AUGUST IS COMING: INTERIM RULE BANNING FEDERAL CONTRACTOR USE OF CERTAIN CHINESE TECHNOLOGIES TAKES EFFECT AUGUST 13TH

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On July 14, 2020, the Federal Acquisition Regulation (FAR) Council published an interim rule ("Interim Rule") implementing the second of a two-part ban on federal contractors' provision and use of certain telecommunications and video equipment and services produced or provided by Huawei, ZTE, Hikvision, and several other Chinese entities, including their affiliates and subsidiaries (referred to collectively as "covered telecommunications equipment and services"). Congress introduced the two-step ban in Section 889 of the National Defense Authorization Act for Fiscal Year 2019. The first step, which went into effect in August 2019 and implemented Section 889(a)(1)(A) ("Part A"), prohibits federal agencies from *acquiring* covered telecommunications equipment and services. Our prior alert on this step can be found here. The second step, which implements Section 889(a)(1)(B) ("Part B") and is much more expansive, prevents federal agencies from contracting with companies that use covered telecommunications equipment and services, regardless of whether that use relates to the performance of a federal contract. The Interim Rule provides much-needed clarification on the scope and application of Part B, although it still leaves some questions unanswered. This alert discusses the Interim Rule's key takeaways.

WHO

- **Who is affected by the prohibition?** The Interim Rule will apply to *all* federal prime contractors, regardless of contract type or size. In the Interim Rule, the FAR Council recognizes the broad range of industries that will be impacted by this rule: "health-care, education, automotive, aviation, and aerospace industries; manufacturers that provide commercially available off-the-shelf items; and contractors that provide building management, billing and accounting, and freight services."
- **Who is *not* affected by the prohibition?** The Interim Rule does *not* apply to lower-tier subcontractors or to a prime contractor's parents, affiliates, or subsidiaries. However, the Interim Rule indicates that the FAR Council is considering expanding the prohibition to a contractor's affiliates, parents, and subsidiaries of prime contractors no later than August 13, 2021.

WHAT

- **What is the new prohibition?** The Interim Rule prohibits agencies from contracting with any entity that uses covered telecommunications equipment as (1) a "substantial or essential component" of any system,

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or (2) as "critical technology" as part of any system. The rule also extends to a contractor's use of services that in turn use covered telecommunications equipment as a substantial or essential component of any system. The FAR currently includes definitions of "covered telecommunications equipment or services,"[1] "substantial or essential component," and "critical technology" from the previous implementation of Part A, and the Interim Rule does not revise the definitions.[2] The Interim Rule clarifies that the prohibition applies regardless of whether the use of covered telecommunications equipment and services is in performance of work under a federal contract.

- **What are the limitations on the new prohibition?** The Interim Rule provides for several exceptions and waivers to the new requirements. For example, the Interim Rule allows the head of an agency to grant a one-time waiver to a particular offeror or contractor on a case-by-case basis. Waivers must expire no later than August 13, 2022.

WHEN

- **When does the prohibition go into effect?** The Interim Rule will be effective August 13, 2020. However, Congress is considering amending Part B in the 2021 NDAA. Any amendment could delay the implementation deadline to August 2021 and limit what constitutes "use" of covered telecommunications equipment and services. Industry can submit comments on the Interim Rule on or before September 14, 2020. The FAR Council will consider and respond to any comments when implementing a final rule.

WHERE

- **Where will contractors see the new prohibition?** The new prohibition applies to all prime contracts, including those for commercial items or commercial off-the-shelf items. This also includes contracts below the simplified acquisition threshold and the micropurchase threshold. Additionally, while the prohibition will not apply to existing contracts, it will be incorporated into new contracts and renewals or extensions (i.e., options or bridge contracts) of existing contracts.

HOW

- **How will executive agencies implement the prohibition?** Similar to how agencies monitored compliance with Part A, agencies will enforce Part B by requiring contractors to make the following representation: "After conducting a reasonable inquiry . . . It [ ] does, [ ] does not use covered telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services." The Interim Rule states that contractors will be able to complete the representation on a contract-by-contract basis or, if that representation is in the negative, as a uniform, annual representation in the System for Award Management.

- **How will contractors verify the absence of covered telecommunications equipment and services?** The Interim Rule introduces a new "reasonable inquiry" standard for contractors: "An entity may represent that it does not use covered telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services within the meaning of this rule, *if a reasonable inquiry by the entity does not reveal or identify any such use*." The Interim Rule defines "reasonable inquiry" as "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

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entity." Note, however, that the Interim Rule specifies that "a reasonable inquiry need not include an internal or third-party audit." While this assurance is helpful to contractors, it does not provide much guidance as to what a "reasonable inquiry" *should* entail, if not an internal audit.

Our U.S. national security law and policy team will closely monitor developments surrounding the Interim Rule as well as potential impacts from the 2021 NDAA and potential expansion of the prohibition to a contractor's parents, affiliates, and subsidiaries. If you have questions regarding the detail or application of the Interim Rule, please reach out to the authors of this alert.

FOOTNOTES

[1] More specifically, the FAR defines "covered telecommunications equipment or services" as:

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.

FAR 52.204-25(a). Note that this definition provides for the possibility of including additional entities to be identified in the future, as well as "white labeled" items that are repackaged under a different brand.

[2] FAR 52.204-25(a).

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