

CLIENT ALERTS

THE CLOCK IS TICKING: Government Contractors and Grant Awardees Must Replace Huawei and other Chinese Telecommunications Equipment Starting August 13, 2020

6.17.2020

Specifically, by that date, the Federal Acquisition Regulation (“FAR”) Council is expected to issue an Interim Rule implementing Section 889(a)(1)(B) of the National Defense Authorization Act for Fiscal Year 2019 (the “FY19 NDAA”), which will prohibit Federal agencies from contracting with an entity that uses telecommunications and surveillance equipment and services from Chinese companies that the Government has determined share information with the Chinese government to the detriment of U.S. national security. Because Congress anticipated that Section 889 would cause considerable disruption for U.S. companies, it decided to split Section 889’s restrictions in half, and staggered their implementation.

In the first phase, Section 889(a)(1)(A), which took effect August 13, 2019 (“Phase A”), Congress prohibited the U.S. Government from purchasing telecommunications equipment and services, and video surveillance equipment and services (“Covered Products”) from Huawei Technologies Company, ZTE Corporation, Hytera Communication Corporation, Hangzhou Hikvision Digital Technology Company or Dahua Technology Company or their affiliates (“Huawei, et al.”). If a company is not engaged in the sale to the U.S. government of services or products that involve components manufactured by Huawei, et al., there is not much a U.S. government contractor or subcontractor has to do under Phase A.

That changes on August 13, 2020, when Section 889(a)(1)(B) (“Phase B”) becomes effective. As of that date, U.S. government contractors and subcontractors will not be permitted to “use” goods or services produced by Huawei, et al. Thus, all U.S. government contractors and subcontractors must perform an inventory of their telecommunications and surveillance equipment to determine if the company uses Covered Products.

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This will require U.S. government contractors and subcontractors to replace any Covered Products used by their organization, such as Huawei et al. laptops, phones and other electronics, goods or services, including products from other OEMs that incorporate Huawei et al. 5G technology or components -- even if the Covered Products are not used in connection with U.S. government contracts.

In the meantime, in Section 889(b), Congress also prohibited the Federal Government from obligating loans or grants to procure Covered Products, and directed those agencies to prioritize funding and technical support to assist affected business institutions and organization to transition from Covered Products to procure replacement equipment and services, while ensuring that communications service to users and customers is sustained.

Given that August 13th is rapidly approaching, it is likely that the FAR Council will issue an Interim Rule for Phase B, like it did for Phase A, to become effective immediately. It is also likely that the Interim Rule for Phase B, like the Interim Rule for Phase A, will require government contractors and subcontractors to make a representation in all proposals whether they are using Covered Products and, if so, to provide a description of all Covered Products it is using and an explanation of its replacement process.

Moreover, since Covered Products from Huawei et al. have become embedded in so many sectors of the U.S. economy and since prime contractors will be required to flow down the substance of FAR 52.204-25 (and the analogous version that will appear in the Interim Rule) to their first-tier subcontractors and to require those subcontractors to flow-down the same provision to lower-tier subcontractors, in "all subcontracts and other contractual instruments, including subcontracts for the acquisition of commercial items," FAR 52.204-25(e), companies -- such as many auto suppliers -- that do not consider themselves government subcontractors should start, if they have not done so already, to ask their customers that are not OEMs whether the customers' customers are government contractors or subcontractors. As for customers that are OEMs, the suppliers can check whether they are government prime contractors or likely first-tier subcontractors by searching the Government's System for Award Management (sam.gov) database.

In light of the breadth of Section 889, we recommend that government contractors and subcontractors consider implementing the following list of action items without delay:

1. Take an inventory of (a) all of the company's supply relationships with Huawei et al. and their distributors, for goods and services provided, included with the company's goods and services and (b) effective August 13, 2020, all goods and services of Huawei, et al., used by the company in its internal operations.
2. Identify in the inventory whether you use Covered Products and, if so, how and when they will be replaced.
3. Prepare a written policy acknowledging the obligations of Section 889 and the specific steps to be taken initially and on a continuing basis to comply, e.g., provide a list of the five companies and their affiliates to sales, IT, and purchasing personnel, provide customers with information they will

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require for their own compliance, and appoint a compliance officer to administer the policy and to provide an annual report to the Board of Directors.

4. Require Company suppliers to provide an annual certification to the Company as to Covered Products provided by Huawei, et al. Please click **here** if you would like to see a typical letter from an OEM to its suppliers regarding implementation of Section 889.
5. Obtain confirmation from the applicable U.S. government contracting agency of any claimed exception for Covered Products. There are a few exceptions available. Be cautious of any claimed exemptions from suppliers of goods and services.

Thus, there is much to do before August 13, 2020. Companies that do not provide electronic products of any type may believe Section 889 does not and will not apply to them. They may be correct if they are not a U.S. government contractor or subcontractor. Otherwise, they must be aware of the obligations under Section 889. This is true under Phase B even if the company's product sold as part of a government supply chain has no electronics.

The inventory process should be risk based. Is an item likely to have electronics that may contain Huawei, et al. Covered Products, such as a tablet, computer, router, etc.? All such items should be on the inventory list. But the list should also include services such as cloud services that may use Huawei, et al. Covered Products or installation of products or components containing Covered Products.

Although a proposed rule related to the implementation of Phase B on August 13, 2020, was expected to be released by now, it is likely that the FAR Council will skip that step and proceed with an Interim Rule that will be promulgated no later than August 13th, which is the effective date set by Congress. Thus, companies need to develop and begin implementation of a plan to comply with Phase B now.

Although Section 889 does not identify penalties for violations, the Government will certainly have the right to suspend and/or debar violators, and will have the right to seek fines and/or criminal penalties under the False Claims Act and the False Statements Act. In addition, violators will be at risk of having whistleblowers file cases under the civil False Claims Act. In other words, every government contractor and subcontractor, at whatever tier, should take all reasonable steps – including those recommended above -- to comply fully with the requirements of Section 889.

Please review and then let us know if we can assist. The first internal inquiry, of course, whether the company is a U.S. Government contractor or subcontractor?

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