

New government contracts and grants rules limit universities' ability to use certain Chinese telecommunications equipment

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Federal contractors, including universities, will soon need to certify that they do not "use" telecommunications equipment or services produced or provided by certain Chinese companies (including ZTE, Hikvision, and Huawei) under a Federal Acquisition Regulation (FAR) [Interim Rule published on 14 July 2020](#). The interim rule, which implements Section 889(a)(1)(B) (Part B) of the [Fiscal Year 2019 National Defense Authorization Act](#) (FY19 NDAA), Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment, will be effective 13 August 2020 (the statutory deadline mandated in the FY19 NDAA). However, the public can still submit comments until 14 September 2020 for consideration in the formation of a final rule. In addition to the government contracts rule, a related change to the Office of Management and Budget's (OMB's) Uniform Guidance (2 CFR Part 200), will also become effective 13 August 2020, prohibiting the use of grant funds to enter into contracts (or extend or renew contracts) with entities that use the covered telecommunications equipment or services.

Existing certification

By way of background, Section 889 (a)(1)(A) (Part A), which was implemented last year through a series of FAR clauses ([52.204-25](#), [52.204-24](#), and [52.204-26](#)), requires contractors to represent that they are not providing under a federal contract 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." "Covered telecommunications equipment or services" are those from the following companies (or any subsidiary or affiliate):

- Huawei Technologies Co.
- ZTE Corp.
- Hytera Communications Corp.
- Hangzhou Hikvision Digital Technology Co.
- Dahua Technology Co.

Also included within the prohibition is covered telecommunications equipment or services from any entities 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 the People's Republic of China.

Part B addition

The interim rule implements the Part B restriction, which prohibits federal agencies from contracting with an entity that itself uses any equipment, system, or service that uses covered telecommunications equipment or services as an essential component of any system or as critical technology as part of any system (regardless of whether the internal use has any nexus to the entity's government contracts). One key issue involves the expansive interpretation of "use" and whether it will cover, for example, telecommunications equipment used in a building in which a contractor rents space or used by employees working remotely from their homes.

Rather than prescribing new FAR clauses, the interim rule amends the current FAR clauses listed above ([52.204-25](#), [52.204-24](#), and [52.204-26](#)), to also include the Part B requirements. The government is also working on updates to the federal System for Award Management (SAM) to allow offerors to make representations annually as part of their SAM registration (rather than making representations contract by contract).

The interim rule will apply to all federal contractors no matter their size (there is no exception for small businesses), and to all government purchases, including those below the micropurchase threshold and for commercial off-the-shelf (COTS).

The rule further provides that inaccurate certification may constitute breach of a government contract and can lead to cancellation, termination, and "financial consequences." In terms of compliance, the rule encourages contractors to adopt a robust, risk-based compliance approach with tracking and training, as well as a "reasonable inquiry" standard that contractors will be required to meet.

Financial assistance prohibition

The FY19 NDAA also contained a related prohibition on the use of loan and grant funds in Section 889(b)(1). On 22 January 2020, OMB issued a [proposed rule](#) that would, along with many other revisions to the grants and agreements regulations at 2 CFR Part 200 (the Uniform Guidance), add a provision, 2 CFR 200.216, implementing 889(b)(1). OMB's [final guidance](#), which will be published in the Federal Register on 13 August 2020, aligns closely to the FY19 NDAA language impacting the financial assistance community.

Under 2 CFR 200.216 *Prohibition on certain telecommunications and video surveillance services or equipment*, recipients and subrecipients are now 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 covered telecommunications equipment or services as a substantial or essential component of any system, or as a critical technology as part of any system. OMB has also added a new 2 CFR 200.471 to provide clarity that costs for any covered equipment or services described in 2 CFR 200.216 are unallowable. Although the majority of the revisions to the Uniform Guidance will become effective 90 days after publication, 2 CFR 200.216 becomes effective on 13 August 2020 (like the 889 Part B procurement ban, this was the statutory deadline for the restriction on grant funds mandated in the FY19 NDAA).

Should you have any questions about the FAR interim rule, the changes to the Uniform Guidance, or the new compliance requirements, please do not hesitate to contact us.

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