

# Securing the Government Supply Chain: Section 889 and Prohibitions on Chinese Telecom

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Rarely does a new law affect federal contractors so universally as does Section 889 of the 2019 National Defense Authorization Act (Section 889).<sup>1</sup> Section 889 is a broad legislative mandate to secure the federal supply chain from threats originating from companies based in China. The statutory provision limits the government's ability to procure, or work with companies that use, "covered telecommunications equipment or services," defined to include equipment and services produced or provided by certain Chinese telecommunications companies.

As implemented through the Federal Acquisition Regulation (FAR), the law applies to all federal contracts and solicitations, and it impacts the operations of federal contractors beyond their government business. The new regulations in the FAR require that government contractors conduct sweeping due diligence to ensure that they are not using, or providing to the government, the covered equipment or services, and contractors must make representations to the government regarding such provision and use. The rules are not limited to a particular agency, nor are contractors that provide commercially available off-the-shelf (COTS) items or sell under the micro-purchase threshold exempt. Consequently, Section 889 has a broad reach that affects all entities that do business with the government and imposes new obligations that necessarily raise the possibility of severe consequences for noncompliance and potential False Claims Act liability.<sup>2</sup>

This article outlines the statutory language and

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regulatory implementation of Section 889. It attempts to provide useful context and clarifications gleaned from the Interim Rules and guidance relating to Section 889 provided to date. A Final Rule has yet to be published, and could provide much-needed answers to questions from contractors as they attempt to comply with the new regulations.

## Section 889

Section 889 includes prohibitions relating to procurements involving certain "covered telecommunications equipment or services" (Covered Equipment or Services). The full text of the provision is relatively short, and, consequently, the statutory language is quite broad. At a high level, Section 889 includes prohibitions on executive agency procurements as well as restrictions relating to expenditure of loan and grant funds. The main focus of this article is the prohibition on executive agency procurements, which includes two key parts, aptly referred to as Part A and Part B.<sup>3</sup>

Part A focuses on the government supply chain. It prohibits executive agencies from

procur[ing] or obtain[ing] or extend[ing] or renew[ing] a contract to procure or obtain 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 as part of any system.<sup>4</sup>

Part B focuses on the activities of entities that work with the government. It prohibits executive agencies from contracting

with an entity that *uses* 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 as part of any system.<sup>5</sup>

In essence, Part A prohibits the government from purchasing from contractors restricted products and services from certain Chinese companies (the Supply Chain Prohibition), while Part B prohibits the government from contracting with entities that use the restricted products and services (the Use Prohibition).<sup>6</sup> Note that both of these prohibitions are limited in applicability to covered telecommunications equipment or services used "as a substantial or essential component of any system, or as critical technology as part of any system."

The statute defines "covered telecommunications equipment or services" as follows:

(A) Telecommunications equipment produced by *Huawei Technologies Company* or *ZTE Corporation* (or any subsidiary or affiliate of such entities).

(B) For the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by *Hytera Communications Corporation*, *Hangzhou Hikvision Digital Technology Company*, or *Dahua Technology Company* (or any subsidiary or affiliate of such entities).<sup>7</sup>

(C) Telecommunications or video surveillance services provided by such entities or using such equipment.

(D) Telecommunications or video surveillance equipment or services produced or provided by an entity 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 a covered foreign country.<sup>8</sup>

Thus, the entities included in the prohibition include the five named Chinese companies, as well as any subsidiary or affiliate of those companies, and may include additional entities as specified by the Secretary of Defense (the Covered Companies).<sup>9</sup>

Additionally, the statute defines “covered foreign country” as “the People’s Republic of China.”<sup>10</sup>

Section 889 contains two exceptions to which the use and procurement prohibitions do not apply: (1) government procurements “with an entity to provide a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements,” and (2) “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.”<sup>11</sup> It also includes two limited circumstances in which the provisions of the statute may be waived: (1) by the head of an executive agency, on a one-time basis, for a maximum of two years, provided certain procedural steps are taken, and (2) by the Director of National Intelligence if in the interest of national security.<sup>12</sup>

Per the statute, Part A went into effect August 13, 2019, and Part B became effective August 13, 2020.<sup>13</sup>

### Implementing Section 889—Federal Acquisition Regulation (FAR) Provisions

To extend the Section 889 prohibitions to federal contractors, the FAR has been amended. An Interim Rule was published on August 13, 2019, to implement Part A, and another Interim Rule was published on July 14, 2020, to implement Part B.<sup>14</sup> To date, a Final Rule has yet to be published. The Interim Rules amend the FAR by creating a new FAR subpart 4.21, as well as new solicitation and contract clauses (FAR 52.204-24, 52.204-25,

and 52.204-26). As discussed in depth below, these FAR clauses shift the onus to contractors to conduct a comprehensive due diligence of their operations and supply chains, and to represent whether they provide to the government, or use, Covered Equipment or Services.

#### FAR 52.204-24

FAR 52.204-24 includes offeror representations and must be included in all solicitations.<sup>15</sup> It includes separate representations, with slightly different requirements, associated with Section 889 Part A and Part B.

#### The Part A Representation

Relating to Part A (the Supply Chain Prohibition), an offeror must represent whether it “will [or] will not provide covered telecommunications equipment or services to the Government in the performance of any contract, subcontract or other contractual instrument resulting from this solicitation.”<sup>16</sup> Note the representation here does not make mention of the use as “a substantial or essential component of any system, or as critical technology” as set forth in Section 889. Thus, the representation here appears to apply more broadly than the statutory language of Section 889 itself.

If an offeror represents that it “will” provide covered equipment or services under the contract per Part A, it must make required disclosures as part of its offer. For covered equipment, this includes disclosing (A) the entity that produced the covered equipment, (B) a description of all covered equipment offered (including the brand, model number, item number, etc.), and (C) an explanation of the proposed use and any factors relevant to determining if such use would be permissible under the Supply Chain Prohibition.<sup>17</sup> For covered services, required disclosures include (A) if the service is related to item maintenance, a description of all covered services offered (including the brand, model number, and item description of the item being maintained), or (B) if not associated with maintenance, the Product Service Code of the service being provided and an explanation of the proposed use and any factors relevant to determining if such use would be permissible under the Supply Chain Prohibition.<sup>18</sup>

#### The Part B Representation

For Part B (the Use Prohibition), the offeror is required to conduct a “reasonable inquiry,” and, following the reasonable inquiry, an offeror must represent whether it “does [or] does not use covered telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services.”<sup>19</sup> Notably, under the regulation, “use” is not limited to use in the performance of work under a federal contract. However, the FAR Council has clarified that this Part B representation currently applies solely to the offeror, and not to subsidiary or affiliate companies of the offeror.<sup>20</sup>

Like Part A, Part B requires that, if an offeror represents that it “does” use covered equipment or services under Part B, it must disclose certain information. For covered equipment, disclosures include (A) the entity that produced the covered equipment, (B) a description of all covered equipment offered (including the brand, model number, item number, etc.), and (C) an explanation of the proposed use and any factors relevant to determining if such use would be permissible under the Use Prohibition.<sup>21</sup> For covered services, the offeror must disclose (A) if the service is related to item maintenance, a description of all covered services offered (including the brand, model number, and item description of the item being maintained), or (B) if not associated with maintenance, the Product Service Code of the service being provided and an explanation of the proposed use and any factors relevant to determining if such use would be permissible under the Use Prohibition.<sup>22</sup>

Notably, again, the language of this FAR provision does *not* include the statutory limitation that the equipment or services be used as “a substantial or essential component of any system, or as critical technology as part of any system.”<sup>23</sup> Thus, for this representation, again, the scope of the FAR clause appears to be broader than the statute.

#### *The “Reasonable Inquiry”*

The FAR 52.204-24 Part B representation requires that an offeror conduct a “reasonable inquiry” into its use of Covered Equipment and Services.<sup>24</sup> The FAR now defines “reasonable inquiry” as “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.”<sup>25</sup> The FAR Council has stated that information in the entity’s possession to be examined will be “primarily documentation or other records.”<sup>26</sup> Thus, based on information available to date, it appears the reasonable inquiry can be limited to information internal to the contracting entity and it is not required that the contractor reach out to suppliers and/or subcontractors for information on their use of Covered Equipment or Services.

The FAR Council has further clarified the scope of the reasonable inquiry is limited to the offeror that will act as prime contractor. It need not extend to suppliers or subcontractors, and currently need not extend to subsidiaries or affiliates of the offeror entity.<sup>27</sup> However, for the Final Rule, the FAR Council is considering expanding the scope to require that the prohibition and representation apply to the offeror as well as any affiliates, parents, and subsidiaries of the offeror that are domestic concerns.<sup>28</sup> Notably, this implies that even if the scope is expanded to apply to subsidiary and affiliate companies, it will not apply to foreign subsidiaries or affiliates.

The rules and guidance available to date do not

specify details regarding how an offeror must conduct its reasonable inquiry. However, the FAR Council provided some guidance related to how a contractor can “help reduce the likelihood of noncompliance,” and outlined six steps that “would most likely be part of the compliance plan developed by any entity.”<sup>29</sup> These include (1) Regulatory Familiarization, (2) Corporate Enterprise Tracking, (3) Education, (4) Cost of Removal (if the entity independently decides to), (5) Representation, and (6) Cost to Develop a Phase-out Plan and Submit Waiver Information (for entities for which a waiver will be requested).<sup>30</sup> The FAR Council acknowledged that during the first year of implementation of the rule, companies will need “to learn about the provision and its requirements as well as develop a compliance plan.”<sup>31</sup> Nonetheless, representations have been required in solicitations as of August 13, 2020.

#### **FAR 52.204-25**

FAR 52.204-25 is required in all solicitations and contracts.<sup>32</sup> It applies to all FAR contracts, including contracts under the micro-purchase threshold and contracts for the acquisition of COTS items.<sup>33</sup> This clause includes the Part A and Part B prohibitions and waiver provisions stemming from Section 889,<sup>34</sup> as applied to contractors, as well as a reporting requirement.

#### *Definitions*

FAR 52.204-25 includes the definitions of “covered telecommunications equipment or services” and “covered foreign country” from Section 889 as well as new definitions for “backhaul,” “interconnection arrangements,” and “roaming,” which are applicable to the noted exceptions in Section 889, as follows:<sup>35</sup>

- “Backhaul” is defined as “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).”<sup>36</sup>
- “Interconnection agreements” is defined as “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.”<sup>37</sup>
- “Roaming” is defined as “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.”<sup>38</sup>

These definitions relate to the exceptions set forth

in Section 889 allowing for the procurement of services that connect to the facilities of a third party (such as backhaul, roaming, or interconnection arrangements).<sup>39</sup> The FAR Council clarified this exception applies only to the government agency and not to the contractor's use of such service.<sup>40</sup> "As a result, the Federal Government is prohibited from contracting with a contractor that uses covered telecommunications equipment or services to obtain backhaul services from an internet service provider, unless a waiver is granted."<sup>41</sup> Thus, it appears the exception will apply in very limited circumstances.

#### *Reporting Requirement*

The new reporting provision in FAR 52.204-25 requires a contractor to notify the government if, during contract performance, the contractor "identifies covered telecommunications equipment or services used as a substantial or essential component of any system, or as critical technology as part of any system."<sup>42</sup> The report is to be made within one business day, with a follow-up report including additional information required within 10 business days.

Each initial report must include the contract number, order number(s) (if applicable), supplier name, supplier unique identifier (if known), supplier CAGE code (if known), brand, model number, item description, and any readily available information about mitigation actions undertaken or recommended.<sup>43</sup> The follow-up report must include "any further available information about mitigation actions undertaken or recommended" and a description of any efforts undertaken and "any additional efforts that will be incorporated to prevent future use or submission of covered telecommunications equipment or services."<sup>44</sup>

As set forth above, FAR 52.204-24 requires the offeror before award to make a representation regarding whether it will supply or use Covered Equipment and Services in performance of the contract regardless of whether an exception applies (i.e., there is no opportunity for the offeror to make a determination regarding whether use of the Covered Equipment or Services is "substantial or essential"). However, under FAR 52.204-25, during contract performance, the contractor is to report the identification of Covered Equipment or Services that are "used as a substantial or essential component of any system, or as critical technology as part of any system."<sup>45</sup> Thus, reporting may not be required if a stated exception applies (e.g., the services/equipment are not "substantial or essential"). However, the government has yet to indicate what is meant by the terms "substantial" or "essential." Based on the plain language of the new FAR provisions, it appears for the reporting requirement, the contractor may make a reasonable judgment on whether the exception applies.

#### *Required Flow-Downs*

FAR 52.204-25 includes a provision requiring that its substance be flowed down to subcontractors, but notably, the Part B "use" provision *need not* be flowed down.<sup>46</sup> The FAR Council clarified that the Part B prohibition

applies *only* to the prime contractor because the prime contractor is the only "entity" that the agency "enters into a contract with."<sup>47</sup> As such, there is no requirement that subcontractors perform a reasonable inquiry or make a representation regarding their "use" of Covered Equipment and/or Services.

#### **FAR 52.204-26**

FAR 52.204-26 is another representation provision that allows offerors to make the Part A and Part B representations (required under FAR 52.204-24) annually in SAM.gov. As of October 26, 2020, all offerors that represent they *do not* provide or use Covered Equipment or Services will be allowed to make an annual SAM representation going forward, rather than making a separate representation with each proposal submission.<sup>48</sup>

#### **Lingering Questions: Contractors Hope for Context and Clarification in Final Rule**

The Interim Rules implementing the new FAR provisions as well as various agency-specific guidance provide useful context and clarifications regarding the implementation of Section 889 Part A and Part B. However, there are still many unknowns about the practical implications for government contractors. A Final Rule has not yet been published, and following submission of comments, which were due September 14, 2020, contractors are anxiously awaiting release of a Final Rule in the hopes that this will provide some clarity to ease compliance burdens and uncertainty surrounding potential liability.

#### **Covered Companies**

Although the definitions added in FAR 52.204-25 provide some useful context, they do not address what is arguably the largest and most ubiquitous complaint from contractors since the rules came out: The government has not provided a comprehensive list of Covered Companies. With respect to the Covered Companies, Section 889 specifically names five Chinese companies, and also states that the prohibitions apply with respect to those companies' "subsidiaries and affiliates."<sup>49</sup> This means there is a large and potentially ever-changing collection of companies to which the regulations apply. Many industry comments requested that the government provide a comprehensive list of the Covered Companies.<sup>50</sup> But, currently, the government has provided no such list, and it seems unlikely that it will do so. Thus, the burden falls to the contractor to identify these entities, and it remains unclear what the consequences might be for a contractor that fails to identify or report provision or use of a covered product or service from an obscure subsidiary or affiliate company that the contractor did not identify.

#### **What Constitutes a "Use"?**

Another concern from contractors is that there appears to be no reasonable limitation on what constitutes a "use" under the regulations. With respect to "use," as it



stands, the Use Prohibition appears incredibly broad as it includes no exception for internal practices unrelated to federal contracting (there is “no ‘nexus’ requirement like, say, [in] the Mandatory Disclosure Rule[], which would limit its application to uses ‘in connection with’ a contract or subcontract”<sup>51</sup>), and it appears to apply even in situations where the contractor has no ability to control its “use” (e.g., in the context of an international location that is serviced by only one Internet service provider). As such, Part B is extremely far-reaching—“it reaches into contractors’ offices, warehouses, and even their C Suites.”<sup>52</sup> In a Final Rule, contractors hope for more clarity on reasonable limitations that will allow them to adequately control supply chain risk without substantially limiting their ability to do business with the federal government.

### **“Telecommunications”—What Is Covered?**

The rules do not specifically define “telecommunications,” which may further complicate contractors’ ability to effectively conduct their reasonable inquiries and comply with the regulations. While the Communications Act of 1934 includes a definition that may be useful (i.e., “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received”),<sup>53</sup> it also includes a definition for “telecommunications equipment” that omits “customer premises equipment,” which seems contrary to the intent behind Section 889.<sup>54</sup>

In a document addressing Frequently Asked Questions about Section 889, the General Services Administration (GSA) provided an example list of information technology or communication technology that may be included in orders requiring the new FAR representation provision. This list included “computers and peripheral equipment; information kiosks and transaction machines; multifunction office machines; commercial unmanned aerial systems (i.e., drones); video surveillance equipment (e.g., video cameras); software; applications; websites; videos; and electronic documents.”<sup>55</sup> This list may be used as a starting point for identifying contractor “telecommunications” that may be covered by the regulations. Note, also, as a result of COVID-19 many contractors have employees working remotely. The Section 889 regulations and “use” of covered technology would appear to extend to devices and services being “used” by contractor employees at home or wherever they may be working remotely.

### **Video Surveillance Equipment**

Another common concern, particularly among small businesses, involves use of security cameras. Contractors use security cameras at their facilities, and many of these may be cameras manufactured by (or containing parts made by) one of the Covered Companies. Replacing the security cameras (and the associated systems) can be

quite costly, which is a concern especially for small businesses that may not have the necessary capital to make wide-ranging replacements.

The statutory language in Section 889, as included in the new FAR provisions, indicates that—at least for three of the five named Chinese companies (Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, and Dahua Technology Company, and their subsidiaries and affiliates)<sup>56</sup>—there is a limitation on which equipment may be included in the definition of “covered telecommunications equipment or services.” Specifically, the definition of “covered telecommunications equipment or services” says equipment from these three companies is “covered” only if it is “[f]or the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes.”<sup>57</sup> We have yet to see guidance interpreting this limitation in the rules.

### **Waivers**


Finally, Section 889 allows two types of waivers: (1) a waiver from the Office of the Director of National Intelligence (DNI), which may exempt contractors from the rules for “national security interests,” and (2) an agency waiver, which can be made on a one-time basis, is valid for a maximum of two years, and functions more like delayed implementation of the rule rather than as a true waiver.<sup>58</sup>

On August 12, 2020, DNI issued a waiver to the DOD that delayed the implementation of Section 889 as it applied to certain DOD contracts until FY 2020.<sup>59</sup> In essence, for procurement actions related to the provision of low-risk, high-volume items such as “supplies, services, food, clothing, transportation, care, and support necessary to execute the DOD mission,” the waiver allowed DOD contractors to continue using Covered Equipment or Services until September 30, 2020. Shortly after the expiration of that waiver, DNI issued another memo, which extended DOD’s waiver through September 30, 2022, for acquisitions of the “low risk” items identified in the initial waiver.<sup>60</sup> DOD clarified that the waiver does not cover “major weapon systems or any support activity related to them. . . . Instead, it covers items that are low risk to national security such as food, clothing, maintenance services, construction materials that are not electronic, and numerous other items that DNI has identified as low risk.”<sup>61</sup> Thus, the waiver is somewhat limited, and DOD ultimately will decide to which contracts it applies.

Agencies, including the GSA, have indicated they will allow for agency waivers only as a “last resort.” Specifically, GSA has stated it will provide waivers only in two circumstances: (1) for new procurements where there are no other means to make an award in time to avoid government mission failure and (2) for existing orders where there are no other means to replace a contractor in a timely manner to avoid government mission failure.<sup>62</sup> Similarly, DOD has stated that waivers require a compelling justification and must be supported by details

of where the Covered Equipment or Services reside within the supply chain, a phase-out plan, and a government report to Congress.<sup>63</sup> As such, it appears the bar is high and it is unlikely that many contractors will be able to secure agency waivers.

## Conclusion

Section 889 and the corresponding FAR provisions include broad prohibitions and requirements that extend to all federal contractors. While the interim rules and guidance issued thus far provide some clarifications, they leave open some of the most pressing questions regarding implementation of the new requirements. As contractors continue their work to comply with the implementation of Section 889, they are anxiously awaiting issuance of a Final Rule that, hopefully, will provide some workable answers. 

## Endnotes

1. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636.
2. Noncompliance could likely result in, *inter alia*, nonaward (pre-contract), contract termination (post-award), negative past performance ratings, and suspension or debarment proceedings. Knowingly or willfully making false representations regarding compliance could also result in potential False Claims Act liability (which, in some circumstances, could include treble damages).
3. These parts are section 889(a)(1)(A) and (a)(1)(B), Part A and Part B for short.
4. Pub. L. No. 115-232, § 889(a)(1)(A).
5. *Id.* § 889(a)(1)(B) (emphasis added).
6. Section 889 and the related regulations are relatively new and, thus, information regarding implementation of the provisions is still being developed. There currently is limited guidance and, thus, observations contained herein are based on materials and information available to date.
7. Section (B) omits from the definition of “covered telecommunications equipment or services” video surveillance and telecommunications equipment and services from the three Chinese companies named in Section (B) (and their subsidiaries and affiliates) where such equipment or services are not used for the purposes stated in Section (B). Guidance has yet to be provided on how this provision will be applied.
8. Pub. L. No. 115-232, § 889(f)(3) (emphasis added).
9. To date, no additional entities have been identified by the Secretary of Defense per section 889(f)(3)(D).
10. Pub. L. No. 115-232, § 889(f)(2).
11. *Id.* § 889(a)(2).
12. *Id.* § 889(d).
13. *See id.* § 889(c).
14. Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment, 84 Fed. Reg. 40,216 (proposed Aug. 13, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-08-13/pdf/2019-17201.pdf>; Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment, 85 Fed. Reg. 42,665 (proposed July 14, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-07-14/pdf/2020-15293.pdf>.
15. Acquisitions below the micro-purchase threshold (currently \$10,000) (*see* FAR 13.301(j)), commercial item acquisitions, and commercially available off-the-shelf (COTS) procurements are not exempt.
16. FAR 52.204-24(d)(1).
17. *See* FAR 52.204-24(e)(1)(i).
18. *See* FAR 52.204-24(e)(1)(ii).

19. FAR 52.204-24(d)(2). Here, again, there is no exception for Covered Equipment or Services that are not used as a “substantial or essential” component.

20. The FAR Council is considering expanding the scope of the clauses to require that the prohibition and representation apply to the offeror as well as any affiliates, parents, and subsidiaries of the offeror that are domestic concerns. *See* Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment, 85 Fed. Reg. 42,665, 42,672 (proposed July 14, 2020). Notably, this implies that even if the scope is expanded to apply to subsidiary and affiliate companies, it will not apply to foreign subsidiaries or affiliates.

21. FAR 52.204-24(e)(2)(i).

22. FAR 52.204-24(e)(2)(ii). Offerors are able to make both Part A and Part B representations annually via the System for Award Management (SAM). Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment, 84 Fed. Reg. 68,314 (proposed Dec. 13, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-12-13/pdf/2019-26579.pdf>; *see* FAR 52.204-26. Where an offeror makes an affirmative annual representation, it will be required to also provide an offer-by-offer representation. *See* 84 Fed. Reg. at 68,316.

23. *See* Pub. L. No. 115-232, § 889(a)(1)(A).

24. FAR 52.204-24(d)(2).

25. FAR 52.204-25(a) (emphasis added).

26. Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment, 85 Fed. Reg. 42,665, 42,669 (proposed July 14, 2020).

27. As noted above, the FAR Council is considering expanding the scope of the representation in the forthcoming final rule to apply to the offeror as well as any affiliates, parents, and subsidiaries of the offeror that are domestic concerns. *Id.* at 42672.

28. *Id.*

29. *Id.*

30. *See id.* at 42669.

31. *Id.*

32. Here, too, there is no exception for micro-purchases or commercial or COTS procurements.

33. 85 Fed. Reg. at 42,667.

34. The Interim Rule contemplates that an agency waiver, as outlined in Section 889, “would likely take at least a few weeks to obtain.” 85 Fed. Reg. at 42,667. It is anticipated that very few agency waivers will be issued.

35. FAR 52.204-25(a). The Interim Rule implementing Part B clarifies that the exception for government procurement of “a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements” applies *only to the Government agency* and not to the contractor’s use of such service. “As a result, the Federal Government is prohibited from contracting with a contractor that uses covered telecommunications equipment or services to obtain backhaul services from an internet service provider, unless a waiver is granted.” 85 Fed. Reg. at 42,669.

36. FAR 52.204-25(a).

37. *Id.*

38. *Id.*

39. *See* Pub. L. No. 115-232, § 889(a)(2).

40. 85 Fed. Reg. at 42,668.

41. *Id.* at 42669.

42. FAR 52.204-25(d).

43. FAR 52.204-25(d)(2)(i).

44. FAR 52.204-25(d)(2)(ii).

45. FAR 52.204-25(d)(1).

46. FAR 52.204-25(e).

47. Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment, 85 Fed. Reg. 42,665, 42666 (proposed July 14, 2020).

48. *See* Prohibition on Contracting for Certain

Telecommunications and Video Surveillance Services or Equipment, 85 Fed. Reg. 53,126 (proposed Aug. 27, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-08-27/pdf/2020-18772.pdf>.

49. See Pub. L. No. 115-232, § 889(f)(3)(A)–(B).

50. See, e.g., Comments to FAR-2019-009 (FR Doc # 2020-15293), <https://beta.regulations.gov/document/FAR-2019-0009-0003/comment> (specifically, see Comment IDs FAR-2019-0009-0019, -0038, -0039, -0046, -0056, -0057, -0064, -0066, and -0069, among others).

51. JONATHAN ARONIE & TOWNSEND BOURNE, *The True Impact of the Chinese Telecom Ban on Government Contractors*, SHEPPARD MULLIN GOV'T CONTRS. & INVESTIGATIONS BLOG (Nov. 25, 2019), <https://www.governmentcontractslawblog.com/2019/11/articles/aerospace-and-defense/chinese-telecom-ban-889/>.

52. *Id.*

53. 47 U.S.C. § 153(50).

54. “Telecommunications equipment” is defined as “equipment, other than customer premises equipment, used by a carrier to provide telecommunications services, and includes software integral to such equipment (including upgrades).” 47 U.S.C. § 153(52). “Customer premises equipment” means “equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.” *Id.* § 153(16).

55. GSA CLASS DEVIATION CD-2019-01, FREQUENTLY ASKED QUESTIONS 2.1 (July 16, 2020), [https://www.acquisition.gov/sites/default/files/page\\_file\\_uploads/CD-2019-11-Section-889-FAQs-External-07162020.pdf](https://www.acquisition.gov/sites/default/files/page_file_uploads/CD-2019-11-Section-889-FAQs-External-07162020.pdf).

56. Here, the statute specifically names “Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities).” Pub. L. No. 115-232, § 889(f)(3)(B).

57. *Id.*

58. See *id.* § 889(d).

59. Memorandum from John Ratcliffe, Dir. of Nat'l Intel., to Ellen M. Lord, Under Sec'y for Acquisition & Sustainment, Dep't of Def., Department of Defense Request for Waiver of Section 889 of Fiscal Year 2019 National Defense Authorization Act (Aug. 12, 2020), [http://thecgp.org/images/08-12-20\\_Memo\\_DNI-Response-to-DoD-Waiver-Request\\_20-00733\\_U-FOUO\\_SIGNED-....pdf](http://thecgp.org/images/08-12-20_Memo_DNI-Response-to-DoD-Waiver-Request_20-00733_U-FOUO_SIGNED-....pdf).

60. Memorandum from John Ratcliffe, Dir. of Nat'l Intell., to Ellen M. Lord, Under Sec'y for Acquisition & Sustainment, Dep't of Def., Department of Defense Request for Waiver of Section 889 of Fiscal Year 2019 National Defense Authorization Act (Sept. 29, 2020), [https://thecgp.org/images/Memo-20-00823\\_DoD-Request-for-Section-889-Waiver-2.pdf](https://thecgp.org/images/Memo-20-00823_DoD-Request-for-Section-889-Waiver-2.pdf).

61. Justin Doubleday, *Pentagon's Huawei Ban Waiver for “Low Risk” Contracts Could Be Extended Past Sept. 30*, INSIDE DEF. (Aug. 19, 2020), <https://insidedefense.com/share/208630>.

62. GOV'T SERVS. ADMIN., SECTION 889: PROHIBITION ON CERTAIN TELECOMMUNICATIONS AND VIDEO SURVEILLANCE SERVICES OR EQUIPMENT: WEBINAR WITH GSA BUSINESS LINES, at slide 11 (Sept. 10, 2020), [https://www.acquisition.gov/sites/default/files/page\\_file\\_uploads/Slides%20for%20Section%20889%20Webinar%20with%20GSA%20Business%20Line%20Leaders%20%289\\_10\\_20%29%20%281%29.pdf](https://www.acquisition.gov/sites/default/files/page_file_uploads/Slides%20for%20Section%20889%20Webinar%20with%20GSA%20Business%20Line%20Leaders%20%289_10_20%29%20%281%29.pdf).

63. Memorandum from Kim Herrington, Acting Principal Dir., Def. Pricing & Contracting, Dep't of Def., Implementation of the Section 889(a)(1)(B) Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment, at 6–7 (July 23, 2020), <https://www.acq.osd.mil/dpap/policy/policyvault/USA001557-20-DPC.pdf>.