Long-Awaited Regulations Banning Use of Chinese Technologies Will Be Effective August 13, Unless Congress Saves the Day

Litigation Alert
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The Federal Acquisition Regulation (FAR) Council has issued a prepublication version of a long-awaited interim rule that will soon implement the impending government-wide ban on contracting with any entity that "uses any equipment, system, or service 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 (FY19 NDAA) . Though it is not the official interim rule, the prepublication version offers a stark preview of what could come next—an interim rule that provides government contractors little relief from the potentially sweeping reach of Section 889(a)(1)(B).

The interim rule will be effective August 13, 2020—the same deadline imposed by the FY19 NDAA—and comes as Congress reportedly is considering major amendments to Section 889(a)(1)(B) in the FY21 NDAA (S.A. 2193, introduced by Senator Ron Johnson (R-WI) June 25, 2020). If those amendments are adopted in the final FY21 NDAA, they would delay the implementation deadline to August 2021 and materially limit what constitutes a prohibited "use" of banned Chinese technologies. If Congress does not act, however, contractors may find themselves scrambling to comply with a potentially disruptive interim rule that will be issued in the midst of a global pandemic just weeks before its effective date. Below we summarize the prepublication version of the interim rule and offer insights on how the new regulations may impact government contractors starting August 13.

How Does the Interim Rule Implement Section 889(a)(1)(B)?

The prepublication version of the interim rule signals that the forthcoming regulations will largely reiterate the core elements of Section 889(a)(1)(B). This will be disappointing to many in the government contracts industry who have spent nearly two years providing regulators with input on ways to minimize the regulations' business impacts. Still, as described below, the unofficial version of the interim rule includes bits of potentially good news for some contractors. And while much uncertainty remains, one thing is clear—contractors must act now if they have not already started to prepare for the ban under Section 889(a)(1)(B).

According to the unofficial version of the interim rule, the regulations implementing Section 889(a)(1)(B):

- **Will adhere to the August 13, 2020 implementation deadline** . This is not surprising given that Congress expressly imposed the existing deadline in the FY19 NDAA. The major unanswered question is if Congress itself will delay the implementation deadline as part of the FY21 NDAA or other legislation (*e.g.*, a supplemental COVID-19 relief package). Unfortunately for contractors, the expected timing of the interim rule leaves little time for Congress to act. According to the prepublication version, the official regulations are being readied for announcement in the Federal Register and could be issued as early as today, July 13. It also explains that, within the first year that Section 889(a)(1)(B) is in effect, a contractor is expected to: (1) familiarize itself with the implementing regulations and (2) develop a "compliance plan," based upon a "reasonable inquiry" into its use of banned technologies, so it can accurately make the representation and provide the information required by the FAR (discussed in the next paragraph). In the coming weeks, as contractors prepare to take these important steps, they should keep a close eye on the FY21 NDAA and other bills, which are making their way through Congress. Ultimately, if Congress passes legislation that modifies Section 889(a)(1)(B), regulators will be called upon to prepare and issue updated regulations in (hopefully) short order.
- **Will amend the FAR to require new representations and information from offerors that want to compete for government contracts**. Absent an extension from Congress, as of August 13, 2020, the Section 889(a)(1)(B) implementing regulations will amend the FAR and require a contractor to: (1) represent in the System for Award Management (SAM) that it "does" or "does not" use banned technologies, after a making a "reasonable inquiry" (discussed in the paragraph below) and (2) alert the government if it discovers such use during contract performance. Prior to the award of a government contract or order, any

offeror which has previously reported that it "does" use banned technologies will be required to furnish additional information and an explanation with its proposal. The contracting officer will then determine if such use renders the offeror ineligible for award.

- **Will obligate offerors to make a "reasonable inquiry" into their use of banned technologies before providing the representations and information required by the FAR**. On a practical level, this is perhaps the most helpful aspect of the forthcoming rule. "Reasonable inquiry" means "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." It does not require a contractor to complete "an internal or third-party audit." Contractors that conduct well-organized, thorough, and documented internal and external reviews should be able to provide the required representations and information in good faith.

- **Will not modify existing regulatory definitions of Section 889(a)(1)(B) but will introduce a few new definitions** . According to the prepublication version of the interim rule, the Section 889(a)(1)(B) regulations will not alter the current regulatory definitions of "covered telecommunications equipment or services," "substantial or essential component," "critical technology," or "covered foreign country." The regulations will, however, include new definitions for: (1) "reasonable inquiry" (described in the preceding paragraph) and (2) "backhaul," "interconnection arrangements," and "roaming," to clarify when an exception to the prohibition applies. "Backhaul" means 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). "Interconnection arrangements" means 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. "Roaming" means 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.

- **Will confirm that Section 889(a)(1)(B) applies only to the corporate "entity" that executes the federal prime contract** . Again, no surprises here, though until now there had been no clear statement that only a named contracting entity will be required to represent its compliance with Section 889(a)(1)(B). This is an important distinction for many companies—particularly those with affiliates, parents, or subsidiaries that have made investments in equipment, systems, or services that are or use banned technologies. Unfortunately, this is not the end of the analysis. As explained in the prepublication version of the interim rule, Section 889(a)(1)(B) "is not limited to contracting with entities that use end-products produced by [covered Chinese] companies; it also covers the *use* of 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." (emphasis added). As a result, contracting entities that *rely on or share* equipment, systems, or services with affiliates, parents, or subsidiaries must determine if such equipment, systems, or services *use* any banned Chinese technologies.

- **May extend Section 889(a)(1)(B) to a contracting entity's domestic affiliates, parents, and subsidiaries** . According to the prepublication version of the interim rule, the FAR Council is "considering" whether to extend Section 889(a)(1)(B) to a named contracting entity's *domestic* affiliates, parents, and subsidiaries. If adopted, this extension would go into effect no later than August 13, 2021. For many contractors, such an extension could compound the compliance burden described in the preceding paragraph, as it may require both a named contracting entity *and* its domestic affiliates, parents, and subsidiaries to individually examine: (1) their use of end-products produced by Huawei, ZTE, and other banned Chinese companies *and* (2) their use of any equipment, system, or service that itself uses a banned technology. That said, even if adopted, extending Section 889(a)(1)(B) to related domestic entities arguably is the lesser of two potential evils because it would not reach a contractor's *foreign* affiliates, parents, or subsidiaries. This is a potentially significant limitation for companies with multi-national operations, especially in Asia and parts of Europe where the use of Huawei and ZTE technologies is ubiquitous.

- **Will confirm that the FAR clauses implementing Section 889(a)(1)(B) are not required flow downs in subcontracts** . Many entities working exclusively as subcontractors or suppliers may initially conclude from this that they have no compliance obligations under the forthcoming regulations. In practice, the reality could be much different. As explained above, prime contractors must determine if they use any equipment, system, or service that itself uses a banned technology. Thus, if your

company is a subcontractor or supplier that provides equipment, systems, or services to a prime contractor, your customer undoubtedly will want to know if you are using banned technologies to do so. This dynamic will likely prompt prime contractors to require certifications from their subcontractors and suppliers, including those that provide equipment, systems, or services which are arguably ancillary to the prime's government contracts work. Presumably, prime contractors also will require subcontractors and suppliers to make a "reasonable inquiry" before providing such a certification. And for companies with both prime contract and subcontract arrangements, the compliance burden could be even heavier, as they will need to investigate their own use of prohibited technologies *and* that of their subcontractors and suppliers.

- **Will confirm that the FAR clauses implementing Section 889(a)(1)(B) apply to micro-purchase contracts and contracts for commercial items**. For those who were hoping the implementing regulations would only apply to higher-value or non-commercial items contracts, this is disappointing news because Section 889(a)(1)(B) is silent on both subjects. According to the prepublication version of the interim rule, there is an "unacceptable level of risk" to the government resulting from the use of the banned technologies and that risk is not alleviated by exempting contracts at or below the micro-purchase threshold or those for commercial items. This only underscores the broad impact Section 889(a)(1)(B) will have on federal contracting.

- **Will impose detailed requirements for requesting and granting a temporary waiver of Section 889(a)(1)(B)** . It appears the government has given concerted thought to how agencies will process requests for a one-time waiver of Section 889(a)(1)(B). As an initial matter, a temporary waiver cannot extend beyond August 13, 2022; thus, a plan to seek a waiver is not, by itself, a viable, long-term compliance strategy. Further, it is not a given that a contractor's waiver request will be granted. Before the head of an agency can authorize a waiver, the agency must: (1) designate a senior agency official for supply chain risk management, (2) begin participating in an interagency information-sharing environment, when and as required by the Federal Acquisition Security Council (FASC), (3) notify and consult the Office of the Director of National Intelligence (ODNI) regarding the waiver request, and (4) notify FASC and ODNI 15 days prior to granting a waiver request. In the case of an emergency acquisition—which presumably includes emergency acquisitions relating to the COVID-19 pandemic—the head of an agency may grant a waiver request without consulting FASC or ODNI, but only: (1) after determining that consultation is impracticable due the emergency and (2) if he/she notifies FASC and ODNI within 30 days of granting the request. Similarly, within 30 days of authorizing any waiver request, the head of the agency must provide "to the appropriate congressional committees": (1) an attestation, supported by reasonable due diligence, that the waiver will not materially increase national security risk to the United States, (2) a detailed accounting of the banned technologies covered by the waiver, and (3) a phase-out plan to remove such technologies from use. At a minimum, contractors seeking a waiver should address these requirements in their requests because they will help the agency determine if it can make the required representations and disclosures to Congress.

As is evident in the prepublication version of the interim rule, there is still much we do not know about how Section 889(a)(1)(B) will be implemented. For example, contractors should expect continued debate about what constitutes an impermissible "use" of covered telecommunications equipment or services. It also remains to be seen if federal agencies will adopt their own unique procedures or otherwise modify their enforcement of the implementing regulations. Despite these uncertainties, contractors no longer have the luxury of waiting to determine if they comply with the prohibition in Section 889(a)(1)(B). Unless Congress authorizes an extension, it appears the interim rule will go into effect August 13 without an opportunity for "full public notice and comment." All of this adds up to one simple conclusion for contractors: the time to determine if you can comply with Section 889(a)(1)(B) is now.

For more information, please contact:

Alex L. Sarria, asarria@milchev.com, 202-626-5822

Jason N. Workmaster, jworkmaster@milchev.com, 202-626-5893
