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## Contractors Must Act Now to Ensure Compliance With Expanded Ban of Chinese Telecommunications Equipment & Services

Later this week, the U.S. will take another step in protecting the federal government’s information and systems by restricting prime-contractors and subcontractors from using certain Chinese telecommunications equipment and services. These restrictions not only apply to those who provide the government with the equipment and services, but also apply to the internal systems used by contractors to conduct their own business. It is expected that the interim rule will have a dramatic impact on a contractor’s existing internal telecommunications products and systems. Contractors will need to know whether their telecommunications equipment, including phones, computers, laptops, tablets, printers, routers, surveillance and security systems, contain prohibited devices.

The Department of Defense (DoD) recently issued a memorandum providing the specific actions contracting officers must take prior to awarding, extending or renewing contracts, task orders, and delivery orders on or after August 13, 2020. Thus, compliance with the rules is important. The purpose of this Client Alert is to provide information and guidance to government contractors so that they may be in compliance.

### The Distinction Between “Supply” and “Use” of the Restricted Equipment

The ban clearly applies to the supply of equipment tied to restricted sources linked to the Chinese government. Importantly, the interim rule now requires offerors to represent whether they use covered telecommunications equipment or services. In other words, contractors that do not supply such equipment or services to the government are still covered by the interim rule.

DoD has advised that use of covered telecommunications equipment or services is not just limited to use in performance of work under a contract with the federal government. This implies that the contractor has an obligation to report the use of prohibited telecommunications equipment or services whether or not such use is related to its work under a federal contract.

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### The Interim Rule

On July 14, 2020, the Federal Acquisition Regulation (FAR) Council issued an interim rule amending FAR 52.204-24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment, and FAR 52.204-25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment, to implement Section 889(a)(1)(B) of the 2019 National Defense Authorization Act (NDAA). The interim rule prohibits contractors from using certain covered telecommunications equipment and services based on their connections to certain Chinese entities. The interim rule further expands the ban previously put in place by FAR 52.204-24 and FAR 52.204-25. To facilitate implementation of the interim rule, the Department of Defense (DoD) recently issued the referenced memorandum providing the specific actions the contracting officers must take prior to awarding, extending or renewing contracts, task orders, and delivery orders on or after August 13, 2020.

## Current Ban on Covered Telecommunications Equipment and Services

In August 2019, the FAR was amended to include FAR 52.204-24 and FAR 52.204-25. These clauses implement Section 889(a)(1)(A) (“Part A”). FAR 52.204-24 requires offerors to represent as part of its certifications and representations whether or not they will supply covered telecommunications equipment or services under their government contract. Covered telecommunications equipment or service includes any of the following:

1. Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation, including its subsidiaries or affiliates;
2. Video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company, including its subsidiaries or affiliates;
3. Telecommunications or video surveillance services provided by such entities or using such equipment; or
4. Telecommunications or video surveillance equipment or services produced or provided by an entity reasonably believed to be an entity owned or controlled by, or otherwise connected to the Chinese government, as determined by the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation.

If the offeror represents that it will supply such equipment or services, then it must provide a description of the equipment and services, an explanation of the proposed use of the equipment and services, and information specifically pertaining to the entity providing the service or producing the equipment.

FAR 52.204-25 prohibits contractors from supplying to the government 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, unless an exception applies. There are exceptions when a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements and when the telecommunications equipment cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles. If a contractor later discovers that it is supplying covered telecommunications equipment or services, it must report the use *within one business day* from the date of identification or notification. The contractor is required to provide the government with information about the equipment or services (e.g., supplier name, brand, model number, and item description) as well as information about mitigation actions undertaken or recommended by the contractor. Within ten business days of the initial report, the contractor has to report on further mitigation actions or recommendation and must describe the efforts it took to prevent use or submission of covered telecommunications equipment or services and the efforts they will take to prevent future use or submission.

## Amendments to the FAR Under the Interim Rule

While Part A restricts the agencies, themselves, from procuring covered telecommunications equipment and services, Part B expands the ban on covered telecommunications equipment and services by prohibiting federal agencies from working with contractors that use such covered equipment and services. Effective August 13, 2020, agencies will be prohibited from procuring, obtaining, extending, or renewing a contract with a contractor that uses equipment, systems, or services that use covered telecommunications equipment or services as a substantial or essential component or as critical technology, unless an exception applies or a waiver is granted. This prohibition will apply to all contracts, including micro-purchase contracts and contracts for the purchase of

commercially available off-the-shelf (COTS) items. Right now, this prohibition will apply only to the prime contractor. However, the FAR Council is considering expanding the scope of the rule to include any affiliates, parents, and subsidiaries of the contractor that are domestic concerns.

As stated above, the interim rule requires offerors to represent whether they use covered telecommunications equipment or services. An offeror may represent that it does not use covered telecommunications equipment or services if a reasonable inquiry does not reveal or identify use of such equipment or services. A reasonable inquiry is an inquiry designed to uncover any information in the contractor's possession about the identity of the producer or provider of covered telecommunications equipment or services used by the entity. As part of a reasonable inquiry, offerors should examine their own systems as well as their relationships with subcontractors and supplier(s). A reasonable inquiry does not necessarily require an internal or third-party audit.

Contractors still will be required to report discovered use of covered telecommunications equipment or services during contract performance. Pursuant to the DoD advice referenced above, the obligation to report the use of prohibited telecommunications equipment or services is not just limited to use in performance of work under a contract with the federal government.

### **Waivers under Part B**

As the government anticipates some compliance issues, for the next two years, the head of an executive agency may grant a one-time waiver from the requirements of Part B on a case-by-case basis.

The contracting officer is tasked with determining if a waiver is necessary to make an award. Offerors seeking a waiver will need to provide the following information:

1. A compelling justification for additional time to comply with the requirements under Part B;
2. A full and complete laydown of the presence of covered telecommunications equipment and services in the offeror's supply chain; and
3. A phase-out plan to eliminate the use of covered telecommunications equipment and services from the entity's systems.

Offerors should consider providing this information when submitting their proposal as the FAR Council anticipates that the waiver process may take at least a few weeks. Even if a waiver is granted, the contractor still must report whether it uses covered telecommunications equipment and services under FAR 52.204-25. Because waivers are based on the agency's judgment, the FAR Council advised that "a waiver granted for one agency will not necessarily shed light on whether a waiver is warranted in a different procurement with a separate agency."

### **Contractors Should Develop a Compliance Plan Now**

Contractors should prepare to take action now to comply with the interim rule. At a minimum, contractors should:

1. Read and understand the interim rule and determine what next steps they need to implement to ensure compliance.
2. Work with their IT Department to perform a reasonable inquiry into systems used by the contractor and determine if they use or provide covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.

3. Discuss with their subcontractors and suppliers whether they use or provide covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system and obtain certifications from subcontractors and suppliers confirming their compliance with the ban.
4. Educate their procurement and purchasing professionals on the ban and implement new policies to ensure that only compliant equipment and services are procured.
5. If they independently decide to remove identified covered equipment and services, they should implement procedures to replace such equipment and services, and ensure the new equipment and services complies with the interim rule.
6. Review their systems before making the representations required by FAR 52.204-24.
7. Immediately inform the contracting officer if they identify covered equipment and services during performance of the contract.
8. If they anticipate needing a waiver, they should develop a phase-out plan, including how much it will cost to phase-out covered equipment and services, and determine the full and complete laydown of the presence of covered equipment and services so that they may provide this information to obtain a waiver.

Contractors should act now and work with their supply chain, compliance, and legal personnel to avoid issues when submitting an offer to the government.

### Do You Want More Information?

The Office of Governmentwide Policy will hold a virtual webinar on September 10, 2020 to discuss the interim rule, and P&A will provide updates regarding the interim rule as it becomes available. Registration for the webinar is available [HERE](#). If you have any questions about the interim rule or need assistance with complying, we are available to assist.

\*Mrs. Petrov is admitted in the State of Maryland only and is practicing under the supervision of DC bar members.

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