



**USAID**  
FROM THE AMERICAN PEOPLE

**U.S. Agency for International Development  
Section 889 Task Force  
Section 889 Frequently Asked Questions (FAQs)  
for Contractors and Recipients of USAID awards**

***Published on 9/18/2020  
Recent Revisions are Highlighted***

*Published on 9/18/2020*

## **Table of Contents**

[Introduction](#)

[1.0 General Questions](#)

[2.0 Acquisition](#)

[3.0 Assistance](#)

***Published on 9/18/2020***

## **Introduction**

This document is the compilation of the many questions we have received. Please review and see if any of the questions apply to your scenario.

### **1.0 General Questions**

**Question:**

What are covered telecommunication equipment or services?

**Answer (8/26/2020):**

“Covered telecommunication equipment or services” as defined in Pub. L. 115-232, Section 889, means any of the following:

- (i) Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities).
- (ii) 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).
- (iii) Telecommunications or video surveillance services provided by such entities or using such equipment.
- (iv) Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of the 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.

**Question:**

What is a covered foreign country?

**Answer (8/26/2020):**

Pub. L. 115-232, Section 889 defines a covered foreign country as the People’s Republic of China.

**Question:**

Does the USG have a working list of consumer-level IT equipment that would be prohibited?

**Answer (Revised 9/18/2020):**

As of now, there is not a list of all consumer IT equipment that would be prohibited. The Department of Commerce’s Bureau of Industry and Security maintains a list of restricted entities that you might wish to consult.

**Question:**

In light of the statute, will USAID review established NICRAs to carve out an estimate or allocation of costs attributed to prohibitive technology in the future, as indirect costs?

**Answer (8/12/2020):**

## ***Published on 9/18/2020***

Negotiation of NICRAs will be done in accordance with the FAR cost principles for acquisition awards; and 2 CFR 200 cost principles for assistance awards.

### **Question:**

Some 70% of missions in Africa and 65% of missions in Asia are apparently relying on service providers with prohibited equipment. Would you please disclose those missions, and are you pursuing country level waivers for those countries?

### **Answer (9/11/2020):**

The CIO survey assessed whether the specific internet and telecommunications service providers that our Missions contract with use prohibited technology. This was an initial data call, and the data has not yet been validated. We are not able to share the survey and its results outside of USAID at this time. It is our understanding that data on national level telecommunications and internet service providers can be obtained from a variety of commercial data providers. Implementing partners are strongly encouraged to conduct their own due diligence to support the representations required under FAR 52.204-24. The law and regulation do not allow for blanket waivers.

### **Question:**

Who pays the cost for mitigations/refresh of covered technology?

### **Answer (9/18/2020)**

Contractors/grantees may independently make a unilateral decision to replace covered technology at their own expense. Pursuant to the statutory requirements of Section 889 and the implementing regulations, USAID cannot contract with an entity that uses covered technology and cannot pay a recipient for covered technology. Contractors using covered technology must disclose such use in the FAR Representation at FAR 52.204-24 when submitting a proposal or signing a modification to extend an existing contract or exercise an option, which would trigger the need for a waiver before the award or modification can be executed by the Contracting Officer. As such, it is in the best interest of the contractor to replace covered technology, if it wants to continue to receive U.S. government contracts.

## **2.0 Acquisition**

### **Question:**

Does the prohibition on using covered telecommunications equipment or services apply to the award or to the contractor? Is it possible that a company could use covered telecommunications equipment or services for some acquisition activities and not others?

### **Answer: (8/24/2020)**

While the representation must be obtained for each offer, the prohibition applies to the entity. This prohibition applies to the entity's use of covered telecommunications equipment or services anywhere in its operations worldwide, regardless of whether that use is in performance of work under a Federal contract. On or after August 13, 2020, the offeror/contractor will be required to submit the representation at FAR 52.204-24 (not any other informal statement) stating whether they do or do not use covered technology or services. If the offeror/contractor represents that it does use covered technology or services, the CO is prohibited from proceeding with the award unless an exception applies or a waiver is granted. The CO may rely on the representation, unless the CO has

## ***Published on 9/18/2020***

reason to question the representation.

### **Question:**

If contractors have to confirm whether “covered telecommunications” are used in their supply chain, why would the provisions not flow down to subcontractors to make the same affirmation? What steps are contractors expected to take to make those assurances to USAID?

### **Answer (8/24/2020):**

The FAR does not require subcontractors to submit a representation but FAR 52.204-25 requires the prime contractor to verify the use of prohibited supplies/services in their supply chains worldwide.

### **Question:**

Can the Agency more specifically define what constitutes “substantial or essential components” or “critical technology” of “any system” as is cited under the prohibition of Section 889 of the NDAA for “covered telecommunications”?

### **Answer (8/11/2020):**

Per FAR 4.21, Substantial or essential component means “any component necessary for the proper function or performance of a piece of equipment, system, or service.” This determination must be made by the contractor when making the representation at FAR 52.204-24.

### **Question:**

Is USAID considering a certification process comparable to the TIP certifications, where implementing partners certify that they are not using “covered telecommunications” globally? Is this what is envisioned with annual SAM certifications?

### **Answer (8/12/2020):**

Currently, FAR Representation at 52.204-24 must be submitted by the offeror/contractor with each proposal or modification to extend or renew the period of performance or exercise an option. There is a separate FAR case that will incorporate the Section 889 representation (FAR 52.204-26) into the annual certifications in beta.SAM.

### **Question:**

How does Section 889 affect new and existing IDIQs?

### **Answer (8/07/2020):**

The prohibition applies to all new awards (including IDIQs) made on or after August 13, 2020. Additionally, current IDIQ contracts must be modified to incorporate the FAR clause 52.204-25 prior to any task orders being awarded on or after August 13, 2020. The CO must obtain the representation in FAR 52.204-24 from the offeror prior to the award of any new IDIQ and also prior to award of any TOs awarded on or after August 13, 2020. If the offeror states that it uses the covered supplies or services, the award cannot be made unless a waiver is approved.

### **Question:**

How far in the supply chain do the restrictions of Section 889 apply? For example, most international companies have offices in China and, as a result, would use covered technology. So could contractors procure software from a vendor who uses covered technology such as internet services from their office in China? Or could contractors work with any service/good provider that has business in China?

***Published on 9/18/2020***

**Answer (8/07/2020):**

The prohibition applies to the prime contractor's use of the prohibited supplies or services whether the use is related to USG awards or not. For example, if offeror A is using the prohibited services (Internet services) in country X to perform an existing USG award and they are now submitting an offer for a contract in Country Y that does not use prohibited technology, and they provide an affirmative representation in 52.204-24, the CO cannot make an award to that organization without a waiver even though they will not be using the prohibited technology in Country Y.

**Question:**

Do the NDAA restrictions apply to the entire supply chain of telecommunications and ICT services of every contractor?

**Answer (8/10/2020):**

Yes. The FAR requires that the contractor/offeror make a reasonable inquiry as to whether it uses "covered telecommunications" equipment or services. This includes a relationship with any subcontractor or supplier in which the prime contractor has a Federal contract and uses the supplier or subcontractor's "covered telecommunications equipment or services" regardless of whether that usage is in performance of work under a Federal contract. "Reasonable inquiry" is defined "as 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."

**Question:**

If the restrictions do apply to USAID contractors' telecommunications supply chains, has State or DoD or any other USG agency been collecting information on telecoms providers in countries in which there is a U.S. Embassy or USG-funded programs, to develop a list of the providers we can use and which ones we can't? And if so, can that list be shared with contractors?

**Answer (8/27/2020):**

The prohibition applies to the prime contractor's use of covered equipment or services in its operations worldwide. Since the prohibition applies to the prime contractor's use of prohibited technology, offerors (contractors) must determine how they will comply with these requirements. USAID does not have a list of providers contractors can use; contractors must conduct a reasonable inquiry to determine if they use covered technology or services anywhere in their operations worldwide. Currently, USAID has a time-limited and context specific waiver limited to contracting activities for communications and internet services that would normally be prohibited under Section 889(a)(1)(B). However, regardless of such a waiver, offerors/contractors must complete the offer-by-offer representation in FAR 52.204-24 Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment of the solicitation to indicate whether they use covered equipment or services as described in FAR 4.2102(a)(2). COs will require contractors to submit the representation prior to awarding a new contract or issuing modifications to extend or exercise an option for both contracts and Task Orders (TOs). The submission of an offer that includes the Offeror's representation at paragraph (d)(2) of the provision at FAR 52.204-24 that it "does" use covered telecommunications equipment or services will require that as part of the disclosure requirements the offerors/contractors

## ***Published on 9/18/2020***

must describe the circumstances (including in-country circumstances) where the Offeror/Contractor uses covered technology. This must include an identification of whether the covered technology is provided by communications service-providers, such as internet, cell phone, landline or others; and the specific country where it is used. The disclosure must also describe the presence of any other covered technology, whether it be in any internal systems or elsewhere in the supply chain. When considering the request for a waiver, the Agency will determine whether any existing waiver is applicable and whether any additional waiver is required. If USAID decides that any additional waiver is required, the CO will request the offeror/contractor to provide the additional information as described in the solicitation provision.

### **Question:**

Do items already in use have to be checked for compliance with NDAA Section 889? For example, we have a list of approved HW and SW for enterprise and OU-specific uses. Do we need to go back to these vendors and ensure that they are compliant with NDAA Section 889? Please note that approved SW and/or HW does not necessarily have any contract associated with it...maybe just a license agreement, which no one has reviewed and approved from a legal perspective.

### **Answer (8/12/2020):**

No. The prohibition applies to all new contracts, and any extensions and options. Otherwise it doesn't apply to existing awards. However, an entity's current use of prohibited equipment or services, regardless of whether under a USG award or not, will trigger the need for an affirmative representation for new awards, extensions and options. For example, an entity that's using the prohibited equipment or services in country X must disclose such covered technology in its representation at FAR 52.204-24 and is ineligible for a new award, extension or an option under a contract in country Y without a waiver.

### **Question:**

What about mobile money? Our activities run on it in Africa. Even if the payment systems themselves miraculously don't have covered technology in them, the payment companies are often owned or otherwise affiliated with service providers. And doing the transactions requires a cell phone and registered, active SIM card.

### **Answer (8/11/2020):**

For contracts the prohibition applies to entering into a contract (or extend or renew a contract) with an entity that uses the prohibited supplies or services. Any entity that uses any of the prohibited equipment or services at any level in its operations worldwide would not be eligible for the award without a waiver. Prior to entering into a contract, extending or reviewing an existing contract or exercising an option on or after August 13, 2020, the CO must receive a representation from the contractor at FAR 52.204-24. If the offeror/contractor represents that it is not using covered technology, the CO may proceed with the award/modification; however, if the offeror/contractor represents that it is using covered technology the CO must not proceed with the award/modification unless an exception applies, or a waiver has been granted.

## ***Published on 9/18/2020***

### **Question:**

Do software (SW) vendors to USAID have to satisfy NDAA Section 889? That is, if a contractor orders software X from vendor Y, does vendor Y have to meet NDAA Section 889?

### **Answer (8/25/2020):**

For the direct purchase of IT by USAID, a vendor must satisfy both the requirement that the equipment provided to USAID is not using the covered supply (the prohibition was effective August 13, 2019), and that the vendor that is selling the equipment is also not using it for their own business (the prohibition in effect on August 13, 2020). The burden is on the prime contractor to meet both standards, which may include not buying the software X from the vendor Y.

### **Question:**

Does a simple incremental funding or deobligation of funds from a contract trigger the 889 representations?

### **Answer (8/07/2020):**

No. The prohibition applies to new awards, extension of the period of performance extensions and when exercising an option. It is not triggered when the only purpose of a modification is to add or remove funds.

### **Question:**

Do the NDAA restrictions apply to subcontracts, including purchase orders under the simplified acquisition threshold, or only prime contracts?

### **Answer (8/10/2020):**

For contracts, Section 889 of the NDAA applies to the prime contracts that USAID executes. The FAR requires the prohibition under section 889(a)(1)(A) to continue to flow down to all subcontractors; however, section 889(a)(1)(B) will not flow down because the prime contractor is the only "entity" that the agency "enters into a contract" with, and an agency does not directly "enter into a contract" with any subcontractor, at any tier.

### **Question**

What duties do COs have to verify whether implementing partners' affirmations surrounding use of the "covered telecommunications" under the statute are true?

### **Answer (8/11/2020):**

COs are not expected to verify an offeror's/contractor's representation unless they have a reason to question it.

### **Question:**

What if a contractor is compliant at post but is using "covered telecommunication" under a USAID activity in another country? Is that a violation of Section 889 of the NDAA statute? What duties do COs (or USAID) have to confirm this?

### **Answer (8/12/2020):**

The prohibition applies to an entity's use of covered equipment or services in its operations worldwide. For example, if offeror A is using the prohibited services (Internet services) in country X to perform an existing USG award and they are now submitting an offer for a contract in Country Y that does not use

## ***Published on 9/18/2020***

prohibited technology, and they provide an affirmative representation in 52.204-24, the CO cannot make an award to that organization without a waiver even though they will not be using the prohibited technology in Country Y. COs must include the representation in all solicitations for awards issued on or after August 13.

### **Question:**

As a contractor, we are implementing multiple projects in which office leases include ISPs. Many contractors also engage hotel and conference facilities that include internet connectivity as part of the subcontract. We also note that the Department of State's recently-issued FAQs say that "the procurement of hotel rooms is not considered to be paying for the covered telecommunications equipment and video surveillance services." We are assuring that telecommunications equipment used on the project office premises are compliant with the FAR clauses. However, when the landlord is our service provider, the ISP becomes the third party providing backhaul and interconnection arrangements. We believe these arrangements are appropriate exceptions provided for in 52.204-24(b)(1) and 52.204-25(c)(1). We ask for confirmation from M/OAA as the requirement comes into effect.

### **Answer (9/04/2020):**

Regarding the exceptions at FAR 52.204-24(b)(1) and FAR 52.204-25(c)(1), the FRN provides, "the exception allowing for procurement of services that connect to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements applies only to a Government agency that is contracting with an entity to provide a service. Therefore, the exception does not apply to a contractor's use of a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements. As a result, the Federal Government is prohibited from contracting with a contractor that uses covered telecommunications equipment or services to obtain backhaul services from an internet service provider, unless a waiver is granted. For further explanation, you might consider submitting a comment to the interim FAR rule on or before September 14, 2020.

Instructions for submitting comments may be found at:

<https://www.federalregister.gov/documents/2020/07/14/2020-15293/federal-acquisition-regulation-prohibition-on-contracting-with-entities-using-certain#p-13>.

### **Question:**

FAR 52.204-25 provides perhaps the most comprehensive interpretation of Section 889. In essence, it states that contractors are prohibited from providing "to the Government" any equipment, systems or service that includes prohibited technology "as an essential or substantial component of a system." It defines substantial or essential as any "component necessary for the proper function or performance of a piece of equipment, system, or service." Contractors or grantees that procure services from an ISP, Telco or other utility (or any other incidental service provider) (collectively "incidental services providers") for their own use and not as part of a USG prime contract deliverable or prime grant objective are not providing the ISP, Telco or utility services to the Government. Incidental services are not a "component of a system" or a component of the services the Contractor or Grantee provides the government. Incidental services also are not a substantial or essential component of services provided to the Government.

### **Answer: (09/04/2020)**

## ***Published on 9/18/2020***

FAR 52.204-25(a) prohibits the government from procuring 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. This applies to the government's direct procurement of prohibited equipment, systems or services. It is unrelated to **contractor's use** of third party ISP services which is covered under Section 889(a)(1)(B), [FAR 52-204-25(b)]. The prohibition applies to the contractor's use of covered technology in its worldwide operations, even if the service is not a deliverable, objective or requirement under the federal contract award.

### **Question:**

We would like to know whether the mass mods for IDIQs and BPAs that USAID issued to incorporate the relevant 889b clauses will be withdrawn or whether the time frame to respond (currently 15 days) will be extended to Sept 30 due to the DNI waiver.

### **Answer (9/11/2020):**

In accordance with the statute and the Interim Rule, the FAR clause at FAR 52.204-25 must be inserted into all new contracts, extensions of contracts, and when exercising an option, made on or after August 13, 2020. USAID has no authority to change this requirement. USAID has no waiver which changes this requirement. Offerors/contractors must submit the representation at FAR 52.204-24 and disclosure information, if applicable. In the case of an affirmative representation, USAID will determine whether any existing waiver is applicable and if the disclosure is not entirely covered by an existing approved waiver, whether any additional waiver is required prior to award.

### **Question:**

Does the DNI waiver allow for existing contracts ending by September 30, 2020 to finish out with the existing covered items (if any)?

### **Answer (9/11/2020):**

The Section 889 prohibition does not apply to existing awards, unless the award is being modified to extend the period of performance or to exercise an option, at which time the prohibition would apply.

### **Question:**

Is it possible for USAID to request a waiver for implementation of Section 889(a)(1)(B) for its contractors, at least through the end of the calendar year, to allow a reasonable time to come into compliance with the provisions?

### **Answer (9/11/2020):**

The law and regulation do not allow for blanket waivers.

### **Question:**

We have noted that DOD and DOS seem to be taking a less conservative approach to implementing Section 889(a)(1)(B). Given that this rule originates with the National Defense Authorization Act, could USAID consider a less conservative approach such as that being implemented by DOD?

### **Answer (9/11/2020):**

It is our understanding that all Agencies are implementing this requirement in accordance with the law and regulation.

## ***Published on 9/18/2020***

### **Question:**

We are receiving informal requests from CORs to “confirm compliance” with Section 889 provisions – usually on contracts to which parts of the provision do not apply because they are existing contracts. This is extremely problematic. Could USAID provide written guidance that Contractors can cite back to CORs that applicable modifications to contracts are being executed by the CO and that it is up to COs to request any required certifications?

### **Answer (9/11/2020):**

USAID’s guidance related to Section 889 applicable to COs and CORs is included in Agency policy at ADS 302.

### **Question:**

If we don’t have covered equipment, and only have covered cell/internet services for which USAID can apply their waiver – can the award/extension go forward?

### **Answer (9/11/2020):**

Contractors and offerors must still provide the FAR representation at 52.204-24 when a new award is made, or when an existing contract is extended or an option is exercised. Once the contractor/offeror submits an affirmative representation, the CO will follow agency procedures to determine the applicability of any existing waiver and whether any additional information is required.

### **Question:**

How is USAID handling cases where IPs are finding banned equipment and services NOW before firms have to represent yet. For example can we dispose of and buy new, charging to the award? What approvals are needed? Do we have to disclose to USAID etc?

### **Answer (9/11/2020):**

If the IP has purchased the equipment for use in support of the award, the contractor must consult with the CO regarding any replacement of equipment. If the covered equipment is a corporate asset, USAID funds are not permitted to be used to rip and replace.

### **Question:**

We are seeing differing language by USAID Washington vs. CO. If the representation is made by the firm on one award or offer, we understand it applies to the entity’s entire supply chain, thus all of the entity’s operation. Some COs are telling us it’s not applicable to our existing award since the clause is not (yet) included on that individual contract.

### **Answer (9/11/2020):**

The FAR representation at FAR 52.204-24 must be submitted with each new offer, an extension or when exercising an option, until the annual representation is available, and must cover the entity’s entire supply chain regardless of whether such technology is used in existing awards as well as in non-Federal awards. However, the prohibition implemented in FAR clause 52.204-25 only applies to new awards, extensions and when exercising an option made on or after August 13, 2020.

### **Question:**

Do we need to obtain a waiver for the following scenario: Personal cell phones which are China made utilized for program support which the cell plan is paid for with USAID funds.

## ***Published on 9/18/2020***

### **Answer (9/11/2020):**

The contractor's use of all covered technology requires a waiver. Contractors and offerors must complete the representation at FAR 52.204-24. When completing the representation, the contractor/offeror must review the definition of "covered telecommunications equipment or services" as defined in FAR Subpart 4.21.

### **Question:**

Can a contractor accept the incorporation of the subject clause on a case by case basis rather than accepting it into the referenced IDIQ through the IPN process?"

### **Answer (9/18/2020):**

The FAR requires that FAR clause 52.204-25 be incorporated into the IDIQ base contract prior to the award of any Task Orders, or modifications for extensions or the exercise of options made on or after August 13, 2020. The clause cannot be incorporated into individual Task Orders. Note also that the FAR representation at FAR 52.204-24 must be submitted by the contractor with each response to any RFTOPs issued on or after August 13, 2020, even if/when the FAR clause 52.204-25 is in the IDIQ base contract.

### **Question:**

Regarding technical risk mitigations measures like encrypting all traffic going through ISPs that uses prohibited equipment, does that count as an acceptable method to be compliant with 889?

### **Answer (9/18/2020):**

No. To be compliant, contractors must not use covered technology and if they do, they must make the representation at FAR 52.204-24 that they are using covered technology in its supply chain, then a waiver must be approved. Technical risk mitigation like encryption does not meet compliance. However, such information could be helpful in obtaining a waiver.

### **Question:**

ADS 302.3.6.14(b)(1)(iv)(3) states that an offeror must submit "a Phase-out Plan to eliminate such covered telecommunications equipment or services from the offeror's systems." What sort of phase-out plan would USAID expect where the service in question is a monopoly telephone/internet provider? The implementing partner has no control over the service provider nor does it possess information as to when the service provider might cease the use of prohibited equipment if ever. Realistically, there are no options to using local telephone and internet service providers so there seems to be no reasonable way to phase-out their use.

### **Answer (9/18/2020):**

We understand the difficulty of the phase out plan for this type of situation. The offeror/contractor must provide the laydown plan as required in the Federal Acquisition Regulation, and further described in the Federal Register Notice, available at: <https://www.govinfo.gov/content/pkg/FR-2020-07-14/pdf/2020-15293.pdf#page=12>. Additionally, USAID's requirements can be found in the solicitation Section L submission requirements and its internal policies in ADS 302, ADS 302mbp (Mandatory Reference). If an entity's only use of covered technology is through the telecommunications and internet service providers, there are instructions in those documents for an entity to follow.

***Published on 9/18/2020***

### **3.0 Assistance**

**Question:**

What is the Section 889 prohibition for assistance award recipients?

**Answer (8/26/2020):**

Recipients and subrecipients are prohibited from using grant funds, including direct and indirect costs, program income, and any cost share, for covered telecommunication equipment or services to:

- (1) Procure or obtain, extend or renew a contract to procure or obtain;
- (2) Enter into a contract (extend or renew a contract to procure; or
- (3) Obtain the equipment, services or systems.

**Question:**

Does an organization have to certify in any way that goods or services procured under an assistance award are not covered telecommunications equipment and video surveillance services?

**Answer (8/26/2020):**

No. There is no separate certification process for Sec 889. When the recipient submits an application and signs an award they are agreeing to comply with all applicable laws, regulations, and standard provisions.

**Question:**

What actions must Agency staff take to enforce the 889 prohibition in assistance awards?

**Answer (8/26/2020):**

For awards made to non-U.S. organizations, Agreement Officers (AOs) must include the new mandatory standard provision Prohibition on certain telecommunication and video surveillance services or equipment (AUGUST 13, 2020) in all awards made on and after August 13.

For awards made to U.S. organizations, AOs must include the revised mandatory standard provision M1. APPLICABILITY OF 2 CFR 200 and 2 CFR 700 (August 2020) in all awards made on and after August 13. The revised standard provision clarifies that “all provisions of 2 CFR 200 and 2 CFR 700, in effect on the date of this award, and all Standard Provisions attached to this agreement are applicable...” This includes 200.216 Prohibition on certain telecommunications and video surveillance services or equipment, implementing the Section 889 prohibitions for U.S. organizations. Like all mandatory and required as applicable standard provisions, these provisions must be attached in full text to the resulting award. Revisions were made to the ADS 303 standard provision packages -- ADS 303maa, Standard Provisions for U.S. NGOs and ADS 303mab, Standard Provisions for Non-U.S. NGOs.

**Question:**

Do existing Federal awards need to be amended to include the provision on or after August 13, 2020?

**Answer (8/26/2020):**

No. Assistance awards made prior to August 13, 2020, do not need to be amended to include the prohibition on covered telecommunications equipment and video surveillance services because the prohibition was not effective at the time of the award. However, if an AO made an award to a non-US organization on or after August 13, and the new standard provision was not included, the AO must

## ***Published on 9/18/2020***

amend the award and include the new standard provision. Similarly, if an AO made an award to a US organization on or after August 13, and the award did not include the revised standard provision “M1. APPLICABILITY OF 2 CFR 200 AND 2 CFR 700” then the AO must amend the award and include the revised standard provision.

### **Question:**

Can an assistance award be made to an applicant if that organization uses covered telecommunications equipment or video surveillance services?

### **Answer (8/26/2020):**

Yes, the applicant may receive an assistance award; however, award funds cannot be used to pay for the covered telecommunications equipment and video surveillance services.

### **Question:**

Can a recipient use any cost share or program income earned under the award to pay for covered telecommunication equipment or video surveillance services?

### **Answer (8/26/2020):**

Recipients with awards made on or after August 13, must not use cost share or program income to pay for covered equipment and services. 2 CFR 200.306 for US NGOs and the mandatory standard provision “Cost Share” for non-US NGOs require that any contributions accepted as cost share be allowable under the award’s applicable cost-principles. The cost principles were revised, effective August 13, to include the prohibition on covered telecommunications equipment and video surveillance services. Similarly, the requirements in 2 CFR 200 Subpart E—Cost Principles continue to apply to program income.

### **Question:**

Can a recipient procure other goods or services with an entity that uses covered telecommunications equipment and video surveillance services?

### **Answer (8/26/2020):**

Yes, as long as long as the procurement is not for covered telecommunications equipment and video surveillance services. For instance, it is permissible to make an assistance award to a recipient that must procure hotel rooms for traveling staff. The hotel may employ covered telecommunication equipment for its security infrastructure. In such a scenario, the procurement of hotel rooms is not considered to be paying for the covered telecommunications equipment and video surveillance services. The Final Guidance does not include a "non-use" provision similar to the "Part B" prohibition that applies to federal contractors. Rather, recipients cannot obligate or expend funds to "procure or obtain equipment, services, or systems that use covered telecommunications equipment or services as a substantial or essential component of any system." This does not prohibit recipients from using covered telecommunications equipment or services; rather, they simply cannot use government award funds to acquire such equipment or services. Recipients should still be aware of what they are including in their indirect costs, however, as prohibited equipment must be excluded from an allowable cost pool.

## ***Published on 9/18/2020***

### **Question:**

What responsibilities does the Agreement Officer's Representative (AOR) have to monitor adherence to the 889 prohibitions on covered telecommunications equipment and video surveillance services?

### **Answer (8/26/2020):**

AORs are often delegated responsibility for overall monitoring and compliance oversight of Federal awards; however, Agency staff are not required or expected to exert additional efforts specifically with the goal of ensuring compliance with the Section 889 prohibitions. It is the recipient's responsibility to ensure they are in compliance with the legal requirements of the award.

### **Question:**

What actions should the AO take if they learn that the recipient charged or procured covered telecommunications equipment and video surveillance services under an award for which they are responsible?

### **Answer (8/26/2020):**

If a recipient procures covered telecommunications equipment and video surveillance services, the AO should disallow the costs. If the recipient does not agree to the costs being disallowed, the AO should consider terminating the award for material failure to comply with the terms and conditions of the award.

### **Question:**

How will the Section 889 prohibitions affect the indirect costs of an organization that uses covered telecommunications equipment and video surveillance services?

### **Answer (8/26/2020):**

Similar to other unallowable costs, covered telecommunications equipment and video surveillance services may not be charged either directly or indirectly under the award. If a recipient uses covered telecommunications equipment and video surveillance services and considers those costs to be indirect costs, the recipient is responsible for revising its indirect cost rate agreement and ensuring that these unallowable costs are removed from the base amount chargeable to its Federal award(s).

### **Question:**

Will the 889 prohibition impact awards that use the 10% de minimis indirect cost rate, as the 10% is based on modified total direct costs (MTDC) and not specific indirect costs elements?

### **Answer (8/26/2020):**

The prohibition on covered telecommunications equipment and video surveillance services will not affect the use of the 10% de minimis indirect cost rate. However, the modified total direct costs (MTDC) must also not include these unallowable costs.

### **Question:**

Are assistance award expenditures made before August 13, but vouchered on or after August 13 allowable?

## ***Published on 9/18/2020***

### **Answer (8/11/2020):**

The prohibition does not apply to existing awards. As such, all expenditures under current awards are not subject to the unallowability of costs in 2 CFR 200.471 relating to covered telecommunications and video surveillance costs in 2 CFR 200.216.

### **Question:**

If a Non U.S. NGO, recipient of a Cooperative Agreement, is subject to the requirements of NDAA, Section 889?

### **Answer (Revised 8/17/2020):**

Non-US NGOs will also be subject to the prohibitions of Section 889 for awards made on or after August 13, 2020. AOs will incorporate the new standard provision into the award, to align with the final rule for 2 CFR 200, published on August 13, 2020.

### **Question:**

It's our interpretation that 2 CFR 200.216 goes into effect 8/13/2020 for new awards signed on or after 8/13/2020, but 2 CFR 200.471, which addresses allowable costs, does not go into effect until 11/12/2020. Would USAID kindly clarify on the effective dates of 2 CFR 200.471 per 2020-17648?

### **Answer (9/18/2020):**

2 CFR 200.471 is a cost principle that provides the standards for cost allowability. Regardless of the effective date of 2 CFR 200.471, the effective date of the prohibition, which is in 200.216, is August 13, 2020. We have confirmed this understanding with OMB. Assistance awards made prior to August 13 are not subject to the Section 889 prohibitions.