



Section 889

Update on Interim Rule

Lorraine Campos
Adelicia Cliffe

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Agenda

FY2019 NDAA: Section 889(a)(1)(B) Implementation

- Background
- Key elements of the interim rule
- Compliance & best practices
- On the horizon

Background on Section 889

- Part of broader supply chain security efforts (“Deliver Uncompromised”) and U.S. Government concerns about PRC and cyberespionage
- FY2019 NDAA Section 889(a)(1)(A): prohibits contractors from furnishing Government customers with any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system or as a critical technology as part of any system
 - Went into effect in August 2019 (FAR 52.204-24, -25, -26)
- FY2019 NDAA Section 889(a)(1)(B): prohibits agencies from entering into a contract with an entity 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 (no nexus with government contracting required to trigger prohibition)
 - Under statute, to become effective August 13, 2020
 - Proposed rule originally anticipated in March 2020; came out as interim rule on July 14, 2020 (with only one month for contractors to prepare)

Key Elements of the Interim Rule

- **Applicability**

- All US contractors with FAR-covered contracts (COTS, commercial, micro-purchase)
 - Currently only offeror entities – not corporate families (but likely to change in final rule to domestic affiliates and subsidiaries)
 - There is no mandatory flowdown to subcontractors but prime contractors may need information/representations from certain subcontractors/suppliers/affiliates for equipment and services supplied to the prime contractor

- **Representation**

- Whether company uses any covered telecommunications or video surveillance equipment or any equipment, system, or service that uses covered telecommunications equipment or services
 - No government contract nexus required – the entire entity

- **Deadline**

- Will be in solicitations and contracts after August 13, 2020, but also appear in solicitations immediately where contract award is expected after August 13, 2020

Key Elements of the Interim Rule

- **Covered Telecommunications and Video Surveillance Equipment**
 - Huawei or ZTE telecommunications equipment or services
 - Certain video surveillance equipment or services from identified companies such as Hytera, Dahua, and Hikvision
 - Video surveillance equipment for the purpose of public safety, security of Government facilities, physical security surveillance of critical infrastructure, and other national security purposes
 - Other entities that may be identified by DoD (in consultation with DNI/FBI)
- **New Definitions**
 - Backhaul, Interconnection Arrangements, Roaming, Reasonable Inquiry
 - Effect application of exception to 889(a)(1) (both A and B) and inquiry expectations when making representations
 - 889(a)(1)(A) will need to be reviewed to ensure definitions used internally before this rule are consistent with the new definitions
 - Does not define “use,” “system,” or qualifying video surveillance language which may have helped to limit application

Key Elements of the Interim Rule

- **New Definitions (continued)**

Backhaul

- Intermediate links between the core network, or backbone network, and the small subnetworks at the edge of the network (e.g., connecting cell phones/towers to the core telephone network). Backhaul can be wireless (e.g., microwave) or wired (e.g., fiber optic, coaxial cable, Ethernet).

Interconnection arrangements

- Arrangements governing the physical connection of two or more networks to allow the use of another's network to hand off traffic where it is ultimately delivered (e.g., connection of a customer of telephone provider A to a customer of telephone company B) or sharing data and other information resources.

Roaming

- Cellular communications services (e.g., voice, video, data) received from a visited network when unable to connect to the facilities of the home network either because signal coverage is too weak or because traffic is too high.

Reasonable Inquiry

- An inquiry designed to uncover any information in the entity's possession about the identity of the producer or provider of covered telecommunications equipment or services used by the entity that excludes the need to include an internal or third-party audit.

Key Elements of the Interim Rule

- **Exceptions**
 - Exception for telecommunications equipment that cannot route or redirect user data traffic, or cannot permit visibility into user data or packets that such equipment transmits or otherwise handles.
 - NO exception for contractors using covered telecommunications equipment or services to obtain backhaul/roaming/interconnection services.
- **Waivers**
 - One-time waivers will expire no later than August 13, 2022.
 - Waivers require: (1) a compelling justification from the offeror for additional time, (2) a full and complete laydown of covered telecommunications or video surveillance equipment or services in the offeror's supply chain, and (3) a phase-out plan to eliminate such covered equipment and services.
 - Not transferable between agencies or contracts at this time.

Key Elements of the Interim Rule

- **Agency Waiver Process**
 - Agency has discretion on whether to initiate waiver process based on market research and feedback during the acquisition process, in concert with other internal factors.
 - Timeline is at least a few weeks; where mission needs do not permit time for waiver, agencies may award to an offeror that does not require a waiver.
 - Extensive formal waiver process, to include notification and consultation with ODNI, and notice to Congressional committees within 30 days of granting the waiver.
- **ODNI Waiver Process**
 - Must be in the national security interests of the United States.
 - No expiration date.

Compliance Requirements

- Requires representation after conducting a “reasonable inquiry”
- “Reasonable inquiry”
 - “an inquiry designed to uncover any information in the entity’s possession about the identify 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
 - “includes examining relationship with any subcontractor or supplier for which contractor uses telecommunications equipment or services as a substantial or essential component of any system”
- Not a mandatory flowdown (but....)

Compliance Requirements

- Offerors expected to develop a compliance plan
- Elements of compliance plan
 - Understanding of 889 requirements
 - Reasonable inquiry to identify covered equipment within entity's infrastructure, systems, or services (including inquiry into subcontractor and supplier relationships – when supplier or subcontractor first used, when significant changes occur, and annually after initial inquiry)
 - Training of procurement/purchasing personnel
 - Procedures for replacing any covered telecommunications equipment or services once identified
 - Plan for updating representation or providing notification to Government
 - Plan for requesting waivers

Anticipated Roll-Out

- FAR clause will be inserted in solicitations after August 13, 2020 (as well as incorporated into IDIQs/MAS for applicability to new orders)
- Rule currently contract specific but FAR Council working on updating SAM representation to include Part B as part of annual reps & certs
- Federal agencies may adopt their own unique procedures or otherwise modify their enforcement of the implementing regulations
- GSA and others expecting flurry of waiver requests
- GSA Guidance
 - Small business utilization webinar July 30, 2020
 - Recorded virtual webinar September 10, 2020
 - Pre-collected questions from industry will be answered by GSA panelist

Potential challenges

- Covered Telecommunications and Video Surveillance Equipment companies are market leaders in their respective industries
- Identify covered equipment within entity's infrastructure
- Substitution difficult . . . Perhaps impossible
- Interpretation and scope of key terms in the interim rule
- Waiver applications are only one time
- Cost of compliance
- Government contractors may reevaluate role and continued government work

Best Practices

- **Inventory and categorize** purchases by risk (purchase of a desk – lower risk but the purchase of a router or other system is a higher risk, perhaps another group would be medium risk)
 - Not only applicable to products that support government contracts
- **Develop standards**, written, risk based process for evaluating the content of various products or services, perhaps by risk or other criteria
- **Coordinate** with purchasing department to determine the source of the highest risk products (indirect and direct) and inventory those items
- **Obtain representations** or certifications from those manufacturers
- **Develop a process** to track the requests and responses and a rhythm to repeat

On the Horizon

- Comments on rulemaking – FAR Council asking for input on series of questions to understand anticipated impact; e.g.:
 - Impact of expanding scope to apply to any domestic affiliates, parents, and subsidiaries?
 - Best processes and technology to identify covered equipment/services?
 - Automated solutions?
 - What additional guidance/information necessary to comply with rule?
- Comments due by September 14, 2020
- Legislative efforts continue to:
 - Delay effective date
 - Revise/narrow scope of prohibition

Questions?



Lorraine Campos
Partner
lcampos@crowell.com
202.624.2786



Adelicia Cliffe
Partner
acliffe@crowell.com
202.624.2816



crowell.com

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