



**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:** Final rule.

**SUMMARY:** DoD is adopting as final, with changes, 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 use of telecommunications equipment or services from certain Chinese entities 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, as a substantial or essential component of any system, or as a critical technology as a part of any system.

**DATES:** Effective **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Heather Kitchens,  
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**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD published an interim rule in the *Federal Register* at 84 FR 72231 on December 31, 2019, to implement section 1656 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018 (Pub. L. 115-91). This final DFARS rule implements the section 1656 prohibition, partially implements section 889(a)(1)(A) of the NDAA for FY 2019 prohibitions for DoD, and is structured to align with the Federal Acquisition Regulation implementation of the section 889(a)(1)(A) Governmentwide prohibition. The final 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, 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. Three respondents submitted comments on the interim rule.

**II. Discussion and Analysis**

DoD reviewed the public comments in the development of the final rule. Two changes were made to the rule as a result of those comments. A respondent expressed support for the rule.

Some respondents expressed concern over the underlying intent of the statute and recommended changes to the rule text to provide specific examples related to definitions. While DoD recognizes the concerns identified by the respondents, most of the recommendations are not within the scope of the statute. The ability to provide examples within the rule text is limited by the statute, which does not provide examples. A discussion of the public comments is provided as follows:

*A. Summary of Significant Changes From Interim Rule*

There are two changes from the interim rule. The changes amend DFARS clause 252.204-7018, Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services, by extending: (1) the reporting timeframe for the discovery of covered defense telecommunications equipment or services from one day to three days, and (2) the reporting timeframe to submit information about mitigation actions undertaken from ten days to thirty days.

*B. Analysis of Public Comments*

1. Cost to the Public and Government.

*Comment:* A respondent stated that the representation adds administration costs to the public and Government and will make it difficult for small businesses to work with the Government.

*Response:* The interim rule imposed the least amount of burden necessary to implement the statutory requirements by including an annual representation that may be relied upon if a negative

representation (i.e., "does not") is provided in lieu of an offer-by-offer representation.

## 2. Reporting Timelines.

*Comment:* Respondents recommended that the reporting timeline for the discovery of covered defense telecommunications equipment or services be extended beyond one business day and that the reporting timeline for the mitigation actions undertaken by the contractor be extended beyond ten days.

*Response:* Concur. The one-day and ten-day requirements for reporting to DIBNet are extended in the final rule to three days and thirty days, respectively.

## 3. Subcontract Reporting.

*Comment:* Respondents recommended that contractors only report subcontractor's discovery of covered defense telecommunications equipment or services that have "credible information".

*Response:* The clause flow down requires that entities at all tiers report the discovery of covered defense telecommunications equipment or services to the higher tier subcontractor or prime contractor. If the higher tier subcontractor or prime contractor does not report lower tier notifications of the discovery of covered defense telecommunications equipment or services, the higher tier subcontractor and prime contractor are at risk of being in violation of the prohibition.

## 4. Flowdown Requirements.

*Comment:* Respondents recommended that the subcontract flow down to "all subcontracts" instead of "all subcontracts and other contractual instruments".

*Response:* The statutory authority does not provide an exception for vendor agreements or suppliers that are not considered subcontractors; therefore, the flow down to "other contractual instruments" is required by the statute.

#### 5. List of Subsidiaries and Affiliates.

*Comment:* Respondents recommended that DoD provide a publicly available list of the subsidiaries and affiliates against which to evaluate compliance. A respondent recommended that the list of subsidiaries and affiliates be included in DIBNet in coordination with the Office of Federal Contract Compliance Programs and recommended this list use the Department of Commerce list of affiliates and subsidiaries for Huawei. Another respondent recommended DoD provide and update, as necessary, a comprehensive list of all of the subsidiaries and affiliates on SAM.gov.

*Response:* The statute does not give the Secretary of Defense the mission to maintain such a list.

#### 6. Definitions.

##### a. "Covered defense telecommunications equipment or services"

*Comment:* Respondents stated that the definition of "covered defense telecommunications equipment or services" should provide examples of what is "covered defense telecommunications equipment or services".

*Response:* The text of the rule aligns with the statutory language. These terms are not defined in the statute.

b. "Defense"

*Comment:* A respondent recommended defining the term "defense".

*Response:* The term "defense" is used in the term "covered defense telecommunications equipment or services" to clarify that the covered telecommunications equipment or services prohibited by section 1656 are only prohibited for DoD, therefore, a definition is not necessary.

c. "Substantial or essential component"

*Comment:* A respondent stated that there should be a new definition of "substantial or essential component" or that examples of what is and is not a "substantial or essential component" should be provided.

*Response:* The text of the rule aligns with the statutory language. These terms are not defined in the statute.

d. "Critical technologies"

*Comment:* A respondent stated that the definition of "critical technology" should include the list of 27 emerging and foundational technologies developed pursuant to section 1758 of the Export Control Reform Act of 2018.

*Response:* To ensure consistency in the event of future changes to the list, the technologies are referenced by a citation, within the definition, to section 1758 of the Export Control Reform Act of 2018.

e. "Owned or controlled by"

*Comment:* A respondent stated that there should be clarifications or definitions provided for "an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country".

*Response:* The text of the rule aligns with the statutory language, which does not clarify these terms.

f. "Covered missions"

*Comment:* A respondent stated that the prescription is not limited to covered missions and that examples of covered missions should be provided.

*Response:* The prescription is not limited to covered missions as a matter of national security. Covered missions include the examples provided in the statutory definition. The statute does not provide additional examples of covered missions.

g. "Equipment", "produce", and "component"

*Comment:* A respondent stated that the terms "equipment," "produce," and "component" should be more clearly defined, consistent with definitions existing in current regulations (such as export control regulations in ITAR, etc.).

*Response:* The text of the rule aligns with the statutory language. These terms are not defined in the statute.

7. Waiver Process.

*Comment:* A respondent stated that there should be clarification for the public on the waiver process.

*Response:* The waiver process is an internal Government operating procedure. By submission of an offer containing the prohibited equipment or services, an entity is by default requesting a waiver. Waivers are a limited exception to the prohibition, and questions regarding the waiver process may be directed to the contracting officer. The contracting officer, working with the requiring activity, will review the representations and disclosures and make a determination to process the formal waiver. At that time, a contracting officer will request the additional information required by the statute for processing a waiver; this does not preclude an offeror from providing this information with its offer. The time to process the information for a waiver is prior to award because the award is prohibited unless and until a waiver is granted.

#### 8. DIBNet Process.

*Comment:* A respondent recommended that the DIBNet homepage clarify how DIBNet would work and who has access to the reported data such as contractors or agencies.

*Response:* DIBNet provides information on its website to clarify who has access to the data. The data is shared with the contracting officer so the contracting officer may work with legal counsel to enforce contractual remedies for violating the terms of the contract.

#### 9. Risk Mitigation Process.

*Comment:* A respondent recommended that DoD provide the steps to mitigate supply chain risk related to the requirement for the



contractor to provide additional information about mitigation actions undertaken or recommended after the presence of covered defense telecommunications equipment or services is identified.

*Response:* The steps to mitigate supply chain risk are unique to the contractor, and the contractor is required to provide the mitigation actions undertaken.

#### 10. Consistent Application.

*Comment:* A respondent stated that there should be consistent inter-department interpretations and that the term "use" should be clarified and used in the same way in all rules.

*Response:* The text of the rule aligns with the statutory language. This term is not defined in the statute. The FAR and DFARS rules on the section 889 prohibition are intended to be complementary.

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

#### *A. New Solicitation Provisions and Contract Clause*

The interim rule added two new solicitation provisions and a new contract clause as follows:

- 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.

#### *B. Determinations*

Consistent with the determinations that DoD made on December 19, 2019, with regard to the application of the requirements of section 1656 of the NDAA for FY 2018, the two provisions and the clause listed above apply to all solicitations and contracts, including solicitations and contracts below the simplified acquisition threshold and for the acquisition of commercial items (including commercially available off-the-shelf 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 final rule will 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.* A final regulatory flexibility analysis has been performed and is summarized as follows:

DoD is converting to a final rule, with two minor changes, an interim rule that amended the DFARS to implement section 1656 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018. This rule also partially implements section 889(a)(1)(A) of the NDAA for FY 2019 prohibitions for DoD, and is structured to align with the Federal Acquisition Regulation implementation of the section 889(a)(1)(A) Governmentwide prohibition. The changes to the interim rule do not change the economic impact on the public. The changes provide additional time to complete the reporting requirements required by the clause at DFARS 252.204-7018, Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services.

The objective of this rule is to increase security of systems and critical technology which 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, 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. Section 1656 of the NDAA for FY 2018 and section 889(a)(1)(A) of the NDAA for FY 2019 are the legal basis for the rule.

There were no public comments in response to the initial regulatory flexibility analysis.

This rule includes a burden for two representations and a reporting requirement. Data from the Federal Procurement Data System (FPDS) for Fiscal Year (FY) 2016 through FY 2018 and data from the System for Award Management (SAM) was used to estimate the number of small businesses affected by this rule.

The provision at DFARS 252.204-7016, Covered Defense Telecommunications Equipment or Services—Representation, requires the offeror to represent whether it does or 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. This provision is estimated to affect 145,955 unique small businesses, which is the estimated number

of unique small businesses required to complete DoD representations in SAM.

As of July 15, 2019, there were 424,927 active registrants in SAM for contracts. DoD extrapolated the estimated number of SAM registrants that are required to fill out DoD representations to be 211,529 unique entities by dividing the average number of DoD unique awardees in the Federal Procurement Data System (FPDS) by the average number of Federal unique awardees in FPDS for FY 2016 through FY 2018 to obtain a percentage of 49.78 percent of all Federal unique awardees that receive DoD awards. Applying 49.78 percent to the total number of active SAM registrants results in 211,529 estimated respondents. To further calculate the number of estimated respondents that are small businesses, this analysis multiplies the 211,529 estimated respondents for DoD by 69 percent, which is the percentage of unique DoD awardees on average for FY 2016 through FY 2018 in FPDS that are small businesses, to estimate 145,955 unique small entities impacted by DFARS 252.204-7016.

The provision at DFARS 252.204-7017, Prohibition on Acquisition of Covered Defense Telecommunications Equipment or Services-Representation, requires that if an offeror provides an affirmative representation under the provision at 252.204-7016, Covered Defense Telecommunications Equipment or Services-Representation, that offeror is required to represent whether it will or will not provide under the contract, covered defense telecommunications equipment or services. If the offeror

responds affirmatively, the offeror is required to further disclose information about the covered defense telecommunications equipment or services.

DFARS provision 252.204-7017 is estimated to affect a total of only 3,054 unique small business entities. Although DoD has no factual basis on which to estimate at this time what percentage of offerors will respond affirmatively to this representation, to be conservative DoD estimates 10 percent of the 44,277 DoD unique awardees on average in FPDS for FY 2016 through FY 2018 (4,428) will respond affirmatively, which triggers the disclosure requirement of the representation. Applying the estimated 69 percent factor for small businesses to the estimate of 4,428 results in 3,054. To calculate the additional disclosure impact within 252.204-7017, DoD estimates 10 percent of the offerors filling out this representation will have to complete the additional disclosure (443 total, of which 306 are small entities).

The clause at DFARS 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 telecommunications equipment or services during the course of contract performance. Although DoD has no factual basis on which to estimate at this time what percentage of awardees will be required to submit a report, the clause is estimated to affect 443 unique entities, which is 1 percent of the number of

unique entities that received DoD awards on average for FY 2016 through FY 2018 in FPDS (44,277). Of the 443 impacted entities 306 entities (69 percent) are estimated to be DoD unique small entities.

Because of the nature of the prohibition enacted by section 1656, it is not possible to establish different compliance or reporting requirements or timetables that take into account the resources available to small entities or to exempt small entities from coverage of the rule, or any part thereof. DoD was unable to identify any alternatives that would reduce the burden on small entities and still meet the objectives of section 1656.

#### **VII. Paperwork Reduction Act**

The rule contains information collection requirements that have been approved by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). This information collection requirement has been assigned OMB Control Number 0750-0002, titled: Covered Defense Telecommunications Equipment or Services.

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

Government procurement.

**Jennifer D. Johnson,**

*Regulatory Control Officer,*

*Defense Acquisition Regulations System.*

Accordingly, the interim rule amending 48 CFR parts 204, 212, 213, and 252 published at 84 FR 72231 on December 31, 2019, is adopted as a final rule with the following changes.

**PART 252-SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

1. The authority citation for part 252 continues to read as follows:

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

**252.204-7018 [Amended]**

2. Amend section 252.204-7018 by-

a. Removing the clause date of "(DEC 2019)" and adding "(JAN 2021)" in its place;

b. In paragraph (d)(2)(i), removing "one business day" and adding "3 business days" in its place; and

c. In paragraph (d)(2)(ii), removing "10 business days" and adding "30 business days" in its place.

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