

**Department of Energy
Acquisition Regulation**

**No. AL-2020-01
Date September 2019**



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 Contracting for Certain Telecommunications and
Video Surveillance Services or Equipment**

References:

Section 889, National Defense Authorization Act for FY 2019 (Pub. L. 115-232)
Federal Acquisition Circular 2019-05 (84 FR 40216)
FAR 4.21
FAR 52.204-24; FAR 52.204-25

When is this Acquisition Letter (AL) effective?

This Acquisition Letter (AL) is effective on August 13, 2019.

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This AL remains in effect until superseded or canceled.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?

A recent interim rule published in the Federal Register prohibits the acquisition of any equipment, system or service that uses “covered telecommunications equipment” (defined below) as a substantial or essential component of any system, or as a critical technology within a system, on or after August 13, 2019. This AL sets forth policy for implementing the rule within DOE and NNSA.

What types of contracts are affected by this AL?

Because this rule stems from a matter of national security, it applies to both DOE and NNSA. It applies to all M&O and non-M&O contracts and subcontracts, as well as purchase orders, including those below the simplified acquisition threshold, those below the micro-purchase threshold, and those made with a purchase card. It applies to contracts and subcontracts for commercial and commercial-off-the-shelf items.

What is the background information?

The rule amending the Federal Acquisition Regulation (FAR) to implement section 889(a)(1)(A) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232) was issued with an effective date of August 13, 2019.

The rule mandates inclusion of a new provision (FAR 52.204-24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment) in all solicitations issued before, on, or after August 13, 2019, provided that the resultant contract will be awarded on or after August 13, 2019. Additionally, the rule requires that the new provision be included in all notices of intent to place an order, as well as solicitations for orders under indefinite-delivery indefinite-quantity (IDIQ) contracts. Finally, the rule requires Contracting Officers to include a new clause (FAR 52.204-25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment) in all new contracts, as well as to modify existing contracts to include the clause when exercising options or contemplating new orders under IDIQ contracts.

The intent of the clause at FAR 52.204-25 is to prohibit the procurement of any “covered telecommunications equipment or services,” which is defined in the NDAA as—

- (1) 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 requires offerors to identify as part of their offer any covered telecommunications equipment or services that will be provided to the Government. The additional information provided through the representation will assist the

Government to appropriately assess the presence of any covered telecommunications equipment or services that may be present in an offer.

What is the guidance contained in this AL?

First, DOE and NNSA Contracting Officers shall incorporate the clause at FAR 52.204-25 not only into new awards, but into all existing contractual vehicles, including blanket purchase agreements. This requirement is more stringent than those contained in the interim rule, which only addressed new contracts and certain contract modifications. This is considered appropriate in the interest of national security. Additionally, as noted above, the provision shall be included not only in new, but in all existing solicitations. 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).

Secondly, DOE Contracting Officers shall ensure that, if covered equipment (see FAR 4.2103) 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).

If additional information is provided by the FAR Council as part of a final rule, this AL will be revised accordingly. However, please note the requirements of the interim rule were effective on August 13, 2019, in order to meet the NDAA implementation date of August 13, 2019 (one year after enactment of the NDAA).

The rule’s requirements flow down to all subcontractors.

DOE/NNSA Contracting Officers shall incorporate the clause in both M&O and non-M&O contracts no later than 60 days after the effective date of this AL.

Attachment: Provision and Clause

52.204-24 Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment.

REPRESENTATION REGARDING CERTAIN TELECOMMUNICATIONS AND VIDEO SURVEILLANCE SERVICES OR EQUIPMENT (AUG 2019)

(a) *Definitions.* As used in this provision—

Covered telecommunications equipment or services, Critical technology, and Substantial or essential component have the meanings provided in clause 52.204-25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.

(b) *Prohibition.* Section 889(a)(1)(A) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232) prohibits the head of an executive agency on or after August 13, 2019, from procuring or obtaining, or extending or renewing 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. Contractors are not prohibited from providing—

(1) A service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or

(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.

(c) *Representation.* The Offeror represents that—

It [] will, [] 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.

(d) *Disclosures.* If the Offeror has responded affirmatively to the representation in paragraph (c) of this provision, the Offeror shall provide the following information as part of the offer—

(1) All covered telecommunications equipment and services offered (include brand; model number, such as original equipment manufacturer (OEM) number, manufacturer part number, or wholesaler number; and item description, as applicable);

(2) Explanation of the proposed use of covered telecommunications equipment and services and any factors relevant to determining if such use would be permissible under the prohibition in paragraph (b) of this provision;

(3) For services, the entity providing the covered telecommunications services (include entity name, unique entity identifier, and Commercial and Government Entity (CAGE) code, if known); and

(4) For equipment, the entity that produced the covered telecommunications equipment (include entity name, unique entity identifier, CAGE code, and whether the entity was the OEM or a distributor, if known).

(End of provision)

52.204-25 Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.

PROHIBITION ON CONTRACTING FOR CERTAIN TELECOMMUNICATIONS AND VIDEO SURVEILLANCE SERVICES OR EQUIPMENT (AUG 2019)

(a) *Definitions.* As used in this clause—

“Covered foreign country” means The People’s Republic of China.

“Covered telecommunications equipment or services” means-

- (1) Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities);
- (2) 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);
- (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.

“Critical technology” means-

- (1) Defense articles or defense services included on the United States Munitions List set forth in the International Traffic in Arms Regulations under subchapter M of chapter I of title 22, Code of Federal Regulations;
- (2) Items included on the Commerce Control List set forth in Supplement No. 1 to part 774 of the Export Administration Regulations under subchapter C of chapter VII of title 15, Code of Federal Regulations, and controlled—
 - (i) Pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology; or
 - (ii) For reasons relating to regional stability or surreptitious listening;
- (3) Specially designed and prepared nuclear equipment, parts and components, materials, software, and technology covered by part 810 of title 10, Code of Federal Regulations (relating to assistance to foreign atomic energy activities);
- (4) Nuclear facilities, equipment, and material covered by part 110 of title 10, Code of Federal Regulations (relating to export and import of nuclear equipment and material);
- (5) Select agents and toxins covered by part 331 of title 7, Code of Federal Regulations, part 121 of title 9 of such Code, or part 73 of title 42 of such Code; or
- (6) Emerging and foundational technologies controlled pursuant to section 1758 of the Export Control Reform Act of 2018 (50 U.S.C. 4817).

“Substantial or essential component” means any component necessary for the proper function or performance of a piece of equipment, system, or service.

(b) *Prohibition.* Section 889(a)(1)(A) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232) prohibits the head of an executive agency on or after August 13, 2019, from procuring or obtaining, or extending or renewing 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. The Contractor is prohibited from providing to the Government 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 paragraph (c) of this clause applies or the covered telecommunication equipment or services are covered by a waiver described in FAR 4.2104.

(c) *Exceptions.* This clause does not prohibit contractors from providing—

(1) A service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or (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.

(d) *Reporting requirement.* (1) In the event 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, during contract performance, or the Contractor is notified of such by a subcontractor at any tier or by any other source, the Contractor shall report the information in paragraph (d)(2) of this clause to the Contracting Officer, unless elsewhere in this contract are established procedures for reporting the information; in the case of the Department of Defense, the Contractor shall report to the website at <https://dibnet.dod.mil>. For indefinite delivery contracts, the Contractor shall report to the Contracting Officer for the indefinite delivery contract and the Contracting Officer(s) for any affected order or, in the case of the Department of Defense, identify both the indefinite delivery contract and any affected orders in the report provided at <https://dibnet.dod.mil>. (2) The Contractor shall report the following information pursuant to paragraph (d)(of this clause (i) Within one business day from the date of such identification or notification: the contract number; the order number(s), if applicable; supplier name; supplier unique entity identifier (if known); supplier Commercial and Government Entity (CAGE) code (if known); brand; model number (original equipment manufacturer number, manufacturer part number, or wholesaler number); item description; and any readily available information about mitigation actions undertaken or recommended (ii) Within 10 business days of submitting the information in paragraph (d)(2) of this clause: any further available information about mitigation actions undertaken or recommended. In addition, the Contractor shall describe the efforts it undertook to prevent use or submission of covered telecommunications equipment or services and any additional efforts that will be incorporated to prevent future use or submission of covered telecommunications equipment or services.

(e) *Subcontracts.* The Contractor shall insert the substance of this clause, including this paragraph (e), in all subcontracts and other contractual instruments, including subcontracts for the acquisition of commercial items.

(End of clause)