

NEW SUPPLY CHAIN PROHIBITIONS OF CERTAIN TELECOMMUNICATIONS EQUIPMENT AND SERVICES PLACE ADDITIONAL REQUIREMENTS ON GOVERNMENT CONTRACTORS

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On Tuesday, August 13, 2019, the Federal Acquisition Regulatory Council issued an interim rule amending the Federal Acquisition Regulations ("FAR") to prohibit agencies from procuring "covered telecommunications equipment and services." The key takeaways include:

- The interim rule requires contractors to disclose whether they intend to provide "covered telecommunications equipment and services" to the U.S. government and generally prohibits the provision of such equipment and services when they are a "substantial or essential component of any system," or as "critical technology as part of any system."
- "Covered telecommunications equipment and services" include those produced by Huawei Technologies Company, ZTE Corporation, several Chinese producers of video surveillance equipment (Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, and Dahua Technology Company), and their respective subsidiaries and affiliates, as well as those produced by any entity reasonably believed to be owned or controlled by, or connected to, the government of the People's Republic of China.
- The interim rule is effective immediately and applies to all solicitations and contracts, including commercial item contracts, contracts below the simplified acquisition threshold, and orders placed under indefinite delivery contracts.
- Contractors must flow down the new prohibition to both first-tier and lower-tier subcontractors. Accordingly, contractors at all levels of the government's supply chain should understand these new requirements.
- Effective one year from now, additional regulations will prohibit agencies from entering into any contract (or extending or renewing an existing contract) with entities that use "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."

NEW FAR REGULATIONS

Designed to protect the integrity of the U.S. government's supply chain, Section 889(a)(1)(A) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232) ("NDAA 2019") prohibits the head of an executive agency on or after August 13, 2019, from procuring or obtaining, or extending or renewing a contract to procure or obtain, 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 sets forth these new supply chain security requirements through two new FAR clauses. Effective August 13, 2019, contracting officers must include FAR § 52.204-24 and FAR § 52.204-25 in all solicitations and contracts, including commercial items contracts and contracts under the simplified acquisition threshold, and, under indefinite delivery contracts, in all notices of intent to place an order or solicitations for an order. FAR § 52.204-25 prohibits contractors "from providing to the Government any equipment, system, or service, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology of any system," unless an exception or waiver applies. FAR § 52.204-25(b). "Covered telecommunications equipment or services" is defined as the following:

1. Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation, (or any subsidiary or affiliate of such entities);
1. 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);
2. Telecommunications or video surveillance services provided by such entities or using such equipment; or
3. 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 a covered foreign country [currently defined as China].

FAR § 52.204-25(a).

The interim rule defines "substantial or essential component" as "any component necessary for the proper function or performance of a piece of equipment, system, or service." *Id.* Additionally, "critical technology" is defined as defense articles and related technology and defense services identified on the U.S. Munitions List of the International Traffic in Arms Regulations, 22 C.F.R. Parts 120–130; certain items listed on the Commerce Control List of the Export Administration Regulations, 15 C.F.R. Parts 730 et seq.; items controlled pursuant to 10 C.F.R. Part 810, which relates to assistance to foreign atomic energy activities, and items controlled pursuant to 10 C.F.R. Part 110, which relates to export and import of nuclear equipment and material; select agents and toxins; and emerging and foundational technologies, which the Department of Commerce has yet to define. See *id.*

Exceptions to FAR § 52.204-25's broad prohibition are limited: agencies may procure and contractors may provide (1) "[a] service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements," and (2) "[t]elecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles." FAR § 52.204-25(c).

Waivers of these new requirements apply to specific contracting components of an agency—not a particular procurement. A component of an agency may request a waiver of the prohibition set forth in FAR § 52.204-25(b) from the head of the agency. See FAR § 4.2104(a). The head of the agency can provide such a waiver on a one-time basis and for a period not to extend beyond August 13, 2021. See *id.* The Director of National Intelligence may also provide a waiver where it is in the national security interests of the United States. See FAR § 4.2104(b).

Complementing FAR § 52.204-25, FAR § 52.204-24 requires offerors to represent whether they will provide covered telecommunications equipment or services to the government during performance. If the offeror intends to provide covered telecommunications equipment or services, then it must, among other information, identify the relevant covered telecommunications equipment and services and provide an explanation of their proposed use. See FAR § 52.204-24(d).

FLOWDOWN REQUIREMENTS

Because the interim rule is effective immediately, it is important to ensure that these new requirements are properly flowed down to subcontractors, including commercial item providers. FAR § 52.204-25(e) requires prime contractors to flow down the substance of the clause to "all subcontracts and other contractual instruments, including subcontracts for the acquisition of commercial items." The flowdown requirement outlined in the clause must also be included in subcontracts, meaning that a first-tier subcontractor is required to flowdown the requirement to second-tier subcontractors, and so on.

FAR § 52.204-24 is not explicitly required to be flowed down; however, under certain circumstances, prime contractors may want to consider flowing down the requirements outlined in this provision to ensure that they can comply with their own disclosure obligations.

REPORTING REQUIREMENTS

In the event that a contractor discovers that covered telecommunications equipment or services are "used as a substantial or essential component of any system, or as critical technology as part of any system, during contract performance," the contractor is required to notify the contracting officer or, for Department of Defense contracts, submit a notice through <https://www.dibnet.dod.mil>, unless other reporting requirements are provided for in the contract. FAR § 52.204-25(d)(1).

COMMENT PERIOD

Parties interested in submitting comments on the interim rule have until October 15, 2019, which is 60 days after the date of publication of the interim rule in the Federal Register. Comments can be submitted through <http://www.regulations.gov> using FAR Case 2018-017.

FORECAST

The FAR sections described above are the first of a two-step process designed further protect the U.S. government's supply chain. The second step, which becomes effective one year from now, on August 13, 2020, is much more expansive: agencies will be **prohibited** from entering into any contract (or extending or renewing an existing contract) "with any entity that **uses** any equipment, system, or services that uses cover telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system." NDAA 2019 § 889(a)(2). This second step will likely have a far greater impact on government contractors and subcontractors, as it will largely require them to cease using technology and services provided by Huawei, ZTE, and other identified entities in support of contracting activity.

Also effective one year from now will be a prohibition on agencies "obligating or expending loan or grant funds to procure or obtain, extending or renewing a contract to procure or obtain, or entering into a contract (or extending or renewing a contract) to procure or obtain covered telecommunications equipment or services." Id. § 889(b)(1). Both of these prohibitions will be implemented through separate rulemaking.

The K&L Gates government contracts & procurement policy and international trade teams are available to answer any questions and help clients develop effective compliance strategies regarding these recent developments or any other related issues.

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