



2019 NDAA Section 889 – Prohibitions on Telecommunications Equipment and Services

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Section 889 Requirements

Section 889 – Statutory Prohibition for Contracts

- Section 889(a)(1) of the 2019 National Defense Authorization Act (NDAA) (Pub. L. 115-232) prohibits the U.S. government (USG) from both:
 - **Purchasing** any products or services that use certain prohibited telecommunications equipment or services (Section 889(a)(1)(A)) (“**Part A**”); and
 - Contracting with any entity that itself **uses** products or services that use the prohibited telecommunications equipment or services (Section 889(a)(1)(B)) (“**Part B**”).
- These prohibitions are implemented in every USG contract via mandatory Federal Acquisition Regulation (FAR) clauses
 - The FAR is a USG-wide regulation that, among other rules, includes standard contract clauses that must be included in all types of contracts

What is the prohibited technology?

- **“Covered telecommunications equipment or services”** includes
 - Telecommunications equipment provided by ZTE Corporation and Huawei Technologies Company or any of their subsidiaries or affiliates,
 - Video surveillance and telecommunications equipment provided by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any of their subsidiaries or affiliates),
 - Video surveillance or telecommunications services provided by such entities for any purpose, and
 - Any other suppliers that the Secretary of Defense reasonably believes are owned, controlled, or otherwise connected to a covered foreign country (i.e., China).

FAR prohibitions – What does Part A require?

- **Part A** has been in effect since **August 13, 2019** via a series of mandatory FAR contract clauses that appear in every USG prime contract
 - Required for any kind of USG contract (research; supplies; services) at any dollar value
- Part A requires contractors to represent that they are not providing to the USG in performance of the contract any equipment, system, or service that uses "covered telecommunications equipment or services."
- If the contractor represents that it is providing such items or services, it must seek a waiver from the USG funding agency.
- Part A requirements flow down to subcontractors.

FAR prohibitions – What does Part B require?

- **Part B** went into effect on **August 13, 2020** (now appears in the same mandatory FAR contract clauses that previously covered only Part A requirements).
- Must represent that the contractor *itself*, after conducting a “**reasonable inquiry**,” **does not use** any equipment, system, or service that **uses** “covered telecommunications equipment or services.”
 - **It does not matter whether that internal use has anything to do with the company’s USG contracting work.**
- If the contractor represents that it is using such items or services, it must seek a waiver from the USG funding agency.
- Part B requirements **do not** flow down to subcontractors.

Section 889 – Statutory Prohibition for Grants

- This is a separate part of the NDAA statute: Section 889(b)(1) Prohibition on Loan and Grant Funds.
- Implemented in regulations via the updated Uniform Guidance (UG) from the Office of Management and Budget (OMB).
 - The UG is the authoritative set of federal rules and regulations for federal grants
- 2 CFR 200.216, *Prohibition on certain telecommunications and video surveillance services or equipment*

Funding recipients are prohibited from obligating or expending loan or grant funds to (1) procure or obtain, (2) extend or renew a contract to procure or obtain, or (3) enter into a contract (or extend or renew a contract) to procure or obtain equipment, services, or systems that use prohibited telecommunications equipment or services
- 2 CFR 200.471 provides that costs for any covered equipment or services described in 2 CFR 200.216 are unallowable.

Section 889 Prohibition on use of USG Grant Funds

- Differences between contracts prohibition and grants prohibition:
 - Unlike federal procurement contracts, USG agencies cannot waive the Section 889 prohibitions for assistance instruments such as grants and cooperative agreements. **No waiver process applies.**
 - Grants can be awarded to an organization that **uses** covered telecommunications equipment or services, as long as USG funds do not pay for the prohibited equipment or services.

Exceptions

- There are two exceptions in the 2019 NDAA itself
 - These exceptions apply to both contracts (Sec. 889(a)(2)) and grants (Sec. 889(b)(2).
- The prohibition does not:
 - (1) prohibit an agency from contracting with an entity to provide a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or
 - (2) cover telecommunications 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 Representations & Disclosures

FAR 52.204-24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment

- Appears in all USG solicitations. An offeror makes these representations to the USG with their proposal before a USG contract can be awarded
 - Part A Representation: 52.204-24 (d)(1) Offeror represents it **will**, or **will not**, *provide* to the USG covered items; and
 - Part B Representation: 52.204-24 (d)(2) Offeror represents it **does**, or **does not**, itself *use* covered telecommunications equipment or services, or *use* any equipment, system, or service that uses covered telecommunications equipment or services
- An offeror that represents it “will” and / or “does” must provide additional disclosures about the equipment or services, and may need to obtain an agency waiver, or the agency may not be able to award the contract.

FAR Representations & Disclosures

FAR 52.204-26, Covered Telecommunications Equipment or Services-Representation

- Annual System for Award Management (SAM) representation
 - All USG contractors are required to maintain a registration in SAM and provide certain representations and certifications to the USG to remain in good standing
- Allows each SAM registrant to *annually* (rather than on an offer-by-offer basis) make the Part A and Part B representations contained in FAR 52.204-24 before a new USG contract is awarded

FAR Ongoing Reporting Obligation

FAR 52.205-25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment

- Contractor **must report** if it discovers covered technology during contract performance:
 - Within **one business day**, the contractor must report to the contracting officer (or online at <https://dibnet.dod.mil> for U.S. DoD contracts) basic information about the identified equipment or services and any readily available information about mitigation actions undertaken or recommended; and
 - Within **10 business days**, the contractor must report additional information about mitigation efforts actions undertaken or recommended.
- Applies to both **Part A** (e.g., contractor discovers it has been providing a product or service directly to the USG that uses prohibited technology) and **Part B** (e.g., contractor discovers it has been using prohibited technology itself)

Potentially broad scope of 889 Part B “use”

- Many USG contractors initially focused on identifying (and stopping) the use of prohibited equipment (e.g., Huawei routers).
- But the “use” prohibition is broader than it may first appear—the statutory prohibition is on **use** of any **equipment, system, or service** that itself **uses** covered telecommunications equipment or services
- There is no geographic limitation or exception (e.g., a USG contractor using a system or service for commercial work in the Asia Pacific region, where these technologies are prevalent).
- Prohibition includes use of equipment, systems, and services owned or provided by other companies (e.g., telecom providers; ISPs; cloud service providers and other Software-as-a-Service vendors; video-surveillance / security services).

889 Part B “use” scenarios

- Potential Part B use scenarios that are less obvious:
 - IT and telecommunications services provided to MGB by third parties / vendors;
 - Use of smartphones and other personal devices by MGB employees;
 - Use of a shared environment for MGB telehealth projects and advisory services (e.g., cloud platform, shared site, connecting to another parties IT systems, etc.);
 - Video surveillance cameras produced by the prohibited companies used in a building security system *or* when the security services are provided by others (e.g., campus security; leasing a warehouse or other space from another party); and
 - Connected cars and Internet of Things (IoT) platforms that use the prohibited technology.

Conducting a “reasonable inquiry”

- The Part A certification simply requires a prime contractor to confirm whether they “will” or “will not” provide any prohibited equipment or services to the USG in performance of the contract.
- In contrast, in making the Part B certification, a prime contractor is representing that they have conducted a “reasonable inquiry” to determine whether the company “does” or “does not” use the prohibited technology internally.
- “Reasonable inquiry” was a term added to the FAR contract clauses – it was not included in the statute. The July 2020 Part B rulemaking describes this as:
 - A reasonable inquiry is an inquiry designed to **uncover any information in the entity’s possession—primarily documentation or other records**—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

MGB is currently conducting an organization-wide “reasonable inquiry

Section 889 waivers (agency waivers v. DNI waivers)

- 1. Agency-specific waivers
 - The statute and FAR rules provide a waiver process for agencies, but this is really just *delayed compliance* because this only allows for a **one-time agency waiver** that will expire no later than **13 August 2021** (for Part A scenarios) or **13 August 2022** (for Part B scenarios)
- 2. The Director of National Intelligence (DNI) has separate statutory authority to issue waivers in the interest of national security.
 - Current DNI waivers include:
 - DoD (for certain food, logistics, and support contracts)
 - USAID (for just internet and phone services)
 - State Department (for just Foreign Assistance and Public Diplomacy funded awards)

Questions?





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