

**Department of Energy
Acquisition Regulation**

**No. AL-2021-01
Date October 2020**



ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the Senior Procurement Executives of DOE and NNSA. It is intended for use by procurement professions of DOE and NNSA, primarily Contracting Officers, and other officials of DOE and NNSA that are involved in the acquisition process. Other parties are welcome to its information, but definitive interpretations of its effect on contracts, and related procedures, if any, may only be made by DOE and NNSA Contracting Officers.

Subject: Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment

References:

Section 889, NDAA for FY 2019 (Pub. L. 115-232)
Federal Acquisition Circular 2020-08 (85 FR 42664)
FAR 4.21; FAR 52.204-24; FAR 52.204-25
“Strategic Supply Chain Security Guidance for Agency Waiver Review Process”
(FOUO), Office of the Director of National Intelligence.

When is this Acquisition Letter (AL) effective?

The portions of this Acquisition Letter (AL) addressing Section 889(a)(1)(B) were effective on August 13, 2020. The portions addressing Section 889(a)(1)(A) took effect on August 13, 2019. This AL hereby rescinds and replaces AL-2020-01.

When does this AL expire?

This AL remains in effect until superseded or canceled.

Who is the intended audience for this AL?

Heads of Contracting Activities and Contracting Officers responsible for administering and managing contracts for all management and operating (M&O) and non-M&O contracts within the Department of Energy (DOE) and National Nuclear Security Administration (NNSA).

Who are the points of contact?

For DOE questions regarding the AL, contact MA-611, DOE_oapmpolicy@hq.doe.gov.
For NNSA questions regarding the AL, contact Kenneth West, Kenneth.West@nnsa.doe.gov.

For additional information on ALs and other issues, visit our website at <http://energy.gov/management/office-management/operational-management/procurement-and-acquisition>.

What is the purpose of this AL?

This AL sets forth policy for implementing the FAR rules that prohibit contracts for, or otherwise obtaining, covered telecommunications and video surveillance equipment and services, as well as contracts with entities that use such services and equipment, within DOE and NNSA.

What types of contracts are affected by this AL?

Because these rules stem from national security matters, they apply to all DOE and NNSA contracts, as well as purchases at any dollar value, whether for commercial or non-commercial items. This includes procurements below the simplified acquisition threshold and below the micro-purchase threshold, as well as those made with a purchase card.

What is the background information?

Section 889 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232) contained two prohibitions related to Federal contracting. The first was set forth in section 889(a)(1)(A) and took effect August 13, 2019; it barred the Federal government from buying, obtaining, or using covered telecommunications equipment or services from five named Chinese companies and their subsidiaries and affiliates.

The second was set forth in section 889(a)(1)(B), took effect August 13, 2020, and prohibits the Federal government from contracting with any 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, on or after August 13, 2020, unless an exception applies or a waiver has been granted.

Overall, the FAR rules stemming from Section 889 aspire to prevent contract awards not only for covered equipment or services, but also to any entity *using* covered equipment and services¹. To that end, the provision and the clause at FAR 52.204-24 and 52.204-25, respectively, have been revised.

¹ “Covered” equipment and services are defined in the NDAA (and FAR 4.2103) as—
Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities); (2) 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); (3) telecommunications or video surveillance services provided by such entities or using such equipment; or (4) 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.

The provision at FAR 52.204-24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment, is mandated for all solicitations for contracts or orders under indefinite-delivery indefinite-quantity (IDIQ) contracts, as well as notices of intent to place orders, that contemplate an award on or after August 13, 2020. The provision requires offerors, after conducting a reasonable inquiry, to provide a representation regarding the use of covered equipment or services when submitting an offer.

The clause at FAR 52.204-25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment, is required in all new contracts, as well as existing contracts that are being modified to exercise options or that contemplate new orders under IDIQ contracts.

Exceptions -- FAR 4.2102(b)

The statute, at section 889(a)(2), provides the following exceptions to the prohibition:

- A service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or
- Telecommunications equipment that cannot route or redirect user data traffic or cannot permit visibility into any user data or packets that such equipment transmits or otherwise handles.

Waivers – FAR 4.2104

The statute provides for the following two types of waivers:

- Executive Agency Waiver--FAR 4.2104(a)
Agency heads (defined by DEAR 902.101 as the Secretary, the Deputy Secretary, or Under Secretaries) may grant a one-time waiver from the requirements at section 889(a)(1)(B) on a case-by-case basis, but only until August 13, 2022. Decisions on whether to initiate the formal waiver process should be based on market research and feedback from industry, and made in consultation with MA-621 (or APM-10 for NNSA).
- Director of National Intelligence Waiver – FAR 4.2104(b)
Section 889(d)(2) permits the Director of National Intelligence (DNI) to provide a waiver if the Director determines one is in the national security interests of the United States. The statute does not include an expiration date for the DNI waiver. This authority is separate and distinct from that granted to an agency head as outlined above.

What is the guidance contained in this AL?

- On or after August 13, 2020, Contracting Officers shall not award contracts, issue task or delivery orders, BPAs or BPA calls, or otherwise attempt to obtain products and services from an offeror 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, unless an exception at FAR 4.2102(b) applies or a waiver is granted.
- On or after August 13, 2020, Contracting Officers shall not exercise an option period or otherwise extend a contract, task order, or delivery order, 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, unless an exception at FAR 4.2102(b) applies or a waiver is granted.
- Contracting Officers shall incorporate the clause at FAR 52.204-25 into all new awards, as well as existing contracts, task orders, and delivery orders that are being modified to extend the period of performance (including exercising an option), on or after August 13, 2020.
- Contracting Officers shall obtain the required representation and, if applicable, additional disclosures set forth in the FAR provision prior to exercising an option on or after August 13, 2020.
- When executing a modification to extend the period of performance, including exercising an option, on or after August 13, 2020, Contracting Officers shall obtain the representation, and should provide a sufficient amount of time to both provide notice for exercising the option and to provide contractors with adequate time to comply with the clause and provide the representation.
- Contracting Officers shall obtain the required representation and, if applicable, additional disclosures as set forth in the FAR provision prior to executing any of the following contract actions on or after August 13, 2020:
 - o Awarding a contract, task order, or delivery order;
 - o Executing a modification to extend the period of performance, including exercising an option;
 - o Issuing a call against a BPA; or
 - o Issuing an order against a BOA.

The provision at FAR 52.204-24 shall be included not only in new, but also in existing solicitations for which contract award will be after August 13, 2020. For purchase card transactions, the prohibition on purchasing “covered equipment,” as defined above, will be included in the DOE Purchase Card Policy and Operating Procedures (DOE Acquisition Guide chapter 13.301).

- The Contracting Officer shall not award contracts or issue task or delivery orders to an offeror that has represented “does” in the representation at paragraph (d)(2) of the provision at FAR 52.204-24, unless a waiver is granted, or unless the Contracting Officer determines, based on a written assessment provided by the program office or requiring activity after a review of the additional disclosures required by paragraph (e)(2) of the FAR provision, that—
 - o The offeror is not using the covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system; or
 - o An exception at FAR 4.2102(b) applies.
- If the Contracting Officer is unable to make a determination as described above, then award shall not be made to that offeror unless a waiver is granted.
- If an offeror has represented “does not” in the representation at paragraph (d)(2) of the provision at FAR 52.204-24, the Contracting Officer may rely on the representation, unless the Contracting Officer has an independent reason to question the representation. If the Contracting Officer has an independent reason to question this representation, the Contracting Officer shall consult with the program office and legal counsel on how to proceed.
- The current representation made by the vendor in SAM pursuant to FAR 52.204-26 only applies to the prohibition at 889(a)(1)(A). The FAR Council is working to update SAM to include a representation for the prohibition at 889(a)(1)(B).
- Offerors that represent that they use covered telecommunications equipment or services must provide, in accordance with paragraph (d)(2) of the provision, a detailed disclosure with separate reporting elements depending on whether the procurement is for equipment, services related to item maintenance, or services not associated with item maintenance, as described in paragraph (e)(2) of the provision.
- Disclosure information required by FAR 52.204-24(e)(2) is different for equipment, services related to item maintenance, and services not associated with item maintenance, because the information needed to identify whether the prohibition applies varies for these three categories.
- Contracting Officers, in consultation with the program office, will evaluate the detailed disclosure to determine if the use violates the prohibition or whether an exception applies. The Contracting Officer, in consultation with the program office, will also use this information when determining whether to pursue a waiver.
- Pursuant to the language in FAR 52.204-25(d)(1), Contracting Officers shall ensure that, if “covered equipment” is discovered, the contractor

simultaneously notifies the Contracting Officer and the appropriate Chief Information Officer point of contact, adhering to the timeline in FAR 52.204-25(d)(2). For DOE (non-NNSA) contracts, notify the Integrated Joint Cybersecurity Coordination Center (circ@jc3.doe.gov; 1-866-941-2472). For NNSA contacts, notify the Information Assurance Response Center (iarc@iarc.nv.gov; 702-942-2611 or 877-692-2611).

- Importantly, section 889(a)(1)(A) of the NDAA for FY 2019 (Pub. L. 115-232), which bars the purchase of covered equipment and services, applies to prime contracts and flows down to subcontracts. Section 889(a)(1)(B) of the NDAA for FY 2019 (Pub. L. 115-232), which bars awards to any entities using covered equipment and services, applies to prime contracts and does *not* flow down to subcontracts. However, agencies continue to be prohibited from obtaining the prohibited products and services in any manner.²

² See 85 FR 42666 (July 14, 2020) which states in relevant part, “The 52.204–25 prohibition under section 889(a)(1)(A) will continue to flow down to all subcontractors; however, as required by statute the prohibition for section 889(a)(1)(B) will not flow down because the prime contractor is the only ‘entity’ that the agency ‘enters into a contract’ with, and an agency does not directly ‘enter into a contract’ with subcontractors, at any tier.”