Contractors: Are You Prepared for the Statutory Ban on Using Chinese Telecommunications Equipment and Services?

Litigation Alert
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During a public meeting last week, senior Department of Defense (DoD) officials faced tough questions from industry about regulations that will implement an impending governmentwide ban on contracting with any company that "uses" Huawei Technologies Company, ZTE Corporation, or other Chinese-made telecommunications equipment or services, as mandated by Section 889(a)(1)(B) of the FY19 National Defense Authorization Act (NDAA) . Many questions focused on the Section 889(a)(1)(B) text itself, which, if construed literally, could prevent federal agencies from working with any company that utilizes covered Huawei or ZTE technology in any major part of its operations – regardless of the connection to the company's government contracts.

While acknowledging DoD has yet to publish draft regulations – even though Section 889(a)(1)(B) is set to take effect August 13, 2020 – Department officials warned that contractors must provide better feedback, supported by hard data, if they have concerns about the statutory ban being implemented without modification. The unstated message of these comments is clear – the regulations implementing Section 889(a)(1)(B) may not soften the impact of the statute's plain text unless industry makes a compelling case on exactly why and how the language should change. Given the potentially widespread consequences of Section 889(a)(1)(B), DoD's public statements serve as a clarion call for government contractors to submit robust comments on the forthcoming regulations, which are now under review at the Office of Management and Budget (OMB). *See* FAR Open Case Status (as of Feb. 28, 2020) (Case No. 2019-009).

What is Prohibited Under Section 889(a)(1)(B)?

Section 889(a)(1)(B) states that federal agencies may not "enter into a contract (or extend or renew a contract) with an entity that uses any equipment, system, or services that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as a critical technology as part of any system." Though not stated directly, the primary focus of the statutory ban appears to be on telecommunications equipment that can "route or redirect user data traffic or permit visibility into [] user data or packets that such equipment transmits or otherwise handles." *See* Section 889(a)(2)(B). The term "covered telecommunications equipment or services" means any of the following:

- Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities).
- 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).
- Telecommunications or video surveillance services provided by such entities or using such equipment.
- Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of the 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 the People's Republic of China.

On its face, Section 889(a)(1)(B) can be read as banning federal agencies from contracting with any company that ***uses*** covered telecommunications equipment and services as a substantial or essential component, or as a critical technology, in ***any*** system ***anywhere*** in its operations – even if that use has no nexus to a government contract. This stands in contrast to the companion

provision at Section 889(a)(1)(A), which was implemented via the Federal Acquisition Regulation (FAR) in August 2019 and merely prohibits federal agencies from ***procuring*** or ***obtaining*** equipment, systems, or services that use prohibited telecommunications technologies.

Industry Pushback and DoD's Call to Action

During the recent public meeting, contractors and trade associations raised a variety of concerns about the plain text of Section 889(a)(1)(B). The consensus view was that the statutory ban, as written, will have serious negative consequences on both large and small government contractors. For example, according to one trade association, the use of Huawei and ZTE equipment is so ubiquitous abroad that, if Section 889(a)(1)(B) is implemented without limitation, it would prevent federal agencies from working with contractors that have virtually any overseas presence. Others noted the challenges, costs, and futility of attempting to determine if prohibited technologies are used on internal systems (and those of suppliers) that have no known connection to any U.S. government contract. And the National Defense Industrial Association (NDIA), a leading trade association for defense contractors, questioned whether the implementation of Section 889(a)(1)(B) should be delayed until the risks posed by Huawei and ZTE products and the availability of alternative equipment can be examined further (Related Documents, National Defense Industrial Association).

In response, DoD officials confirmed that they too interpret the text of Section 889(a)(1)(B) to be as potentially far-reaching and impactful as the industry commentators. They urged contractors to provide detailed information about the consequences of the statutory provision, emphasizing that the Department must have strong data and real-world examples to make any meaningful changes in the forthcoming regulations. DoD is particularly interested in industry feedback regarding the business impacts of Section 889(a)(1)(B), proposed mitigation measures, the time needed to implement the statutory prohibition, and the effects it would have on contractor supply chains and small businesses.

What Should Contractors Do Next?

With the August 13, 2020 statutory deadline looming and OMB working to finalize a draft rule, contractors should expect to see regulations implementing Section 889(a)(1)(B) in the near future. Based on DoD's recent public statements, contractors should prepare for the possibility that the initial regulations will adopt the text of Section 889(a)(1)(B) with little or no substantive modification. Specifically, contractors should consider taking the following steps in the coming weeks:

- **Gauge the Impact of Section 889(a)(1)(B) on Your Business** . If your company contracts with the U.S. federal government, or performs subcontracts in support of U.S. government programs, you should initiate a review of internal systems and assets that are known or suspected to use Huawei, ZTE, or other covered telecommunications equipment and services. For many companies, this will require in-depth analysis of all computer systems, networks, and other technologies that record, store, and/or transmit data (*e.g.*, global-positioning, data system diagnostic/performance data, individual user data). Your company also may have to investigate if its suppliers or service-providers utilize such equipment or services to support your operations. If your company discovers prohibited technologies within or supporting its operations, it should then take steps to determine:

  - If the subject equipment or service meets the legal definition of a "substantial or essential component" or "critical technology." This legal analysis is crucial for any contractor that is impacted by Section 889(a)(1)(B), as it will inform downstream decision-making on what, if any, mitigation measures the company is required to undertake.

  - The feasibility, cost and operational impact of removing and replacing such equipment (should it be necessary to ensure compliance).

  - The estimated cost and effort required to manage the company's Section 889(a)(1)(B) compliance going forward.

  At a minimum, the foregoing information will help your company gauge both the quantitative and qualitative impact of Section 889(a)(1)(B) on its business.

- **Consider Commenting on the Implementing Regulations** . If your company determines Section 889(a)(1)(B) will have a material impact on operations, it also should consider submitting comments on the implementing regulations once they are published, either individually or as part of a consortium (*e.g.*, group of interested contractors / companies, trade association,). As DoD officials noted during the recent public meeting, the Department will be better equipped to consider alternative language or broader exceptions to Section 889(a)(1)(B) if contractors provide objective data, clear examples, and thoughtful work-arounds with their submissions. This may include public versions of the information your company already has developed internally when assessing the business impacts of the statutory ban.
- **Prepare for the Implementation of Section 889(a)(1)(B) in August 2020** . Given the tight timeframes involved, there is a possibility that DoD's implementing regulations might not provide meaningful relief before the statutory ban goes into effect August 13, 2020. Contractors must therefore prepare contingency plans to: (a) explain to their government customers why any Huawei, ZTE, or other Chinese-made telecommunications equipment or services within their operations do not constitute a "substantial or essential component" or "critical technology" of any system; and/or (b) seek a temporary, one-time waiver from the head of their company's customer agenc(ies) or the Director of National Intelligence. *See* Section 889(d)(1)-(2). In preparing such plans, contractors should be mindful that they must provide "compelling justification" for granting a waiver request. *See id*.

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