

ALERT

FAR Council Adopts Annual SAM Representation and Listing for Ban on Huawei, ZTE, and Other Chinese Telecommunications Equipment and Services

December 16, 2019

WHAT: On Friday, December 13, 2019, the Federal Acquisition Regulatory Council published a second interim rule amending the FAR to implement Section 889(a)(1)(A) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (2019 NDAA). Section 889(a)(1)(A) of the 2019 NDAA prohibits executive agencies from procuring, obtaining, extending, or renewing a contract to procure or obtain, 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. These restrictions extend to telecommunications and video surveillance equipment and services furnished by Huawei, ZTE, and certain other Chinese companies. The first interim rule from August 2019 (which we previously reported) includes a solicitation clause (FAR 52.204-24) requiring contractors to represent whether they will provide “covered telecommunications equipment or services” in connection with the performance of the solicited contract. The second interim rule establishes a new annual representation in SAM.gov, and adds to the SAM.gov list of excluded parties the designated Chinese companies (as well as other entities designated by U.S. Department of Defense (DOD)).

WHEN: The FAR Council published the interim rule on Friday, December 13, 2019, and it was effective immediately. Comments are due on or before February 11, 2020. The FAR Council plans to issue additional rulemaking under FAR Case 2019-009 to implement additional restrictions under Section 889(a)(1)(B) that become

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Practice Areas

Government Contracts

effective in August 2020.

WHAT DOES IT MEAN FOR INDUSTRY: The new interim rule streamlines reporting with an annual representation to supplement the contract-by-contract representation required initially. Going forward, only contractors who furnish covered telecommunications equipment or services will be required to make ad hoc representations and disclosures in their proposals. Industry will also benefit from a new listing in SAM.gov of the designated Chinese companies, and additional companies that DOD may identify, making it easier for contractors to manage their supply chain and their own representations. Contractors will be required to consult the listing in SAM.gov to ensure they do not furnish covered telecommunications equipment or services from any listed companies. Contractors will now be required to consult the SAM.gov excluded parties list before completing their own SAM.gov or proposal representations regarding covered telecommunications and video surveillance equipment.

The first interim rule created a solicitation representation clause at FAR 52.204-24 (Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment), which required contractors to represent on a contract-by-contract basis whether they would provide any covered telecommunications equipment or services to the Government in the performance of the solicited contract. Any contractor reporting that it will provide covered equipment must provide additional detailed disclosures.

As had been expected, the new interim rule adds an annual SAM certification requirement in FAR 52.204-26 (Covered Telecommunications Equipment or Services—Representation) and FAR 52.212-3(v) (Offeror Representations and Certifications—Commercial Items) that will allow contractors to represent annually in SAM whether they offer the Government equipment, systems, or services that include covered telecommunications equipment or services. The new interim rule allows offerors that represent that they do not furnish such products or services to skip the offer-by-offer representation implemented by FAR 52.204-24. Only contractors that affirmatively represent that they furnish covered telecommunications equipment or services, or have not yet made the annual representation in SAM, will need to make the contract-by-contract representation and disclosure.

The revised interim rule does not address additional restrictions in Section 889(a)(1)(B) that become effective in August 2020 regarding entities that use covered telecommunications equipment or services. The FAR Council will issue separate rulemaking on that provision before its August 13, 2020 effective date. The FAR Council also intends to address industry comments it has received on the first and second interim rules.