

ALERT

FAR Council Issues Interim Rule Prohibiting Procurement and Operation of Certain Unmanned Aircraft Systems

November 13, 2024

WHAT: On November 12, 2024, the Federal Acquisition Regulatory Council (FAR Council) issued an interim rule amending the FAR to implement the statutory prohibition on procurement and operation of unmanned aircraft systems (UAS or drones) manufactured or assembled by certain foreign entities identified by the Federal Acquisition Security Council (FASC), including entities in China or subject to influence or control by the Chinese government or Chinese Communist Party. This prohibition was mandated by the American Security Drone Act of 2023, which was incorporated into the National Defense Authorization Act (NDAA) for Fiscal Year 2024 (Pub. L. No. 118-31). The interim rule is intended to respond to threats to the security of U.S. federal agency data by prohibiting the procurement, operation, or use of federal funds on UAS prohibited by the FASC.

WHEN: The FAR Council published the interim rule on November 12, 2024. The interim rule is effective immediately. Interested parties have until January 13, 2025 (60 days from the issuance of the interim rule) to submit written comments to be considered in the formation of the final rule.

WHAT IT MEANS FOR INDUSTRY: The FAR Council's interim rule immediately prohibits federal contractors from procuring, and on or after December 22, 2025, operating a FASC-prohibited UAS in performance of a contract or using federal funds for the procurement or operation of a FASC-prohibited UAS. Absent an exemption, exception, or waiver, this prohibition applies to all procurements and contracts, including acquisitions at or below the Simplified Acquisition Threshold (SAT), for commercial products and services, and for

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Practice Areas

Government Contracts
Uncrewed Aircraft Systems (UAS)

commercially available off-the-shelf (COTS) items.

Continue reading for a more in-depth discussion of the significant impacts to contractors from this interim rule.

Prohibition

The interim rule implements the statutory prohibition on procurement and operation of UAS manufactured or assembled by an American Security Drone Act-covered foreign entity. A list of the covered entities will be developed and maintained by the FASC and published in the System for Award Management (SAM) at <https://www.sam.gov>.

The interim rule immediately prohibits executive agencies from procuring a FASC-prohibited UAS. It also prohibits, on or after December 22, 2025, executive agencies from operating a FASC-prohibited UAS. The interim rule also prohibits federal contractors from, on or after December 22, 2025, operating a FASC-prohibited UAS in performance of a contract or using federal funds for the procurement or operation of a FASC-prohibited UAS. Contractors are required to search SAM to confirm their compliance with the prohibition before submitting a proposal or using any UAS in performance of a covered contract.

The interim rule amends FAR Part 40 by establishing subpart 40.2, Security Prohibitions and Exclusions, which lays out the prohibitions. The interim rule also creates a corresponding contract clause at FAR 52.240-1, Prohibition on Unmanned Aircraft Systems Manufactured or Assembled by American Security Drone Act-Covered Foreign Entities. The requirements in FAR subpart 40.2 will expire on December 22, 2028 in accordance with the NDAA, but contractual prohibitions will continue to apply after that date for contracts that include the clause at FAR 52.240-1.

Application

The interim rule applies to all procurements and contracts, including acquisitions at or below the SAT, for commercial products and services, and for COTS items. The prohibitions in 40.202 also apply to purchases at or below the micro-purchase threshold. Accordingly, the interim rule requires contracting officers to insert FAR 52.240-1 in solicitations issued and contracts awarded on or after November 12, 2024, as well as contract options exercised and modifications executed after that date that extend the period of performance. The interim rule also requires contracting officers to modify existing indefinite-delivery contracts to include the clause for application to future orders. The clause must be flowed down in all subcontracts.

Notably, the interim rule does not prohibit FASC-covered entities from supplying parts to non-covered entities to assemble or manufacture UAS. The interim rule also explains that until December 22, 2025, “the phased prohibition permits the continued use of previously-acquired UAS that were subsequently identified as FASC-prohibited, as well as contractor operation of UAS in services where the UAS is not a deliverable (e.g., a contractor flies a UAS for aerial surveillance on a security contract or a contractor uses a UAS for analyzing crop and soil conditions as part of services performed under an agriculture-related contract).” The FAR Council anticipates the interim rule will have minimal impact on businesses, in part because the FAR Council believes that “[a]lternative suppliers exist and continue to emerge.”

Exemptions, Exceptions, and Waivers

The interim rule includes exemptions that apply to certain government entities for specific purposes:

- *Department of Homeland Security, Department of Defense, Department of State, and the Department of Justice*: if the procurement or operation is determined to be in the national interest of the United States and meets specific criteria outlined in the statute;
- *Department of Transportation*: for UAS in support of the safe, secure, or efficient operation of the National Airspace System and maintenance of public safety, among other activities;
- *National Transportation Safety Board*: for the purposes of conducting safety investigations;
- *National Oceanic and Atmospheric Administration*: for meeting science or management objectives or operational mission.

The interim rule also includes exceptions for: wildfire management operations; search and rescue operations; intelligence activities; and Tribal law enforcement.

The interim rule authorizes heads of Executive agencies to issue waivers in certain circumstances. Waivers must be made on a case-by-case basis, with approval from the OMB Director, after consultation with the FASC, and upon notification to appropriate congressional committees.

When an exemption, exception, or waiver applies, the agency must make that determination and state so in the contract.

Disclosure

The FAR clause in the interim rule does not include any reporting or certification requirements similar to those that apply to the Section 889 prohibitions on telecommunications and video surveillance equipment. The FAR Council is considering adding requirements for offerors and contractors to disclose and report certain information to contracting officers. The interim rule requests input on this potential disclosure requirement. The FAR Council requests input on the following items specifically:

- What challenges do you anticipate regarding compliance with the contemplated disclosure requirement?
- What challenges do you anticipate regarding compliance with the contemplated reporting requirement?
- Would more detail regarding “Federal funds” (e.g., text similar to FAR 52.203-12(b)) be helpful in complying with the prohibition on the use of Federal funds in the procurement or operation of FASC-prohibited UAS?
- What other suggestions do you have to ensure Government customers are aware of, and can mitigate, risks posed by FASC-prohibited UAS?

Wiley's cross-functional Government Contracts, TMT, UAS, and National Security teams will continue to monitor these developments.