



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**

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Recent Revisions are Highlighted***

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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):

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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.

Question:

Do you have a waiver that applies to surveillance equipment?

Answer (10/23/2020)

USAID Response: Video surveillance equipment and services are not covered under any current waiver. Please note that any waiver provided to the Agency does not alter the FAR requirements for contractors to make a representation, nor does it alter the requirement for the contractor to provide the required disclosure information in accordance with the FAR provision at 52.204-24. The Agency will review the contractor's representation and disclosure and determine whether any existing waiver(s) applies in whole or part, and whether any further waiver is required.

For assistance awards, the AO will incorporate special award requirements into the assistance award that specify the allowability of costs for internet and telephone services for new awards made during the duration of the waiver.

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Question:

Can USAID provide an authoritative list of affiliates and subsidiaries of covered Chinese companies?

Answer (10/23/2020):

The Agency does not maintain a list of subsidiaries or affiliates. The Bureau of Industry and Security in the Department of Commerce maintains a list.

Question:

Does USAID have waivers from ODNI that extend to the partner community ?

Answer (10/23/2020):

Any DNI waivers are provided to the Agency. To support the Agency's work, USAID received a telecommunications waiver for internet and phone services, which was originally scheduled to expire on September 30, 2020. The Agency has received approval to extend this waiver through September 30, 2022. In regard to acquisition (contracts), the Agency waiver does not alter the FAR requirements for contractors to make a representation and provide disclosure information, if applicable. Nor does it alter the requirement to provide a compelling justification for the additional time to implement the requirements under 889(a)(1)(B), a full and complete laydown of the presences of covered telecommunications or video surveillance equipment or services in the entity's supply chain, and a Phase-Out Plan for eliminating the covered equipment or services from the Offeror's systems if an affirmative representation is made by an offeror/contractor and no existing waiver applies. The Agency will review a contractor's representation and disclosure information to determine whether this waiver applies in whole or part and whether any further waiver is required.

For assistance awards, the AO will incorporate special award requirements into the assistance award that specify the allowability of costs for internet and telephone services for new awards made during the duration of the waiver.

As of September 30, 2022, the Agency statutory waiver authority ends and the Agency will not enter into any contracts with contractors using covered technology. For contractors that wish to continue to do business with USAID, it is important to phase out the use of covered technology. Recipients should ensure they have alternate funding because costs for covered technology will become unallowable. Regardless of this waiver, supply chain risk is a cybersecurity threat that USAID and the USG expect implementing partners to mitigate.

Question:

Why are the Sec. 889 prohibitions for assistance awards different from contracts? It seems harder for those with cooperative agreements or grants than for contracts.

Answer (10/23/2020):

The National Defense Authorization Act for FY 2019 applied the Section 889 prohibitions differently for contracts and assistance awards. The Congressional record provides no insight into why there are these differences. The statutory prohibitions for contracts have a broader application than those for assistance awards. The implementation of the Acquisition requirements are found in the FAR and the implementation of the Assistance requirements are found in 2 CFR 200.

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Question:

When a project closes, can property covered under the provisions of section 889 be transferred to a local or other non-US organization? If not, how to dispose of it at the end of the project?

Answer (10/23/2020):

The Section 889 prohibitions do not place new or additional limitations on the disposition of property. All property disposition questions must be addressed to the cognizant CO/AO for the award. Prior to disposition of IT used under the award, please work with your CO/AO who will coordinate with the M/CIO IT Authorization Team for guidance on degaussing requirements.

Question:

Our organization generally provides an allowance for staff to use towards phone credits for their personal phones. Can we assume that we can continue this practice or do we need to check what service provider and equipment staff purchase with the allowance?

Answer (10/23/2020):

If your organization is a contractor to the USG, you will need to determine if the use of cell phone equipment and service providers will impact your organization's representation at FAR 52.204-24. This is not a determination the Agency can make. Similarly the Agency cannot comment on your organization's individual business practices, such as allowances.

If your organization is a recipient, award funds must not be used to pay for covered technology or services.

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 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):

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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?

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.

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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 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

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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.

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.

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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 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

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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)

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.

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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 due to the DNI waiver.

Answer (Revised 10/23/2020):

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, irrespective of whether there is an approved waiver. USAID has no waiver that changes this requirement.

Question:

Does the DNI waiver allow for existing contracts to finish out with the existing covered items (if any)?

Answer (Revised 10/23/2020):

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. Any DNI waiver provided to the Agency applies only to awards, or modifications for extensions and options, made on or after August 13, 2020. It does not apply to existing awards other than as noted above.

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.

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.

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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.

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"?

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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.

Question:

If we got CIO approval for IT equipment under AAPD 16-02, is it considered in compliance with 889?

Answer (10/23/2020):

No. Approval for IT equipment under AAPD 16-02 is a separate process with different information submitted, a different review, and is required by a different law. It is strongly urged that you conduct your own due diligence to determine whether your organization uses covered technology in its worldwide operations and supply chain.

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Question:

Does the restriction on subcontractors and vendors for using covered equipment apply only to the goods and services acquired from them?

Answer(10/23/2020):

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. The FAR does not require subcontractors to submit a representation but FAR 52.204-25 requires the prime contractor to determine whether it uses the supplier’s or subcontractor’s “covered telecommunications” equipment or services. The prime contractor’s representation includes examining relationships with any subcontractor or supplier for which the prime contractor has a Federal contract and uses the supplier or subcontractor’s “covered telecommunications” equipment or services as a substantial or essential component of any system. A reasonable inquiry is an inquiry designed to uncover any information in the entity’s possession—primarily documentation or other records—about the identity of the producer or provider of covered telecommunications equipment or services used by the entity. A reasonable inquiry need not include an internal or third-party audit.

Question:

Could someone please explain the difference between 52.204-25 (b) Prohibitions paragraph (1) and paragraph (2)?

Answer (10/23/2020):

Each paragraph implements one of two separate prohibitions in the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232).

FAR 52.204-25(b)(1) implements the prohibition in Sec. 889(a)(1)(A) for agencies to “procure or obtain, or extend or renew 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 or waiver as described in FAR applies. This policy applies only to covered equipment, systems, and services USAID acquires for its own direct use or benefit.

FAR 52.204-25(b)(2) implements the prohibition in Sec. 889(a)(1)(B) for agencies to “enter into a contract to procure or obtain, or extend or renew 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 or waiver as described in FAR applies. USAID cannot contract with an entity that uses covered telecommunications equipment or services, regardless of whether that usage is in performance of work under a Federal contract. The prohibition applies at the prime contract level because the prime contractor is the only “entity” that the agency “enters into a contract” with; the agency does not directly “enter into a contract” with any subcontractors, at any tier. However, it is the contractor’s responsibility to determine whether it uses the supplier’s or subcontractor’s “covered telecommunications” equipment or services as described in FAR 4.2102(a)(2).

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Question:

How can one certify components in an equipment? Let's say, a wifi chip or a bluetooth radio chip? Is there a list of all said components?

Answer (10/23/2020):

For contracts, the entity is required to make a reasonable inquiry on the use of covered technology when providing the FAR representation. The term "reasonable inquiry" is defined in the FAR. This question is best directed to your IT staff and legal counsel. No such component list exists.

Question:

Does the act of making an affirmative representation about using the prohibited technologies automatically trigger a waiver request, after which the Agency would review existing waivers to determine whether any apply?

Answer 10/23/2020:

Contractors do not need to request a waiver. When submitting an offer, if the offeror makes an affirmative representation that it uses covered telecommunications equipment or services as a substantial or essential component of a system, or as critical technology as part of any system and no exception applies, it will mean that the offeror is seeking a waiver. Once an offeror submits its offer, the contracting officer will first have to decide if a waiver is necessary to make an award and then request the offeror to provide: (1) A compelling justification for the additional time to implement the requirements under 889(a)(1)(B), for consideration by the head of the executive agency in determining whether to grant a waiver; (2) a full and complete laydown of the presences of covered telecommunications or video surveillance equipment or services in the entity's supply chain; and (3) a phase-out plan to eliminate such covered telecommunications equipment or services from the entity's systems. This process is described in Section L of solicitations. An FAQ will be provided in the next published set of FAQs to clarify this information.

Question:

Please confirm that an existing contract issued by any USG funder (USAID, State, USDA, etc.) prior to August 13, 2020 is not subject to 889 for the life of the prime contract both for existing equipment and services and any future equipment and services to be procured under the contract.

Answer (10/23/2020):

Section 889 applies to all new contracts, extensions of existing awards and the exercising of options made on or after August 13, 2020. The prohibition does not apply to existing equipment and services and any future equipment and services procured under existing awards unless the awards are modified to extend the period of performance or exercise an option. However, please note that if the contractor submits an offer on a new solicitation or signs a bilateral modification for extension of an existing award or the exercising of an option, the contractor must submit the representation at FAR 52.204-24 and must disclose all covered technology in the entity's supply chain, including any covered technology in existing awards, irrespective of whether the covered technology is used on federal awards. Additionally, when FAR clause 52.204-25 is incorporated in a new award or a modification extending an existing award or exercising an option, the contractor must disclose any covered technology discovered in the entity's system after such award or modification.

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Question:

Several contractors we have approached have taken the view that previously purchased technology (which is now banned) does not need to be refreshed, but even if that is correct that would leave contractors at a disadvantage because they would have to represent they are using covered technology. Can you provide specifics regarding the risk-based compliance plan required in Section 889? How does the agency suggest we treat low risk subcontractors?

Answer (10/23/2020):

Section 889 does not allow for a contractor to conduct a risk-based approach. Under existing awards, the contractor is not required to “refresh” its equipment; however, please note that if the contractor submits an offer on a new solicitation or signs a bilateral modification for extension of an existing award or the exercising of an option, the contractor must submit the representation at FAR 52.204-24 and must disclose all covered technology in the entity’s supply chain, including any covered technology in existing awards, irrespective of whether the covered technology is used on federal awards. The entity must determine through a reasonable inquiry whether the entity itself 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 includes examining relationships with any subcontractor or supplier for which the prime contractor has a Federal contract and uses the supplier or subcontractor’s “covered telecommunications” equipment or services as a substantial or essential component of any system. A reasonable inquiry is an inquiry designed to uncover any information in the entity’s possession—primarily documentation or other records—about the identity of the producer or provider of covered telecommunications equipment or services used by the entity. A reasonable inquiry need not include an internal or third-party audit. An entity’s assessment of how to make its disclosures based on its use of subcontractors is outside the purview of USAID.

Question:

If a contractor wants an extension and doesn't need any new equipment but has been using covered equipment, what does the contractor certify to?

Answer (10/23/2020):

If a contract is being modified to extend the period of performance then the contractor must submit the required representation at FAR 52.204-24 and must disclose all covered technology (CT) in the contractor’s supply chain irrespective of whether it is being used under Federal awards, including any CT in existing awards. The representation covers the contractor’s current use of CT and future purchases are covered under the FAR Clause 52.205-25 that will be incorporated into the modification.

Question:

How does this apply to subcontractors under acquisition? Also do subcontractors need to submit reps and disclose the use of covered equipment?

Answer (10/23/2020):

Subcontractors must address issues of compliance with the prime contractor. The prime contractor is responsible for submitting the representation to the Agency. The FAR representation at FAR 52.204-24 does not flow down to subcontractors. However, the prime contractor’s representation includes examining relationships with any subcontractor or supplier for which the prime contractor has a Federal contract and uses the supplier or subcontractor’s “covered telecommunications” equipment or services as a substantial

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or essential component of any system. A reasonable inquiry is an inquiry designed to uncover any information in the entity's possession—primarily documentation or other records—about the identity of the producer or provider of covered telecommunications equipment or services used by the entity. A reasonable inquiry need not include an internal or third-party audit.

Question:

Could you please clarify if the rule applies only to new awards and extensions or if it applies to a contractor as a whole (and thereby affecting all awards not just new awards)?

Answer (10/23/2020):

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.

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

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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 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):

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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.

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:

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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?

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.

Question:

Please confirm that an existing assistance award under any USG funder (USAID, State, USDA, etc.), issued prior to August 13, is not subject to 889 restrictions for the life of the award both for existing equipment and services and any future equipment and services to be procured under the award.

Answer (10/23/2020):

USAID cannot speak for other USG agencies. However, USAID's current understanding of the rule is that the assistance prohibitions do not apply to awards made prior to August 13.

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Question:

Under assistance, please confirm that the new 889 restrictions do not affect or impact in any way a recipient's other "non-USG funded awards" from private and other non-US government funders/donors.

Answer (10/23/2020):

For assistance, Section 889 does not apply to non-U.S. funded awards. It only applies to the use of grant funds under USAID Assistance awards, including cost-share and program income.

Question:

As grantees, what is our basis or criteria for determining when equipment constitutes a "substantial or essential component of any system, or as critical technology as part of any system"?

Answer (10/23/2020):

The recipient makes the determination on what is a substantial or essential component under an assistance award, and bills USAID according to their decision. See 2 CFR 200.216. Neither 2 CFR 200 nor Sec. 889 define "substantial or essential component" or "critical technology". Although not applicable, please note the definitions in FAR 4.2101 (<https://www.acquisition.gov/far/4.2101>).

Question:

Under an assistance award, if an organization is found to have violated the provision, is the "penalty" just unallowability, or can the violation result in termination, suspension, debarment, etc.?

Answer (10/23/2020):

If the recipient fails to comply with the prohibitions, the costs will be unallowable and USAID always has the right to remedies for noncompliance in accordance with 2 CFR 200.338 for any matters of non-compliance or failure to meet the terms and conditions of the award

Question:

Is there a flow down provision for sub-awardees on the assistance side?

Answer (10/23/2020):

Yes. For US organizations, the standard provision M1. Applicability of 2 CFR 200 and 2 CFR 700 states that the provisions of 2 CFR 200 apply to recipients and subrecipients. For non-US organizations, the standard provision M29. Prohibition on Certain Telecommunication and Video Surveillance Services or Equipment requires that the provision be included in subawards.

Question:

Will USAID be providing additional information on the utilities and emergency transportation waiver USAID has received, so that assistance implementers understand that these costs are allowable?

Answer (10/23/2020):

Under assistance, the costs for utilities and emergency transportation are not unallowable. Please note that the Final Guidance amending 2 CFR 200 does not include a "non-use" provision similar to the Sec 889(a)(1)(B) "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."