

Reasonable Inquiry in Uncertain Time(s): DoD Says Buyers "Should" Give Current Contractors "Adequate" Time to Comply with Section 889 Part B

Litigation Alert
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The Department of Defense (DoD) has issued a [memorandum](#) with instructions on how it will implement the looming prohibition on contracting with any "entity" that "uses equipment, systems, or services that use" covered telecommunications equipment or services provided by certain Chinese companies. The DoD memorandum comes on the heels of a recently-published [interim final rule](#), which—[as we reported here](#)—will amend the Federal Acquisition Regulation (FAR) effective August 13, 2020 to enforce the contracting ban created by [Section 889\(a\)\(1\)\(B\)](#) of the FY19 National Defense Authorization Act (Section 889 Part B).

DoD's memorandum provides insights on how the Department will apply Section 889 Part B in practice, though it is lacking in at least one critical respect—it *recommends* but does not *require* DoD to give current contractors "sufficient" notice and "adequate" time to conduct a "reasonable inquiry" and make the representation mandated by the FAR. In doing so, DoD failed to answer a key question [prompted by the interim final rule itself](#)—should contractors with existing DoD agreements plan to complete their reasonable inquiry by August 13 or "*during the first year*" Section 889 Part B is in effect? Without clarity on this important point, contractors should confer with the contracting officers on their existing agreements about any upcoming modifications or extensions and, if necessary, propose a plan of action for completing the "reasonable inquiry" before the updated Section 889 FAR clauses are incorporated into their agreements.

DoD Section 889 Part B Memorandum

The [DoD memorandum](#) includes a series of "Requirements for Contracting Officers" relating to Section 889 Part B. Though written as instructions to government personnel, these requirements preview the procedures DoD will apply when the interim final rule goes into effect August 13. Specifically, the memorandum states that:

- **DoD "shall not" award a contract or issue an order to any offeror, or extend any contract or order with any contractor, which does not comply with Section 889 Part B.** This instruction should come as no surprise—it is the core policy expressed in Section 889 Part B itself, which has been public since August 2018. But for those who were still hoping DoD would find a creative way to relax the new rules, the instruction leaves no doubt—as early as August 13, contractors will be ineligible for new awards and extensions of existing agreements if they cannot (1) represent that they comply with Section 889 Part B after conducting a "reasonable inquiry," or (2) persuade the government that an exception applies or that a waiver should be granted. The Section 889 Part B prohibition will be implemented via the clause at [FAR 52.205-25 \(Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment\)](#), which is mandatory in all FAR-based contracts, including those for commercial items and micro-purchase contracts.
- **DoD "shall" require the representation in FAR 52.204-24 as part of contracting actions executed on or after August 13** . Again, no surprises here. Until the System for Award Management (SAM) can be configured to permit an annual representation, offerors will be required to make the representation in [FAR 52.204-24 \(Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment\)](#). FAR 52.204-24 will appear in all solicitations issued: (1) on or after August 13, and (2) solicitations issued before August 13 if award will occur on or after that date. The clause also will be incorporated in existing

contracts and orders via modification when the government adds new work, exercises an option, or otherwise extends the period performance. The same basic rules will apply to existing Blanket Purchase Agreements (BPAs) and Basic Ordering Agreements (BOAs).

Once incorporated, FAR 52.204-24 will require each offeror and contractor to represent that it "does" or "does not": (a) use covered telecommunications equipment or services, or (b) use any equipment, system, or service that uses covered telecommunications equipment or services (see [DoD Memorandum, FAR 4.2101 \(Definitions\)](#) ("Covered telecommunications equipment or services")). If the offeror or contractor states that it "does" use covered telecommunications equipment or services, then it will be required to furnish information regarding such use. This information will be reviewed by DoD acquisition and program officials to determine if the offeror or contractor is ineligible for award or an extension.

- **Before modifying existing agreements to enforce Section 889 Part B, DoD "should" give contractors "sufficient" notice and "adequate" time to conduct a reasonable inquiry and make the required representation.** Perhaps the most intriguing element of the DoD memorandum is the instruction that, when extending the period of performance of an existing agreement (including by option exercise), contracting officers "should" give contractors "sufficient" notice that they will be required to make the representation in FAR 52.204-24 and "adequate time" to conduct a reasonable inquiry to support that representation (see [DoD Memorandum, FAR 4.2101 \(Definitions\)](#) ("Reasonable inquiry")). To state the obvious, "should" is not the same as "shall," so there are no guarantees that DoD contractors will have notice before FAR 52.204-24 appears in existing agreements or enough time to gauge if they can comply once it does. The memorandum also does not provide guidance on what constitutes "sufficient" notice or "adequate time."

This omission exacerbates the complexity already created by the [interim final rule](#), which will require contractors to complete the representation in FAR 52.204-24 as early as August 13, *but also* encourages contractors to conduct the reasonable inquiry needed to make the representation "[d]uring the first year" Section 889 Part B is in effect (*i.e.*, from August 13, 2020 to August 13, 2021). See also [DoD Memorandum](#) at 8-9 (reiterating the interim final rule's in "the first year" guidance). Without clear guidance on this critical question, the most conservative approach will be for DoD contractors to complete their reasonable inquiry by August 13 or very soon thereafter. Alternatively, contractors could confer with their contracting officers to determine if and when FAR 52.204-24 and FAR 52.204-25 will be incorporated into their existing agreements via modification (*e.g.*, in connection with an option exercise, period of performance extension, other schedule/scope of work changes). A contractor can then select a target date for completing its reasonable inquiry based upon the date that its existing agreement will be modified to include the updated Section 889 FAR clauses.

- **DoD may rely on a representation that an offeror or contractor "does not" used covered telecommunications equipment or services, unless DoD has reason to question its accuracy.** This instruction repeats a basic rule of federal procurement—contracting officers may not ignore information that independently calls into question the accuracy of a representation made by an offeror or contractor. By itself, that is not news. But it does serve as a reminder to contractors that they must be mindful of public information regarding their use of: (1) covered telecommunications equipment or services, and (2) equipment, systems or services known to use or suspected of using covered telecommunications equipment or services. Such public information could provide the government a basis for terminating a contract, declining to exercise an option, or even opening a False Claims Act investigation. It also could be fodder for competitors to challenge a contract award in a bid protest. In any case, when making representations such as the one required in FAR 52.204-24, it pays to keep a close eye on public information that may contradict what your company has said to the government.
- **DoD will determine whether to initiate a formal waiver process and contractors can help the government decide .** The DoD memorandum states that the "executive agency will decide whether or not to initiate the formal waiver process based on market research and feedback from Government contractors during the acquisition process, in concert with other internal factors." See [DoD Memorandum](#) at 6. Proposals indicating that an offeror "does" use covered telecommunications equipment or services will automatically be treated as a waiver request, but that "does not preclude an offeror from submitting this information with their offer, in advance of a contracting officer decision to initiate the formal waiver request through the head of the executive agency."

See id. Given the onerous steps an agency must complete to seek a formal waiver, *see id.* at 6-8, an offeror in need of a waiver should provide the agency all necessary information *prior to submitting or with its proposal*, including: (1) a compelling justification for the additional time needed to comply with Section 889 Part B, (2) a full and complete laydown or description of the covered telecommunications equipment or services, (3) a detailed phase-out plan, and (4) an explanation of why granting the waiver would not present a material increase in risk to U.S. national security, *see id.* at 6-7.

Though it includes some helpful guidance, DoD's memorandum underscores some of the issues that surely will emerge from the hasty implementation of Section 889 Part B. Clearly, better guidance and more time are sorely needed, but at least for now it seems contractors and government contracting officers will be forced to make do without either.

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