Alert

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COZEN O'CONNOR

New Rule Bans Federal Contractors from Using Chinese Telecom Equipment

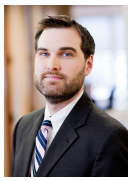
On August 13, 2020, an interim final rule published by the Federal Acquisition Regulations Council (the Council) went into effect that prohibits the use of certain telecommunications equipment produced by Chinese entities such as Huawei, ZTE, and Hikvision, among others by federal contractors. The prohibition specifically applies to "uses" of the covered telecommunications equipment (CTE) as a substantial or essential component of any system or as a critical technology of any system. While the interim final rule is already effective, the public comment period for this rule runs until September 13.

The Council comprises the Department of Defense, General Services Administration, and National Atmospheric and Space Administration. The Council's proposed rule broadens a policy currently in effect pursuant to Section 889 of the National Defense Act, which prevents federal agencies from acquiring or using such CTE. Under the Council's rule, the prohibition is expanded to include federal contractors in all industries and all contracts (regardless of size or type). At present, the interim rule applies only to prime contractors (including all divisions and branches of the legal entity contracting with the government), but the Council may expand the rule to include U.S. affiliates, subsidiaries, and parents of the prime contractor as well.

The interim final rule does not provide a clear and concise definition of the term "uses" in the context of the CTE. This allows for a broad interpretation of the definition to include any number of potential uses of CTE by federal contractors. Importantly, the interim rule broadly applies "to the use of [CTE] or services, regardless of whether that use is in performance of work under a Federal contract." Until (and if) this term becomes more defined, contractors should assume the prohibition applies for all uses of CTE, for any reason, anywhere in the world.

With this in mind, the rule requires any contractor to determine whether it uses CTE through a "reasonable inquiry." Notably, this inquiry does not require any internal or third-party audit, but should uncover information in the contractor's possession related to the use of CTE. While this would, on its face, appear to give contractors some flexibility in undertaking this type of inquiry, the concept of "reasonableness" will in practice likely be different for different agencies, and the standards will also likely be different for businesses working in certain sensitive industries. The rule also specifies that such inquiry includes a review of "relationships with any subcontractor or supplier for which the prime contractor has a Federal contract and uses the supplier or subcontractor's" CTE. Following a reasonable inquiry, the contractor must represent to the respective contracting officer that it does not run afoul of the prohibition. In the event that any prohibited use is discovered by the contractor, the rule requires the entity to report such use within **one business day** of identifying/learning about the use. This means contractors will need to have a strict monitoring program in place to discover any prohibited uses after the initial representation is made.

Absent any significant changes prior to the rule's finalization in September, it appears clear that the Council's actions place a significant compliance burden on federal contractors relating to the use of CTE. All contractors should review pending bids and future federal contracts to determine the application of this interim rule and take any actions necessary to prevent violation of the CTE prohibition put in place by the Council.



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