



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204, 212, 213, and 252

[Docket DARS-2019-0063]

RIN 0750-AJ84

**Defense Federal Acquisition Regulation Supplement: Covered
Defense Telecommunications Equipment or Services (DFARS Case
2018-D022)**

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Interim rule.

SUMMARY: DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Acts for Fiscal Years 2018 and 2019 related to the procurement of covered telecommunications equipment or services. Specifically, the rule prohibits the procurement of any equipment, system, or service to carry out the DoD nuclear deterrence or homeland defense missions that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as a critical technology as a part of any system. Covered telecommunications equipment or services includes telecommunications equipment or services from certain Chinese

entities, including their subsidiaries and affiliates, and from any other entities that the Secretary of Defense reasonably believes to be owned or controlled by or otherwise connected to, the government of the People's Republic of China or the Russian Federation.

DATES: Effective Date: **[Insert date of publication in the FEDERAL REGISTER]**.

Applicability:

Contracting officers shall include the provisions at DFARS 252.204-7016, Covered Defense Telecommunications Equipment or Services-Representation, and DFARS 252.204-7017, Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services-Representation, as prescribed-

- In solicitations issued on or after **[Insert date of publication in the FEDERAL REGISTER]**; and
- In solicitations issued before **[Insert date of publication in the FEDERAL REGISTER]**, provided the resulting award occurs on or after **[Insert date of publication in the FEDERAL REGISTER]**.

Contracting officers shall include the clause at DFARS 252.204-7018, Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services, as prescribed, in all awards made on or after **[Insert date of publication in the FEDERAL REGISTER]**.

Contracting officers shall modify, in accordance with Federal Acquisition Regulation (FAR) 1.108(d), existing indefinite-delivery contracts, blanket purchase agreements, or basic ordering agreements to include the DFARS clause for future orders or calls, prior to placing any future orders or calls.

If modifying an existing contract, order, or call to extend the period of performance, including exercising an option, contracting officers shall include the DFARS clause in accordance with FAR 1.108(d).

Comment date: Comments on the interim rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.
ADDRESSES: Submit comments identified by DFARS Case 2018-D022, using any of the following methods:

- o *Federal eRulemaking Portal:* <http://www.regulations.gov>. Search for "DFARS Case 2018-D022". Select "Comment Now" and follow the instructions provided to submit a comment. Please include "DFARS Case 2018-D022" on any attached documents.

- o *Email:* osd.dfars@mail.mil. Include DFARS Case 2018-D022 in the subject line of the message.

- o *Fax:* 571-372-6094.

- o *Mail:* Defense Acquisition Regulations System, Attn: Ms. Heather Kitchens, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense

Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Heather Kitchens,
telephone 571-372-6104.

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Acquisition Regulations System codifies and publishes uniform policies and procedures for acquisition by all executive agencies. The Federal Acquisition Regulations System consists of the Federal Acquisition Regulation (FAR), which is the primary document, and agency acquisition regulations that implement or supplement the FAR. The DFARS is a supplement to the FAR that provides DoD-specific acquisition regulations that DoD contracting officers - and those contractors doing business with DoD - must follow in the procurement process for supplies and services.

Section 1656 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115-91) prohibited DoD from procuring or obtaining, or extending or renewing a contract to

procure or obtain, any equipment, system, or service to carry out the DoD nuclear deterrence or homeland defense missions that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as a critical technology as a part of any system. Covered telecommunications equipment or services includes telecommunications equipment or services from certain Chinese entities, including their subsidiaries and affiliates, and from any other entities that the Secretary of Defense reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of the People's Republic of China or the Russian Federation.

Likewise, section 889(a)(1)(A) of the NDAA for FY 2019 (Pub. L. 115-232) established a Governmentwide prohibition on procuring or obtaining, or 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 a critical technology as a part of any system. Covered telecommunications equipment or services includes certain video surveillance and telecommunications equipment or services from certain Chinese entities, including their subsidiaries and affiliates, and from any other entities 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 the People's Republic of China.

The DoD prohibition under 1656 differs from the Governmentwide prohibition under 889(a)(1)(A) in that it: applies to equipment, systems, or services to carry out the DoD nuclear deterrence or homeland defense missions; includes different definitions of "covered telecommunications equipment or services" and "covered foreign country"; does not include exceptions from the prohibition; and provides independent waiver authority to the Secretary of Defense. This interim DFARS rule implements the section 1656 prohibition for DoD, and is structured to align with the FAR implementation of the section 889(a)(1)(A) Governmentwide prohibition.

To implement section 889(a)(1)(A) of the NDAA, DoD, the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) published an interim rule in the *Federal Register* at 84 FR 40216 on August 13, 2019, as amended by the interim rule published at 84 FR 68314 on December 13, 2019 (reference FAR Case 2018-017, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment).

This interim DFARS rule implements the section 1656 and 889(a)(1)(A) prohibitions for DoD, and is structured to align with the FAR implementation of the section 889(a)(1)(A) Governmentwide prohibition. The interim rule should increase security of systems and critical technology that is part of any system used to carry out the nuclear deterrence and homeland defense missions of DoD by prohibiting the use of telecommunications equipment or services from certain Chinese entities, including their subsidiaries and affiliates, and from any other entities that the Secretary of Defense reasonably believes to be owned or controlled by or otherwise connected to, the government of the People's Republic of China or the Russian Federation.

II. Discussion and Analysis

To implement the section 1656 prohibition and the DoD-specific procedures associated with the 889(a)(1)(A) prohibition in the FAR, this rule adds: DFARS subpart 204.21, Prohibition on Contracting for Certain telecommunications and Video Surveillance Services or Equipment; the provision at DFARS 252.204-7016, Covered Defense Telecommunications Equipment or Services-Representation; the provision at DFARS 252.204-7017, Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services-Representation; and the clause at DFARS 252.204-7018, Prohibition on the Acquisition of

Covered Defense Telecommunications Equipment or Services. The new DFARS subpart, provisions, and clause mirror the FAR implementation of section 889(a)(1)(A) at FAR subpart 4.21, the provisions at FAR 52.204-24 and 52.204-26, and the clause at FAR 52.204-25, but the subpart addresses the section 1656 prohibition. The section 889(a)(1)(A) prohibition remains implemented in the FAR, except that the DoD-specific procedures for handling representations from offerors and reports from contractors contained in this rule apply to both the section 1656 and 889 prohibitions.

The new DFARS subpart 204.21 notifies contracting officers of the section 1656 prohibition, provides DoD-specific procedures for sections 1656 and 889(a)(1)(A), advises of the waiver process for section 1656, and prescribes the two new solicitation provisions and the contract clause associated with section 1656. To differentiate between the FAR and DFARS prohibitions, this DFARS rule uses the term "covered defense telecommunications equipment or services" instead of "covered telecommunications equipment or services," and provides a new definition of "covered foreign country" for the DFARS coverage of the section 1656 prohibition. These differences reflect the additional requirements in section 1656, which only apply to the DFARS rule.

This interim DFARS rule provides a two-tier representation structure to ensure contracting officers comply with the section 1656 prohibition. The DFARS provision 252.204-7016 requires offerors to represent in the System for Award Management (SAM) at least annually whether they provide covered defense telecommunications equipment or services as part of their offerings to the Government. Only offerors who represent that they do provide covered defense telecommunications equipment or services in the annual representation will be required to provide the offer-by-offer representation in the provision at DFARS 252.204-7017. If an offeror represents in its offer-by-offer representation under 252.204-7017 that it will provide covered defense telecommunications equipment or services as part of its offered products or services to DoD in the performance of any award resulting from the solicitation, then the offeror must provide certain disclosures about the equipment or services. DoD will use the information provided in the disclosure to determine whether the award is prohibited or if a waiver request may be appropriate. Offerors should note that annual representation in SAM is currently provided under the number 252.204-70ZZ, which references the clause at 252.204-YY; in the next release of updates to SAM, the provision will be updated to reflect 252.204-7016 and the clause will be updated to reflect 252.204-7018.

The FAR uses the same two-tier representation structure to implement the section 889(a)(1)(A) prohibition, because it significantly reduces the reporting burden on the public by allowing for an annual representation, in lieu of an offer-by-offer representation, if an offeror does not offer the prohibited products and services to the Government. At FAR 4.2103(a), contracting officers are directed to follow agency procedures when an offeror represents that it will include covered telecommunications equipment or services in its offer, or if the contracting officer has reason to question an offeror's representations.

To implement the section 889(a)(1)(A) prohibition, in part, and the section 1656 prohibition, this interim DFARS rule provides the agency procedures for handling the offeror representations in response to the FAR provisions at 52.204-26, 52.212-3(v), and 52.204-24, and the DFARS provisions at 252.204-7016 and 252.204-7017. The agency procedures require that, if the contracting officer has reason to question a negative representation from an offeror, then the contracting officer is instructed to consult with their requiring activity and legal counsel. If the offeror discloses information about covered telecommunications equipment or services to be included in its offer (as required by paragraph (e) of FAR 52.204-24) or covered defense telecommunications equipment or services (as required by

paragraph (e) of DFARS 252.204-7017), then the contracting officer is required to forward the information to the requiring activity and may not award to the offeror unless the requiring activity advises that they have obtained one of the waivers described at FAR 4.2104 or DFARS 204.2104, as appropriate.

Similar to the clause at FAR 52.204-25, the new DFARS clause 252.204-7018 prohibits contractors from providing equipment, system, or services that use covered defense telecommunications equipment or services as a substantial or essential component of any system, or as a critical technology as a part of any system. However, unlike the FAR clause, this prohibition only applies if the equipment, systems, or services are to carry out the DoD nuclear deterrence or homeland defense missions. The clause requires contractors and subcontractors to report through <https://dibnet.dod.mil> any discovery of covered defense telecommunications equipment or services during the course of contract performance.

FAR 4.2103(b) directs contracting officers to follow agency procedures when a contractor provides the report required under FAR 52.204-25. This interim DFARS rule provides the agency procedures at DFARS 204.2103(b) for handling reports received under FAR 52.204-25 and DFARS 252.204-7018. Specifically, contracting officers are advised that they will be notified by Defense Cyber Crime Center regarding any reports received and

the contracting officer shall consult with the requiring activity on how to proceed with the contract.

This interim rule also adds text in DFARS subpart 212.3, Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items, and DFARS subpart 213.2, Actions at or Below the Micro-purchase Threshold, to address application of section 1656 to commercial items and micro-purchases. This interim rule also amends DFARS 252.204-7007, Alternate A, Annual Representations and Certifications, by updating the list of annual representations and certifications to include the new provision at DFARS 252.204-7016.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule creates two new provisions and a new clause, which apply to contracts at or below the simplified acquisition threshold (SAT) and to commercial items (including commercially available off-the-shelf (COTS) items). The following provisions and clause are created by this interim rule:

- The provision at DFARS 252.204-7016, Covered Defense Telecommunications Equipment or Services-Representation.
- The provision at DFARS 252.204-7017, Prohibition on Acquisition of Covered Defense Telecommunications Equipment or Services-Representation.

- The clause at DFARS 252.204-7018, Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Principal Director, Defense Pricing and Contracting (DPC), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations. DoD has made that determination to apply this rule at or below the simplified acquisition threshold.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including COTS Items

10 U.S.C. 2375 governs the applicability of laws to contracts and subcontracts for the acquisition of commercial items,

including COTS items, and is intended to limit the applicability of laws to contracts and subcontracts for the acquisition of commercial items, including COTS items. 10 U.S.C. 2375 provides that if a provision of law contains criminal or civil penalties, or if the Under Secretary of Defense (Acquisition and Sustainment) (USD(A&S)) makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items. Based on delegations of authority from USD(A&S), the Principal Director, DPC, is the appropriate authority to make this determination. DoD has made that determination to apply this rule to the acquisition of commercial items, including COTS items.

C. Determinations

Consistent with the determinations that DoD has made with regard to the application of the requirements of section 1656 of the NDAA for FY 2018, the two provisions and the clause apply to all solicitations and contracts, including solicitations and contracts below the SAT and to the acquisition of commercial items (including COTS items). It is important to apply the statutory prohibitions to all acquisitions in order to protect the security of nuclear command, control, and communications systems and ballistic missile defense from commercial dependencies on equipment and services from certain companies or

certain foreign countries that are considered to create a risk to our national security.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771.

This rule is not subject to the requirements of E.O. 13771, because the rule is issued with respect to a national security function of the United States.

VI. Regulatory Flexibility Act

This interim rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. An initial

regulatory flexibility analysis has been performed and is summarized as follows:

This interim rule is necessary to implement section 1656 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 and section 889(a)(1)(A) of the NDAA for FY 2019.

The objective of this rule is to increase security of systems and critical technology that is part of any system used to carry out the nuclear deterrence and homeland defense missions of DoD by prohibiting the use of telecommunications equipment or services from certain Chinese entities, including their subsidiaries and affiliates, and from any other entities that the Secretary of Defense reasonably believes to be owned or controlled by or otherwise connected to, the government of the People's Republic of China or the Russian Federation.

To implement the prohibition, this rule creates two new representations and a new reporting requirement. Data from the Federal Procurement Data System (FPDS) and the System for Award Management (SAM) were used to estimate the number of small businesses that will be affected by this rule:

- DFARS provision 252.204-7016, Covered Defense Telecommunications Equipment or Services—Representation, requires each offeror to represent whether it provides covered defense telecommunications equipment or services as a part of its offered products or services to the

Government in the performance of any contract, subcontract, or other contractual instrument. All offerors will be required to complete this representation in the SAM at least annually. As of July 31, 2019, there were 424,927 active registrants in SAM. Approximately 49.78% (211,529) of the active SAM registrants completed the DoD-specific representations and certifications, of which approximately 158,647 (75 percent) are estimated to be registered as a small entity for their primary NAICS code. These small entities would be required to complete the representation under DFARS 252.204-7016.

- DFARS 252.204-7017, Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services—Representation, requires that if an offeror provides an affirmative representation under the DFARS provision 252.204-7016, then that offeror will be required to represent on every solicitation whether it is including covered defense telecommunications equipment or services as a part of its offer in response to the solicitation. If the offeror responds affirmatively, the offeror is required to further disclose information about the covered defense telecommunications equipment or services. According to data in FPDS for fiscal years (FYs) 2016 through 2018, on average DoD makes awards each year to approximately 44,277

unique entities, of which 30,762 are unique small entities. DoD estimates that approximately 3,076 (10 percent) of the unique small entities that receive DoD awards each year may be required to submit the additional offer-by-offer representation. DoD further estimates that of the estimated 3,076 unique small entities that may be required to represent on an offer-by-offer basis, it is estimated that 10 percent (308 unique small entities) may also be required to provide the additional disclosure within the representation.

- DFARS clause 252.204-7018, Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services, requires contractors and subcontractors to report through <https://dibnet.dod.mil>, any discovery of covered defense telecommunications equipment or services that is being used as a substantial or essential component of any system, or as critical technology as part of any system, during the course of contract performance. At this time, there is no way for DoD to estimate how many contractors (small or otherwise) may make such discovery and be required to submit a report; however, DoD expects this number to be relatively low. DoD estimates that approximately 1,538 entities (5 percent of the 30,762

unique small entities that receive DoD awards annually) may be required to submit a report to DIBNET.

The rule does not duplicate, overlap, or conflict with any other Federal rules. This interim rule mirrors implementation of a similar prohibition in the Federal Acquisition Regulation associated with section 889(a)(1)(A) of the FY 2019 NDAA. It is necessary to create additional representations and reporting requirements in the DFARS to implement the section 1656 prohibition for DoD, because the statutory definitions that form the basis of the prohibitions are not the same. Section 889(a)(1)(A) includes certain types of video surveillance equipment in the definition of covered telecommunications equipment or services and defines "covered foreign country" as the People's Republic of China. In section 1656, covered telecommunications equipment and services includes only telecommunications equipment and services (not video surveillance equipment or services); is limited to equipment, system, or services used to carry out the nuclear deterrence and homeland defense missions; and includes Russia in the definition of "covered foreign country."

DoD has been unable to identify any significant alternatives that would accomplish the stated objectives of the statute and minimize any significant economic impact of the rule. Because this rule is a matter of national security, it must apply to

acquisitions that do not exceed the simplified acquisition threshold (including micro-purchases), and acquisitions of commercial items (including commercially available off-the-shelf items). Small entities cannot be exempted from coverage without increased risk to national security. The rule is not expected to have significant economic impact, except on entities that currently or plan to include covered defense telecommunications equipment or services as part of their offered products and services to the Government.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (DFARS Case 2018-D022), in correspondence.

VII. Paperwork Reduction Act

DoD has requested and the Office of Management and Budget has approved an emergency clearance of information collection requirements under the Paperwork Reduction Act (44 U.S.C. chapter 35). DoD is soliciting comments on this emergency clearance 0750-0002, titled "Covered Defense Telecommunications Equipment or Services."

A. *Estimate of Public Reporting Burden.*

The annual public reporting burden is estimated as follows:

DFARS 252.204-7016 Representation

Respondents: 211,529

Responses per respondent: 1.

Total annual responses: 211,529.

Hours per response: 0.08333.

Total Burden Hours: 17,627.

DFARS 252.204-7017 Representation

Respondents: 4,428

Responses per respondent: 45.

Total annual responses: 199,260.

Hours per response: 0.08333.

Total burden hours: 16,604.

DFARS 252.204-7017 Disclosure

Respondents: 443.

Responses per respondent: 45.

Total annual responses: 19,935.

Hours per response: 3.

Total burden hours: 59,805.

DFARS 252.204-7018 Reporting

Respondents: 443.

Responses per respondent: 5.

Total annual responses: 2,215.

Hours per response: 1.5.

Total burden hours: 3,323.

Total Public Responses and Hours

Total annual responses: 432,939.

Total burden hours: 97,359.

B. Request for Comments Regarding Paperwork Burden.

Written comments and recommendations on the information collection, including suggestions for reducing this burden, should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503, or email Jasmeet_K._Seehra@omb.eop.gov, with a copy to the Defense Acquisition Regulations System, Attn: Ms. Heather Kitchens, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060. Comments can be received from 30 to 60 days after the date of this notice, but comments to OMB will be most useful if received by OMB within 30 days after the date of this notice.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the DFARS, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality,

utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Acquisition Regulations System, Attn: Ms. Heather Kitchens, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060, or email *osd.dfars@mail.mil*. Include DFARS Case 2018-D022 in the subject line of the message.

VIII. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. It is critical that the DFARS is immediately revised to include the requirements of this statute for the reason described below.

Section 1656 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115-91) provides that DoD may not procure or obtain, or extend or renew a contract to procure or obtain, any equipment, system, or service to carry out the DoD nuclear deterrence or homeland defense missions that uses

covered defense telecommunications equipment or services as a substantial or essential component of any system or as a critical technology as a part of any system. The section 1656 prohibition is similar to the Government-wide prohibition enacted under section 889 of the NDAA for FY 2019 (Pub. L. 115-232) on the procurement of equipment, systems, or services that use covered telecommunications and video surveillance equipment or services as a substantial or essential component of any system or as a critical technology as a part of any system. The rule also implements DoD-specific procedures associated with the section 889(a)(1)(A) prohibition in the FAR.

While DoD worked closely with GSA, NASA, and the Office of Federal Procurement Policy to develop the framework for these types of prohibitions in the FAR rule implementing section 889, DoD issued internal guidance to establish an approval process for the procurement of certain telecommunications and video surveillance services or equipment. However, codification of this prohibition in the DFARS and the procedures contained in this rule are urgent, because the rule aligns with the rollout of the annual representation from offerors in the System for Award Management. The representations from offerors required by this rule will give the Department the assurances it needs that it is not violating the statutory prohibition and that it can rely on the integrity and security of equipment that is critical

to the DoD nuclear deterrence mission of DoD and the homeland defense mission. It is essential that DoD be able to protect against entities that may intentionally try to deliver products or services that could infiltrate and exploit our military communications and jeopardize our national security network.

DoD's highest priority missions (to include nuclear command, control, and communications, continuity of Government; and ballistic missile defense) must be executed with complete confidence on the security, reliability, and resiliency to operate in a cyber-contested environment. DoD must take immediate action to eliminate vulnerabilities in the supply chain that would undermine the security of our nation. However, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), DoD will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 204, 212, 213, and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 204, 212, 213, and 252 are amended as follows:

1. The authority citation for 48 CFR parts 204, 212, 213, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 204—ADMINISTRATIVE MATTERS

2. Amend section 204.1202 by—

a. Redesignating paragraphs (2)(i) through (xiii) as paragraphs (2)(ii) through (xiv); and

b. Adding paragraph (2)(i).

The addition reads as follows:

204.1202 Solicitation provision.

(2) * * *

(i) 252.204-7016, Covered Defense Telecommunications Equipment or Services—Representation.

3. Add subpart 204.21, consisting of 204.2100 through 204.2105, to read as follows:

SUBPART 204.21—PROHIBITION ON CONTRACTING FOR CERTAIN

TELECOMMUNICATIONS AND VIDEO SURVEILLANCE SERVICES OR EQUIPMENT

Sec.

204.2100 Scope of subpart.

204.2101 Definitions.

204.2102 Prohibition.

204.2103 Procedures.

204.2104 Waivers.

204.2105 Solicitation provisions and contract clause.

SUBPART 204.21—PROHIBITION ON CONTRACTING FOR CERTAIN

TELECOMMUNICATIONS AND VIDEO SURVEILLANCE SERVICES OR EQUIPMENT

204.2100 Scope of subpart.

This subpart implements section 1656 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91) and section 889(a) (1) (A) of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232).

204.2101 Definitions.

As used in this subpart—

Covered defense telecommunications equipment or services means—

(1) Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation, or any subsidiary or affiliate of such entities;

(2) Telecommunications services provided by such entities or using such equipment; or

(3) Telecommunications equipment or services produced or provided by an entity that the Secretary of Defense reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

Covered foreign country means—

(1) The People's Republic of China; or

(2) The Russian Federation.

Covered missions means—

(1) The nuclear deterrence mission of DoD, including with respect to nuclear command, control, and communications,

integrated tactical warning and attack assessment, and continuity of Government; or

(2) The homeland defense mission of DoD, including with respect to ballistic missile defense.

204.2102 Prohibition.

(a) *Prohibited equipment, systems, or services.* In addition to the prohibition at FAR 4.2102(a), unless the covered defense telecommunications equipment or services are subject to a waiver described in 204.2104, the contracting officer shall not procure or obtain, or extend or renew a contract (e.g., exercise an option) to procure or obtain, any equipment, system, or service to carry out covered missions that uses covered defense telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.

204.2103 Procedures.

(a) *Representations.*

(1)(i) If the offeror selects "does not" in response to the provision at DFARS 252.204-7016, the contracting officer may rely on the representation, unless the contracting officer has an independent reason to question the representation. If the contracting officer has a reason to question the "does not" representation in FAR 52.204-26, FAR 52.212-3(v), or 252.204-

7016, then the contracting officer shall consult with the requiring activity and legal counsel.

(ii) If the offeror selects "does" in paragraph (c) of the provision at DFARS 252.204-7016, the offeror must complete the representation at DFARS 252.204-7017.

(2)(i) If the offeror selects "will not" in paragraph (d) of the provision at DFARS 252.204-7017, the contracting officer may rely on the representation, unless the contracting officer has an independent reason to question the representation. If the contracting officer has a reason to question the "will not" representation in FAR 52.204-24 or DFARS 252.204-7017, then the contracting officer shall consult with the requiring activity and legal counsel.

(ii) If an offeror selects "will" in paragraph (d) of the provision at DFARS 252.204-7017, the offeror must provide the information required by paragraph (e) of the provision. When an offeror completes paragraph (e) of either of the provisions at FAR 52.204-24 or DFARS 252.204-7017, the contracting officer shall—

(A) Forward the offeror's representation and disclosure information to the requiring activity; and

(B) Not award to the offeror unless the requiring activity advises—

(1) For equipment, systems, or services that use covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, that a waiver as described at FAR 4.2104 has been granted; or

(2) For equipment, systems, or services to be used to carry out covered missions that use covered defense telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, that a waiver as described at DFARS 204.2104 has been granted.

(b) *Reporting.* If a contractor reports information to <https://dibnet.dod.mil> in accordance with the clause at FAR 52.204-25 or DFARS 252.204-7018, the Defense Cyber Crime Center will notify the contracting officer, who will consult with the requiring activity on how to proceed with the contract.

204.2104 Waivers.

The Secretary of Defense may waive the prohibition in 204.2102(a) on a case-by-case basis for a single, one-year period, if the Secretary—

(a) Determines such waiver to be in the national security interests of the United States; and

(b) Certifies to the Congressional defense committees that—

(1) There are sufficient mitigations in place to guarantee the ability of the Secretary to carry out the covered missions; and

(2) The Secretary is removing the use of covered defense telecommunications equipment or services in carrying out such missions.

204.2105 Solicitation provisions and contract clause.

(a) Use the provision at 252.204-7016, Covered Defense Telecommunications Equipment or Services-Representation, in all solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items and, solicitations for task and delivery orders, basic ordering agreements (BOAs), orders against BOAs, blanket purchase agreements (BPAs), and calls against BPAs.

(b) Use the provision at 252.204-7017, Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services-Representation, in all solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items, and solicitations for task and delivery orders, BOAs, orders against BOAs, BPAs, and calls against BPAs.

(c) Use the clause at 252.204-7018, Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services, in all solicitations and resultant awards, including solicitations and contracts using FAR part 12 procedures for the

acquisition of commercial items, and solicitations and awards for task and delivery orders, BOAs, orders against BOAs, BPAs, and calls against BPAs.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

4. Amend section 212.301 by adding paragraphs (f) (ii) (H), (I), and (J) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(f) * * *

(ii) * * *

(H) Use the provision at 252.204-7016, Covered Defense Telecommunications Equipment or Services—Representation, as prescribed in 204.2105(a), to comply with section 1656 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91).

(I) Use the provision at 252.204-7017, Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services—Representation, as prescribed in 204.2105(b), to comply with section 1656 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91).

(J) Use the clause at 252.204-7018, Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services, as prescribed in 204.2105(c), to comply with section

1656 of the National Defense Authorization Act for Fiscal Year 2018
(Pub. L. 115-91).

PART 213—SIMPLIFIED ACQUISITION PROCEDURES

5. Amend section 213.201 by adding a new paragraph (j) to read
as follows:

213.201 General.

* * * * *

(j) Do not procure or obtain, or extend or renew a contract
to procure or obtain, any equipment, system, or service to carry
out covered missions that use covered defense telecommunications
equipment or services as a substantial or essential component of
any system, or as critical technology as part of any system,
unless a waiver is granted. (See subpart 204.21.)

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. Amend section 252.204-7007 by—

- a. Removing the clause date "JUN 2019" and adding "DEC 2019" in
its place;
- b. Redesignate paragraphs (d)(1)(i) through (viii) as
paragraphs (d)(1)(ii) through (ix), respectively; and
- c. Adding paragraph (d)(1)(i).

The addition reads as follows:

**252.204-7007 Alternate A, Annual Representations and
Certifications.**

* * * * *

(d) (1) * * *

(i) 252.204-7016, Covered Defense Telecommunications Equipment or Services—Representation. Applies to all solicitations.

* * * * *

7. Add sections 252.204-7016, 252.204-7017, and 252.204-7018 to read as follows:

252.204-7016, Covered Defense Telecommunications Equipment or Services—Representation

As prescribed in 204.2105(a), use the following provision:

COVERED DEFENSE TELECOMMUNICATIONS EQUIPMENT OR SERVICES—
REPRESENTATION (DEC 2019)

(a) *Definitions.* As used in this provision, *covered defense telecommunications equipment or services* has the meaning provided in the clause 252.204-7018, Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services.

(b) *Procedures.* The Offeror shall review the list of excluded parties in the System for Award Management (SAM) (<https://www.sam.gov>) for entities excluded from receiving federal awards for “covered defense telecommunications equipment or services”.

(c) *Representation.* The Offeror represents that it [] does, [] does not provide covered defense telecommunications equipment or services as a part of its offered products or services to the Government in the performance of any contract, subcontract, or other contractual instrument.

(End of provision)

252.204-7017 Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services—Representation.

As prescribed in 204.2105(b), use the following provision:

PROHIBITION ON THE ACQUISITION OF COVERED DEFENSE
TELECOMMUNICATIONS EQUIPMENT OR SERVICES—REPRESENTATION (DEC
2019)

The Offeror is not required to complete the representation in this provision if the Offeror has represented in the provision at 252.204-7016, Covered Defense Telecommunications Equipment or Services—Representation, that it “does not provide covered defense telecommunications equipment or services as a part of its offered products or services to the Government in the performance of any contract, subcontract, or other contractual instrument.”

(a) *Definitions.* Covered defense telecommunications equipment or services, covered mission, critical technology, and substantial or essential component, as used in this provision, have the meanings given in the 252.204-7018 clause, Prohibition

on the Acquisition of Covered Defense Telecommunications Equipment or Services, of this solicitation.

(b) *Prohibition.* Section 1656 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91) prohibits agencies from procuring or obtaining, or extending or renewing a contract to procure or obtain, any equipment, system, or service to carry out covered missions that uses covered defense telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.

(c) *Procedures.* The Offeror shall review the list of excluded parties in the System for Award Management (SAM) at <https://www.sam.gov> for entities that are excluded when providing any equipment, system, or service to carry out covered missions that uses covered defense telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless a waiver is granted.

(d) *Representation.* If in its annual representations and certifications in SAM the Offeror has represented in paragraph (c) of the provision at 252.204-7016, Covered Defense Telecommunications Equipment or Services—Representation, that it “does” provide covered defense telecommunications equipment or services as a part of its offered products or services to the

Government in the performance of any contract, subcontract, or other contractual instrument, then the Offeror shall complete the following additional representation:

The Offeror represents that it [] will [] will not provide covered defense telecommunications equipment or services as a part of its offered products or services to DoD in the performance of any award resulting from this solicitation.

(e) *Disclosures.* If the Offeror has represented in paragraph (d) of this provision that it "will provide covered defense telecommunications equipment or services," the Offeror shall provide the following information as part of the offer:

(1) A description of all covered defense telecommunications equipment and services offered (include brand or manufacturer; product, such as model number, original equipment manufacturer (OEM) number, manufacturer part number, or wholesaler number; and item description, as applicable).

(2) An explanation of the proposed use of covered defense telecommunications equipment and services and any factors relevant to determining if such use would be permissible under the prohibition referenced in paragraph (b) of this provision.

(3) For services, the entity providing the covered defense telecommunications services (include entity name, unique entity identifier, and Commercial and Government Entity (CAGE) code, if known).

(4) For equipment, the entity that produced or provided the covered defense telecommunications equipment (include entity name, unique entity identifier, CAGE code, and whether the entity was the OEM or a distributor, if known).

(End of provision)

252.204-7018 Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services.

As prescribed in 204.2105(c), use the following clause:

PROHIBITION ON THE ACQUISITION OF COVERED DEFENSE
TELECOMMUNICATIONS EQUIPMENT OR SERVICES (DEC 2019)

(a) *Definitions.* As used in this clause—

Covered defense telecommunications equipment or services
means—

(1) Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation, or any subsidiary or affiliate of such entities;

(2) Telecommunications services provided by such entities or using such equipment; or

(3) Telecommunications equipment or services produced or provided by an entity that the Secretary of Defense reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

Covered foreign country means—

(1) The People's Republic of China; or

(2) The Russian Federation.

Covered missions means—

(1) The nuclear deterrence mission of DoD, including with respect to nuclear command, control, and communications, integrated tactical warning and attack assessment, and continuity of Government; or

(2) The homeland defense mission of DoD, including with respect to ballistic missile defense.

“Critical technology” means—

(1) Defense articles or defense services included on the United States Munitions List set forth in the International Traffic in Arms Regulations under subchapter M of chapter I of title 22, Code of Federal Regulations;

(2) Items included on the Commerce Control List set forth in Supplement No. 1 to part 774 of the Export Administration Regulations under subchapter C of chapter VII of title 15, Code of Federal Regulations, and controlled—

(i) Pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology; or

(ii) For reasons relating to regional stability or surreptitious listening;

(3) Specially designed and prepared nuclear equipment, parts and components, materials, software, and technology covered by part 810 of title 10, Code of Federal Regulations (relating to assistance to foreign atomic energy activities);

(4) Nuclear facilities, equipment, and material covered by part 110 of title 10, Code of Federal Regulations (relating to export and import of nuclear equipment and material);

(5) Select agents and toxins covered by part 331 of title 7, Code of Federal Regulations, part 121 of title 9 of such Code, or part 73 of title 42 of such Code; or

(6) Emerging and foundational technologies controlled pursuant to section 1758 of the Export Control Reform Act of 2018 (50 U.S.C. 4817).

Substantial or essential component means any component necessary for the proper function or performance of a piece of equipment, system, or service.

(b) *Prohibition.* In accordance with section 1656 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91), the contractor shall not provide to the Government any equipment, system, or service to carry out covered missions that uses covered defense telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless the covered defense telecommunication equipment or services are covered by a

waiver described in Defense Federal Acquisition Regulation Supplement 204.2104.

(c) *Procedures.* The Contractor shall review the list of excluded parties in the System for Award Management (SAM) at <https://www.sam.gov> for entities that are excluded when providing any equipment, system, or service, to carry out covered missions, that uses covered defense telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless a waiver is granted.

(d) *Reporting.*

(1) In the event the Contractor identifies covered defense telecommunications equipment or services used as a substantial or essential component of any system, or as critical technology as part of any system, during contract performance, the Contractor shall report at <https://dibnet.dod.mil> the information in paragraph (d)(2) of this clause.

(2) The Contractor shall report the following information pursuant to paragraph (d)(1) of this clause:

(i) Within one business day from the date of such identification or notification: the contract number; the order number(s), if applicable; supplier name; brand; model number (original equipment manufacturer number, manufacturer part number, or wholesaler number); item description; and any readily

available information about mitigation actions undertaken or recommended.

(ii) Within 10 business days of submitting the information in paragraph (d)(2)(i) of this clause: any further available information about mitigation actions undertaken or recommended. In addition, the Contractor shall describe the efforts it undertook to prevent use or submission of a covered defense telecommunications equipment or services, and any additional efforts that will be incorporated to prevent future use or submission of covered telecommunications equipment or services.

(e) *Subcontracts.* The Contractor shall insert the substance of this clause, including this paragraph (e), in all subcontracts and other contractual instruments, including subcontracts for the acquisition of commercial items.

(End of clause)

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