

Know Your Supplier: Effective August 13, 2019, Certain Chinese Telecoms Banned From Federal Procurement

Government Contract & Export Controls Alert

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As we stated last month, further restrictions are afoot on the use of Chinese technology in federal acquisitions. An Interim Rule issued by the Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) (collectively, the "FAR Council") implements the first phase of Section 889 of the FY2019 National Defense Authorization Act (NDAA). The Interim Rule, effective August 13, 2019, broadly prohibits federal agencies, federal contractors, and grant or loan recipients from procuring "covered telecommunications equipment or services" produced by Huawei Technologies Company and ZTE Corporation and, with respect to certain public safety or surveillance applications, Hytera Communications Corporation, Dahua Technology Company, and Hangzhou Hikvision Digital Technology Company. In particular, federal suppliers are prohibited from sourcing "substantial or essential component of any system, or as critical technology as part of any system" from the foregoing companies.

Defining Critical Technologies and Substantial or Essential Components

Many of you will note that the definition of "critical technologies" mirrors that in the Foreign Investment Risk Review Modernization Act of 2018 implementing regulations at 31 CFR § 801.204. Accordingly, critical technologies are identically defined by both the FAR Council and the Committee on Foreign Investment in the United States (CFIUS), which – *inter alia* – reviews certain transactions involving foreign persons. Critical technology, as used in the Interim Rule and by CFIUS, includes all defense articles listed on the United States Munitions List of the International Traffic in Arms Regulations, all dual-use articles listed on the Commerce Control List of the Export Administration Regulations, and all of the yet-to-be-defined emerging and foundational technologies. The uniformity of the critical technology definition by and among the Departments of Treasury and Defense, along with the GSA and NASA, underscores the extent to which the Government believes that doing business with certain Chinese entities presents a national security threat.

Another interesting definition concerns "substantial or essential component," which the Interim Rule defines as "any component necessary for the proper function or performance of a piece of equipment, system, or service." No further meaning is offered as to the terms "necessary" and "proper function" – which undeniably means that the Government will interpret the language as broadly as possible.

Rule Applies to COTS Items and Acquisitions Below SAT

Although the Interim Rule applies immediately to new solicitations as well as to procurements pending award, interested parties may still submit comments for up to 60 days. The FAR Council will, of course, consider all industry comments timely received prior to publishing the final rule. More importantly, the Interim Rule is applicable to commercial item acquisitions including those below the simplified acquisition threshold (SAT). The foregoing includes government purchases of commercially available off-the-shelf (COTS) items.

Representation, Immediate Reporting, Flowdown, and Waivers

The Interim Rule adds two contract clauses to the Federal Acquisition Regulation (FAR):

- **FAR 52.204-24, Representation Regarding Certain Telecommunications and Video Surveillance Services**, requires the contractor to represent whether or not it will provide covered telecommunications equipment or services in the performance of the contract. If the response is affirmative, the contractor is required to provide a detailed disclosure of: (i) the brand, model, and item description; (ii) the proposed use of the equipment or service, including relevant factors about whether the use is permissible under the prohibition; (iii) the entity providing any covered service; and (iv) the entity that produced any covered equipment. The Interim Rule indicates that the Government's System for Award Management website will soon allow contractors to certify annually whether they sell covered equipment or services. If the contractor's response is affirmative, it must provide offer-by-offer disclosures in its proposals for contracts or task orders. Accordingly, all contractors should conduct a thorough review of their supply chain prior to making any certifications to the federal government.
- **FAR 52.204-25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment**, incorporates Section 889's prohibitions and definitions into the contract and also imposes a significant reporting requirement on the contractor. The reporting requirement obligates the contractor to report through DIBNet if it identifies any activity prohibited by the rule during contract performance. Contractors must do so within one business day of identifying the activity, and then follow up within 10 business days with any additional information about mitigation activities undertaken or recommended. Each contractor should, of course, update their existing policies and procedures to ensure compliance with these requirements.

Each of these clauses is a mandatory flow-down – meaning that they must be incorporated into related subcontracts. In addition, both clauses will be incorporated into solicitations for contracts or task orders issued on or after August 13, 2019, and all solicitations for contracts or task orders issued before August 13, 2019, where award is not made prior to August 13, 2019. Further, indefinite delivery/indefinite quantity contracts will include the new clauses prior to placing new orders; and existing contracts and task orders will include the clauses if or when the operative contract is modified to extend the period of performance (including option exercises).

The Interim Rule allows for a one-time waiver for a period no longer than two years (August 13, 2021) on the procurement ban with respect to a government entity if the agency head submits a compelling justification for the additional time and a complete description of the supply chain landscape and phase-out plan. In addition, the Director of National Intelligence has been authorized to grant a waiver if doing so would further U.S. national security interests.

Carefully Review Your Supply Chain Before Reporting, and Prepare for Additional Restrictions

It is crucial that government contractors of all sizes conduct thorough reviews of their supply chains before making any certifications in response to FAR 52.204-24 and FAR 52.204-25. As you likely know, an incorrect certification could yield significant potential liability – including breach of contract claims and False Claims Act allegations. In addition, many COTS suppliers are unlikely to have the appropriate policies and procedures in place to appropriately conduct the review and to meet the reporting requirements. Therefore, we recommend that you seek counsel to ensure compliance with these requirements. In addition, if any activity prohibited by the Interim Rule is discovered, immediately confer with counsel in order to properly prepare the one- and ten-day reports required by the Rule.