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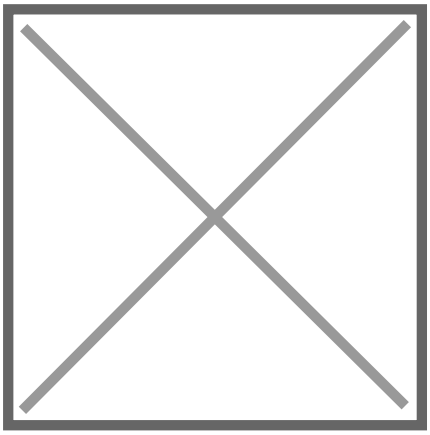

U.S. Government Issues Section 889 Part B Interim Rule

Implementation date remains August 13, 2020; certifications requirements do not extend to parent and subsidiary companies, and can be based on "reasonable inquiry" into information in the company's possession.

The federal government has pre-published its long awaited interim rule for implementation of Section 889(a)(1)(B) (Part B) of the National Defense Authorization Act (NDAA) of 2019. The interim rule, which becomes effective August 13, 2020, will require entities contracting with the federal government to certify that they do not use equipment or services produced or provided by certain Chinese telecommunications companies or their subsidiaries or affiliates, ***regardless of whether such equipment or services are used in, or in connection with, the products to be procured by the government***.

The interim rule provides a number of welcome clarifications that limit Part B's potential scope and make the review and certification process more practical. First, the interim rule clarifies that the ***Part B certification only pertains to the entity contracting with the government, not its parent, affiliates or subsidiaries***—at least until the federal government is able to study the potential impact of requiring a broader certification. Second, ***a contractor may certify that it does not use covered equipment or services, based on a "reasonable inquiry" designed to uncover information in the contractor's possession*** regarding the identity of the producer or provider of its covered telecommunications equipment or services; it does not need to conduct an internal or external audit. Third, ***a contractor is not required to flow its Part B obligations to its subcontractors***; the obligation pertains to the prime contractor alone.

In short, Part B will pose significant challenges for companies seeking to enter government contracts, fulfill orders on indefinite-delivery contracts, or modify or renew existing contracts after August 13, 2020. However, the interim rule provides several "wins" for industry that will make it somewhat easier for companies to determine whether they can comply with Part B and certify that they do not use covered equipment or services.

Background

Section 889(a)(1)(A) (Part A) of the NDAA, which became effective August 2019, prohibits federal agencies ***from procuring any system or service that uses*** telecommunications or video surveillance equipment, or services, provided by specified Chinese companies. Part B, which will take effect as scheduled on August 13, 2020, prohibits federal agencies ***from contracting with any entity that uses certain telecommunications equipment*** produced or provided by specified Chinese companies—regardless of whether the entity uses such equipment or services in connection with its government contract. The Chinese companies include: Huawei, ZTE, Hytera Communications Corp., Hangzhou Hikvision Digital Technology Company, and Dahua Technology Company, or any of their subsidiaries or affiliates (which are not identified by the government in the regulation or elsewhere).

Interim Rule Highlights

The interim rule clarifies a number of critical issues regarding implementation of Part B:

- Part B will become ***effective on August 13, 2020*** (despite widespread industry efforts to delay implementation).
- A contractor may certify that it does not use covered equipment or services if its ***"reasonable inquiry"*** does not identify such use. ***A "reasonable inquiry" is one "designed to uncover any information in the entity's possession about the identity of the producer or provider" of covered equipment or services used by the entity.*** It does not require an internal or third-party audit.
- ***The certification is to be made by the "entity" contracting with the government; it does not include affiliates, parents or subsidiaries***. However, no later than August 13, 2021, the government will determine whether to expand the certification to include the contractor's ***domestic*** affiliates, parents and subsidiaries.
- Whereas the contracting entity must flow Part A prohibitions to its subcontractors, it ***need not flow Part B's prohibitions to subcontractors***, which apply to the contracting entity only.
- As with Part A, the ***Part B prohibitions apply to all FAR contracts***, including micro-purchase contracts.
- Contractors will need to provide Part B certifications with every offer, until the System for Award Management (SAM) is updated to allow for annual certification, as is currently possible for Part A certifications.
- The interim rule sets forth the process for seeking one-time waivers, which is particularly detailed and cumbersome.
- The ***interim rule does not apply to federal grants***, which is the subject of separate rulemaking that seeks to extend Part B's prohibitions to grant recipients, despite statutory language suggesting its inapplicability to grants. See 2 CFR 200.216 (proposed)