

# Coronavirus

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## Thermal Cameras May Jeopardize Access to Federal Government Contracts

As the country begins to reopen and states begin to relax stay-at-home orders, companies are trying to ensure the health and safety of their employees and customers. In order to limit exposure to COVID-19, companies are taking numerous measures, including using thermometers and heat scanners to identify employees or customers that may be infected. Nevertheless, companies with federal government contracts should be aware of certain statutory and regulatory restrictions that may impact these efforts. Notably, government contractors may be unable to source certain equipment, such as thermal cameras from Chinese companies, without jeopardizing eligibility for federal contract awards.

Section 889 of the 2019 National Defense Authorization Act (NDAA) imposes new restrictions for government contractors, which are being rolled out in two phases. The first phase prohibits “executive agencies, including the Department of Defense, from procuring or obtaining, or extending or renewing a contract to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.” Section 889(a)(1)(A). The second phase prohibits agencies from entering into contracts with an entity that uses any equipment, system or services that uses covered telecommunications equipment or services as a substantial or essential component of any system. Section 889 (a)(1)(B). The government has already implemented an interim final rule, addressing the first phase described above, codified in the Federal Acquisition Regulation at FAR 52.204-24 and FAR 52.204-25.

The guidance on the second phase is still unclear but based on the Statutory language, if the equipment in question is being used for internal purposes, and not on a government contract, the use is likely still covered under Section 889(a)(1)(B). Terms remain undefined and contractors have many outstanding questions regarding compliance. COVID-19 and



the impending economic restart has only hastened the need for answers. There has been little guidance, however, on the impact of the current health crisis on implementation of Section 889(a)(1)(B). One important aspect of the statutory prohibition is that subcontractors are covered, including those entities that never deal directly with the government.

The statute requires the second phase to be implemented by August 13, 2020. That date is rapidly approaching, and the FAR Council has not yet issued a Final Rule implementing the requirements of Section 889(a)(1)(B). Huawei's attempt to challenge the statute as an unconstitutional bill of attainder failed earlier this year. On June 10, 2020, Under Secretary of Defense for Acquisition and Sustainment Ellen Lord testified before the House Armed Services Committee, and requested that Congress delay the effective date. As a result, there is a possibility that the Fiscal Year 2021 NDAA may extend the deadline. Until the delay is adopted by Congress, contractors should operate under the assumption that they will be obligated to comply with Section 889(a)(1)(B) beginning August 13, 2020.

At that time, Government contractors may not use certain telecommunications equipment or services from Chinese companies such as Dahua, Huawei, ZTE Corporation, or Hytera Communications Corporation. One of the key pieces of equipment that companies may wish to utilize for COVID-19 prevention is temperature scanning equipment. This equipment is likely encompassed within the definitions of the 2019 NDAA given that it is most readily sourced from Chinese manufacturers. Any entity with government contracts should be wary of buying this equipment, because it may impact future eligibility for federal contracts.

Further, many government contractors may already have potentially problematic equipment or components incorporated into their infrastructure. Before Section 889 is fully implemented, government contractors should take the time to identify the origins of equipment and components currently in use and to develop a plan for any necessary replacements. Unfortunately, and as pointed out by many contractors, replacement of existing equipment may be an expensive proposition.

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