Subpart 4.21 Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment

Parent topic: Part 4 - Administrative and Information Matters

4.2100 Scope of subpart.

This subpart implements paragraphs (a)(1)(A) and (a)(1)(B) of section 889 of the John S. McCain *National Defense* Authorization Act for Fiscal Year 2019 (Pub. L. 115-232).

4.2101 Definitions.

As used in this subpart—

Backhaul means intermediate links between the core network, or backbone network, and the small subnetworks at the edge of the network (*e.g.*, connecting cell phones/towers to the core telephone network). Backhaul can be wireless (*e.g.*, microwave) or wired (*e.g.*, fiber optic, coaxial cable, Ethernet).

Covered foreign country means The People's Republic of China.

Covered 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) For the purpose of public safety, security of Government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities);

(3) Telecommunications or video surveillance services provided by such entities or using such equipment; or

(4) Telecommunications or video surveillance equipment or services produced or provided by an entity 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 a *covered foreign country*.

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).

Interconnection arrangements means arrangements governing the physical connection of two or more networks to allow the use of another's network to hand off traffic where it is ultimately delivered (*e.g.*, connection of a customer of telephone provider A to a customer of telephone company B) or sharing data and other information resources.

Reasonable inquiry means an inquiry designed to uncover any information in the entity's possession about the identity of the producer or provider of *covered telecommunications equipment or services* used by the entity that excludes the need to include an internal or third-party audit.

Roaming means cellular communications services (*e.g.*, voice, video, data) received from a visited network when unable to connect to the facilities of the home network either because signal coverage is too weak or because traffic is too high.

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

4.2102 Prohibition.

(a) *Prohibited equipment, systems, or services*.

(1) On or after August 13, 2019, agencies are prohibited from 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 *critical technology* as part of any system, unless an exception at paragraph (b) of this section applies or the *covered telecommunications equipment or services* are covered by a waiver described in 4.2104.

(2) On or after August 13, 2020, agencies are prohibited from entering into a contract, or extending

or renewing a contract, with an entity that uses 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, unless an exception at paragraph (b) of this section applies or the *covered telecommunications equipment or services* are covered by a waiver described in 4.2104. This prohibition applies to the use of *covered telecommunications equipment or services*, regardless of whether that use is in performance of work under a Federal contract.

(b) *Exceptions*. This subpart does not prohibit agencies from procuring or contractors from providing-

(1) A service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or

(2) Telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.

(c) *Contracting Officers*. Unless an exception at paragraph (b) of this section applies or the covered telecommunications equipment or service is covered by a waiver described in 4.2104, *Contracting Officers shall* not—

(1) Procure or obtain, or extend or renew a contract (*e.g.*, exercise an *option*) 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; or

(2) Enter into a contract, or extend or renew a contract, with an entity that uses 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.

(d) *Recording prohibitions in the System for Award Management (SAM).*

(1) Prohibitions on purchases of *products* or services produced or provided by entities identified in paragraphs (1) and (2) of the definition of "*covered telecommunications equipment or services*" (including known subsidiaries or *affiliates*) at 4.2101 will be recorded in SAM (see 9.404).

(2) Prohibitions on purchases of *products* or services produced or provided by entities identified pursuant to paragraph (4) of the definition of "*covered telecommunications equipment or services*" (including known subsidiaries or *affiliates*) at 4.2101 are recorded by the Department of Defense in SAM (see 9.404).

4.2103 Procedures.

(a) *Representations.*

(1)

(i) If the *offeror* selects "does not" in paragraphs (c)(1) and/or (c)(2) of the provision at 52.204-26 or in paragraphs (v)(2)(i) and/or (v)(2)(ii) of the provision at 52.212-3, the *contracting officer may* rely on the "does not" representation(s), unless the *contracting officer* has reason to question the representation. If the *contracting officer* has a reason to question the representation, the *contracting officer shall* follow agency procedures.

(ii) If the *offeror* selects "does" in paragraph (c)(1) of the provision at 52.204-26 or paragraph (v)(2)(i) of the provision at 52.212-3, the *offeror* will be required to complete the representation in paragraph (d)(1) of the provision at 52.204-24.

(iii) If the *offeror* selects "does" in paragraph (c)(2) of the provision at 52.204-26 or paragraph (v)(2)(ii) of the provision at 52.212-3, the *offeror* will be required to complete the representation in paragraph (d)(2) of the provision at 52.204-24.

(2)

(i) If the *offeror* selects "will not" in paragraph (d)(1) of the provision at 52.204-24 or "does not" in paragraph (d)(2) of the provision at 52.204-24, the *contracting officer may* rely on the representations, unless the *contracting officer* has reason to question the representations. If the *contracting officer* has a reason to question the representations, the *contracting officer shall* follow agency procedures.

(ii) If an *offeror* selects "will" in paragraph (d)(1) of the provision at 52.204-24, the *offeror must* provide the information required by paragraph (e)(1) of the provision at 52.204-24, and the *contracting officer shall* follow agency procedures.

(iii) If an *offeror* selects "does" in paragraph (d)(2) of the provision at 52.204-24, the *offeror must* complete the disclosure at paragraph (e)(2) of the provision at 52.204-24, and the *contracting officer shall* follow agency procedures.

(b) *Reporting*. If a contractor provides a report pursuant to paragraph (d) of the clause at 52.204-25, Prohibition on *Contracting* for Certain Telecommunications and Video Surveillance Services or Equipment, follow agency procedures.

4.2104 Waivers.

(a) *Executive agencies*. The head of an *executive agency may*, on a one-time basis, waive the prohibition at 4.2102(a) with respect to a Government entity (*e.g.*, requirements office, *contracting office*) that requests such a waiver.

(1) *Waiver.* The waiver *may* be provided, for a period not to extend beyond August 13, 2021 for the prohibition at 4.2102(a)(1), or beyond August 13, 2022 for the prohibition at 4.2102(a)(2), if the Government official, on behalf of the entity, seeking the waiver submits to the head of the *executive agency*–

(i) A compelling justification for the additional time to implement the requirements under 4.2102(a), as determined by the head of the *executive agency*; and

(ii) A full and complete laydown or description of the presences of covered telecommunications or video surveillance equipment or services in the relevant supply chain and a phase-out plan to eliminate such covered telecommunications or video surveillance equipment or services from the relevant systems.

(2) *Executive agency waiver requirements for the prohibition at 4.2102(a)(2).* Before the head of an *executive agency* can grant a waiver to the prohibition at 4.2102(a)(2), the agency *must*—

(i) Have designated a senior agency official for supply chain risk management, responsible for ensuring the agency effectively carries out the supply chain risk management functions and responsibilities described in law, regulation, and policy;

(ii) Establish participation in an information-sharing environment when and as required by the Federal *Acquisition* Security Council (FASC) to facilitate interagency sharing of relevant *acquisition* supply chain risk information;

(iii) Notify and consult with the Office of the Director of National Intelligence (ODNI) on the waiver request using ODNI guidance, briefings, best practices, or direct inquiry, as appropriate; and

(iv) Notify the ODNI and the FASC 15 days prior to granting the waiver that it intends to grant the waiver.

(3) *Waivers for emergency acquisitions.*

(i) In the case of an *emergency*, including a declaration of *major disaster*, in which prior notice and consultation with the ODNI and prior notice to the FASC is impracticable and would severely jeopardize performance of mission-critical functions, the head of an agency *may* grant a waiver without meeting the notice and consultation requirements under 4.2104(a)(2)(iii) and 4.2104(a)(2)(iv) to enable effective mission critical functions or *emergency* response and recovery.

(ii) In the case of a waiver granted in response to an *emergency*, the head of an agency granting the waiver *must—*

(A) Make a determination that the notice and consultation requirements are impracticable due to an *emergency* condition; and

(B) Within 30 days of award, notify the ODNI and the FASC of the waiver issued under *emergency* conditions in addition to the waiver notice to Congress under 4.2104(a)(4).

(4) *Waiver notice.*

(i) For waivers to the prohibition at 4.2102(a)(1), the head of the *executive agency shall*, not later than 30 days after approval—

(A) Submit in accordance with agency procedures to the appropriate congressional committees the full and complete laydown of the presences of covered telecommunications or video surveillance equipment or services in the relevant supply chain; and

(B) The phase-out plan to eliminate such covered telecommunications or video surveillance equipment or services from the relevant systems.

(ii) For waivers to the prohibition at 4.2102(a)(2), the head of the *executive agency shall*, not later than 30 days after approval submit in accordance with agency procedures to the appropriate congressional committees—

(A) An attestation by the agency that granting of the waiver would not, to the agency's knowledge having conducted the necessary due diligence as directed by statute and regulation, present a material increase in risk to U.S. national security;

(B) The full and complete laydown of the presences of covered telecommunications or video surveillance equipment or services in the relevant supply chain, to include a description of each

category of covered technology equipment or services discovered after a *reasonable inquiry*, as well as each category of equipment, system, or service used by the entity in which such covered technology is found after conducting a *reasonable inquiry*; and

(C) The phase-out plan to eliminate such covered telecommunications or video surveillance equipment or services from the relevant systems.

(b) *Director of National Intelligence*. The Director of National Intelligence *may* provide a waiver if the Director determines the waiver is in the national security interests of the *United States*.

4.2105 Solicitation provisions and contract clause.

(a) The *contracting officer shall* insert the provision at 52.204-24, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment–

(1) In all *solicitations* for contracts; and

(2) Under indefinite delivery contracts, in all notices of intent to place an order, or *solicitations* for an order (*e.g.*, subpart 8.4 and 16.505).

(b) The *contracting officer shall* insert the clause at 52.204-25, Prohibition on *Contracting* for Certain Telecommunications and Video Surveillance Services or Equipment, in all *solicitations* and contracts.

(c) The *contracting officer shall* insert the provision at 52.204-26, *Covered Telecommunications Equipment or Services*-Representation, in all *solicitations*.