



Section 889: Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment

Webinar with GSA Business Lines

Section 889's Two Prohibitions

- Part A: Effective **August 13, 2019**, the Government may not **obtain** (through a contract or other instrument) certain telecommunications equipment or services produced by five named Chinese companies or their subsidiaries and affiliates
- Part B: Effective **August 13, 2020**, the Government may not contract with an entity that **uses** certain telecommunications equipment or services, as a substantial or essential component of any system, or as critical technology as part of any system, produced by any of the same five named Chinese companies or their subsidiaries and affiliates
 - Use is “regardless of whether that use is in performance of a Federal contract”

Representation Provision (-24)

- Representations are required regardless of whether the offeror believes that an exception under paragraph (b) applies
- Offerors are required to ensure that representations regarding equipment and services **provided** to the Government and representations regarding equipment, systems, and services **used** by the offeror are accurate
- Offerors may want to consult with their own legal counsel
- Understanding the additional information required by paragraph (e) of the representation provision ([FAR 52.204-24](#)) may be helpful in determining the appropriate level of investigation required before making representations

Required Offeror Due Diligence

- Offerors should conduct reasonable inquiries, and represent findings to the Government, regarding:
 - All equipment, systems, and services, used by the offeror, regardless of geographic location, including equipment, systems, and services owned or provided by other companies (e.g., affiliates, parents, subsidiaries, subcontractors, suppliers)
- The representation is limited to **use by the offeror itself**; the representation does not concern use by other legal entities (e.g., affiliates, parents, subsidiaries, subcontractors, suppliers)
 - As mentioned in the previous bullet, however, it does concern use by the offeror of equipment, systems, and services owned or provided to the offeror by other companies

Reporting Clause (-25)

- Requires contractors and subcontractors to **notify** the Government if they identify that covered telecommunications equipment or services are **used**, as a substantial or essential component of any system, or as critical technology as part of any system, **during contract performance** ([FAR 52.204-25\(d\)\(1\)](#))
- Unlike the representation provisions' requirements, the reporting requirement **does** flow down to subcontractors
- The reporting clause is only about reporting, not representation
 - No representations are required by the reporting clause

Annual (SAM) Representation (-26)

- A fourth interim FAR rule was published on August 27 and will be effective, along with the technological update to SAM.gov, on October 26
- This rule updates the SAM representation provision ([FAR 52.204-26](#))
 - Starting October 26, entities must both **represent**, in SAM, whether they **provide** and whether they **use** covered telecommunications equipment or services
- Starting October 26, if an entity **represents**, in SAM, that it **does not provide** and **does not use** covered telecommunications equipment or services, it will only need to re-represent annually, via SAM (it does not respond to the representation provision ([FAR 52.204-24](#)) when submitting offers)

FAS Implementation

- Existing Federal Acquisition Service (FAS) indefinite delivery vehicles (IDVs) are being modified to incorporate the updated reporting clause ([FAR 52.204-25 \(AUG 2020\)](#))
 - Mass modifications began to be issued on August 13, 2020 for Schedule contracts (A824) and certain non-Schedule IDV contracts (A823)
 - All other IDV contracts are being modified manually
- Information about whether an IDV has been modified can be found using the [GSA FAS Section 889 Part B Contract Vehicle Modification Tracking Dashboard](#)
 - Note that information is also available on [Contracts Online](#) (for Schedules) or program websites

PBS Implementation

- Existing Public Building Service (PBS) indefinite delivery vehicles (IDVs) are being modified to include the updated reporting clause ([FAR 52.204-25 \(AUG 2020\)](#)) using robotic process automation (“RPA” or “a bot”)
- Guidance for GSA lease acquisitions may be found in [Leasing Alert LA-20-11](#)

Waivers to Section 889

- Office of the Director of National Intelligence (ODNI) waivers
 - The Director of National Intelligence may provide a waiver to either Section 889 prohibition for “national security interests”
- Agency waivers
 - Agency heads may, on a one-time basis for each contractor, delay the effect of Section 889 Part A through August 13, 2021
 - Agency heads may, on a one-time basis for each contractor, delay the effect of Section 889 Part B through August 13, 2022

Agency-Granted Waivers

- Each Agency-granted waiver must include:
 - A compelling justification for additional time needed
 - A full and complete laydown of, and a phase-out plan to eliminate, the covered telecom from the offeror/contractor
 - An ODNI determination that granting the waiver will not adversely affect U.S. national security
 - 15-day advanced notification to the FASC and ODNI
- Agencies must notify Congress within 30 days of issuance of a waiver

GSA-Granted Waivers

- GSA contracting officers have been instructed that waivers should be sought only as a last resort and, therefore, there are only two circumstances in which a GSA contracting officer may pursue a waiver:
 - For a new procurement, when there is no other means to make an award in time to avoid Government mission failure
 - For an existing contract (or order), where there is no other means to replace the contractor in time to avoid Government mission failure
- GSA's [Acquisition Letter MV-20-10](#) includes a multi-step process for GSA contracting officers to follow when pursuing waivers
 - Although addressed to GSA's acquisition workforce, the waiver process may be educational for industry

Outstanding Industry Questions

- GSA received several questions from industry, that the FAR rule does not address, to which GSA does not have answers:
 - Information about the list of subsidiaries and affiliates
 - When (or if) will it be developed?
 - If developed, where will it be available?
 - How will companies be added or removed?
 - Will a “white list” of approved equipment and services be made available?
 - Is commercial sale “use” by the offeror?
 - Is employee use of personal property “use” by the offeror?
 - Are maintenance or warranty services “use” by the offeror?
 - Will additional definitions, including "system", be shared?

How to Comment

- Outstanding questions and answers to the FAR rule's questions should be submitted as comments to the FAR rules
 - Comments to the third interim FAR rule are due September 14
 - Comments to the fourth interim FAR rule are due October 26
- Comments may be submitted at [regulations.gov](https://www.regulations.gov)
 - Search for "FAR Case 2019-009"
 - Select corresponding "Comment Now" link
 - Follow instructions provided
- Once processed, all comments will be publicly viewable on [regulations.gov](https://www.regulations.gov)
- Comments may be submitted anonymously

Section 889 Resources

- **Publicly available resources on [Acquisition.gov](https://www.acquisition.gov)**
 - Text of all four FAR rules
 - [Video](#) and [Slides](#) from GSA Office of Small and Disadvantaged Business Utilization (OSDBU) Webinar
 - [Two-Page Industry Flyer](#) explaining Section 889
 - [GSA Acquisition Letter MV-20-10](#) implementing Section 889
 - [GSA Class Deviation CD-2020-15](#) applying Section 889 FAR representation and reporting requirements to GSA's real property lease acquisitions and Commercial Solution Opening procurements (CSOs)
 - [Addendum 1 to CD-2019-11](#) cancelling GSAR 552.504-70 and temporarily suspending the rest of the previous deviation
 - GSA SCRM Review Board Decision Rubrics ([Part A](#); [Part B](#))

Section 889 Resources, cont'd

- **Publicly available resources coming soon to [Acquisition.gov](#)**
 - Frequently Asked Questions
 - Implementation Tables
 - Decision Trees
- **Publicly available resources in other locations**
 - [Leasing Alert LA-20-11](#) providing information about GSA's application of Section 889 to GSA's real property lease acquisitions
 - Information about whether a FAS IDV has been modified can be found using the [GSA FAS Section 889 Part B Contract Vehicle Modification Tracking Dashboard](#)
 - Note that information is also available on [Contracts Online](#) (for Schedules) or program websites

