
11. 85 Fed. Reg. at 42667.

Expectations for a compliance plan

The interim rule's preamble notes that submission of an inaccurate representation under the FAR clauses may constitute breach of a government contract and can lead to cancellation, termination, and financial consequences.[12] The FAR Council goes on to state that it expects contractors' compliance plans to include:

1. familiarization with Section 889 requirements;
2. conducting a reasonable inquiry to identify any covered items within or affecting the entity's infrastructure, systems, or services (including shared technology and services and an examination of subcontractor and supplier relationships);
3. training of procurement/purchasing personnel to ensure awareness of Section 889 and the organization's compliance plan;
4. procedures for replacing any covered items if identified;
5. plan for updating representations or providing notification to the government if covered items are identified; and
6. if planning to request a waiver, develop a phase-out plan for removing covered items and a process for submitting waiver information (including the company's phase-out plan) to the government.

Waiver process

The interim rule provides details on a waiver process, but this is more aptly described as delayed compliance because the process provides only for a one-time waiver that will expire no later than 13 August 2022. A contractor can seek a waiver where it submits an offer and makes the representation that it does use covered telecommunications equipment or services and there is no applicable exception. The contracting officer must then decide if a waiver is necessary to make an award and shall request the offeror to provide: (1) a compelling justification for the additional time to implement Part B; (2) a full and complete laydown of the presence of covered telecommunications or video surveillance equipment or services in the entity's supply chain; and (3) a phase-out plan to eliminate such banned technologies. The rule recognizes that given the extent of information necessary for requesting a waiver, any waiver would likely take at least a few weeks to obtain.

Although the FAR Council considered providing uniform procedures for how agency waivers must be initiated and processed, the Council ultimately adopted a contract-by-contract process requiring the customer agency's judgment on each request. The Council reasoned that each executive agency "operates a range of programs that have unique mission needs as well as unique security concerns and vulnerabilities."[13] This could ultimately make it difficult for contractors to determine how best to make their case for a waiver.[14]

Conclusion

The FAR Council is accepting comments in order to develop a final rule. However, as the interim rule is effective on the FY19 NDAA statutory deadline of 13 August 2020 (prior to the September due date for comments), delayed implementation is unlikely unless Congress steps in. One noteworthy effort for delayed implementation is Senator Ron Johnson's amendment 2193 to the FY21 NDAA. This amendment would defer the effective date of Part B to 13 August 2021, which DoD officials have urged Congress to support. This amendment would also allow for class-based waivers and clarify that the Part B prohibition only applies to use of covered equipment in the performance of a federal contract. It is unclear, however, when and if the amendment would be adopted into the final FY21 NDAA.

At present, contractors now face less than one month before this prohibition goes into effect. In the next 30 days, prime contractors should consider their compliance with Section 889 Part B and take a risk-based approach to determine whether they use covered equipment or services or contract with entities that do so.

12. *Id.* at 42669.
13. *Id.* at 42672.
14. Additionally, before a contractor's waiver request can be granted, the customer agency must also consult with the Office of the Director of National Intelligence (ODNI) and notify the Federal Acquisition Security Council (FASC). In the case of an emergency, including a major disaster declaration, in which prior notice and consultation with ODNI and FASC is impracticable and would severely jeopardize performance of mission-critical functions, the head of an agency may grant a waiver without meeting the notice and consultation requirements. The multiple layers of review and burdensome process may signal there will be a limited number of waivers granted by the government.

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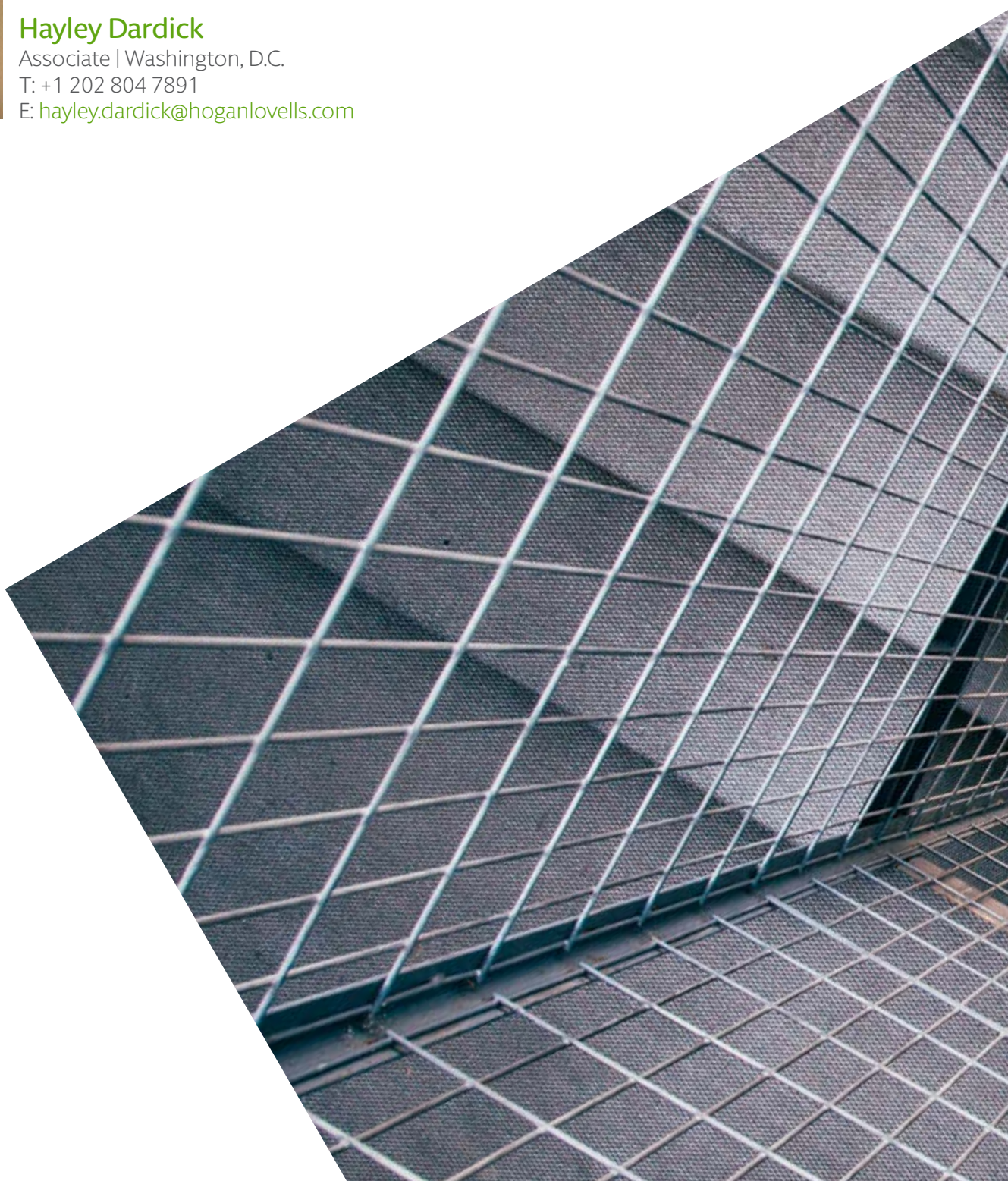

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