

Department of Defense Issues Interim Rule Requiring Disclosure of Chinese Workforce and Facilities

August 31, 2022

WHAT: The Department of Defense (DoD) issued an interim rule requiring certain Defense contractors and subcontractors to disclose the use of workers and facilities in People's Republic of China (PRC). The rule, which implements Section 855 of the FY22 NDAA, amends the Defense Federal Acquisition Regulation Supplement (DFARS) to add clauses requiring pre-award and post-award disclosures, as well as award restrictions, on covered entities who maintain facilities or employ one or more individuals who perform work in the PRC in connection with covered DoD contracts.

The new DFARS clauses require disclosures by a "covered entity"—that is, a company performing work on a DoD contract or subcontract with a value over \$5 million, excluding contracts for commercial products or commercial services, that performs work in the PRC. Pursuant to the interim rule, covered entities (and their subcontractors) must disclose (1) the number of individuals that will or do perform work in the PRC and (2) a description of the entity's physical presence (or proposed physical presence) in the PRC. The clauses flow down to any subcontractors on covered contracts.

These clauses do not apply to commercial contracts and subcontracts. The clauses also permit the disclosure requirements to be waived if the senior procurement executive determines in writing that the required disclosures would not be in the national security interests of the United States.

Authors

Kevin J. Maynard
Partner
202.719.3143
kmaynard@wiley.law
Hon. Nazak Nikakhtar
Partner
202.719.3380
nnikakhtar@wiley.law
Cara L. Sizemore
Partner
202.719.4192
csizemore@wiley.law

Practice Areas

Government Contracts
National Security

WHEN: DoD published its interim rule on August 25, 2022. The interim rule is effective immediately. DoD will also consider comments in developing the final rule, which are due by October 24, 2022.

WHAT DOES IT MEAN FOR INDUSTRY: The interim rule will likely affect only a small subset of contractors. In that regard, the preamble to the interim rule indicates that in the prior three fiscal years, there were no awards that would be subject to the rule. Also, the interim rule as currently drafted does not require the disclosure of Chinese nationals working in domestic facilities; disclosure of work in the PRC if the work is not related to a covered contract; or disclosure of the names and identities of Chinese individuals working on covered contractors. However, these are all issues to watch for in the final rule.

Despite its potentially narrow scope, this rule is nevertheless further evidence of the U.S. Government's efforts to reduce reliance on Chinese suppliers; to strengthen "Buy America" rules; and to reduce the defense industrial base's exposure to vulnerabilities (including embedded surveillance capabilities) from the use of Chinese-made components.

Wiley's Government Contracts and National Security practice groups will continue to monitor developments in this area and will provide updates as warranted.