

## Agencies Call for Comments on NDAA 2019 Section 889

June 4, 2019

### Key Points

- The Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) announced ([84 FR 25545](#)) that they will hold a town hall-style public meeting on **July 19, 2019**, to solicit input from industry stakeholders on paragraph (a)(1)(B) of NDAA 2019 § 889. Comments and presentations must be submitted by **July 8, 2019**.
- Paragraph (a)(1)(B) of § 889, effective August 13, 2020, provides—subject to certain limited exceptions—that U.S. executive agencies “may not enter into a contract (or extend or renew a contract) with an entity that uses any equipment, system, or service that **uses** covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.”
- This meeting and its accompanying call for comments and presentations offer an opportunity to weigh in on the implementation of § 889.

### Background

Section 889 of the 2019 National Defense Authorization Act (NDAA) generally prohibits federal agencies, federal contractors, and grant or loan recipients from procuring or, potentially, using certain “covered telecommunications equipment or services”—specifically those produced by **Huawei** Technologies Company and **ZTE** Corporation, and with respect to certain public safety or surveillance applications, **Hytera** Communications Corporation, **Dahua** Technology Company, and Hangzhou **Hikvision** Digital Technology Company—as a “substantial or essential component of any system, or as critical technology as part of any system.”

Broadly speaking, § 889’s prohibitions become effective in two phases:

- First, under § 889(a)(1)(A), as of one year following the enactment of the 2019 NDAA, i.e., by **August 13, 2019**, federal executive agencies may not **themselves** “procure or obtain or extend or renew a contract to procure or obtain any equipment, system, or service that uses covered telecommunications equipment or

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services as a substantial or essential component of any system, or as critical technology as part of any system.”

- Second, under § 889(a)(1)(B), as of two years following enactment, i.e., by **August 13, 2020**, federal executive agencies may not “enter into a contract (or extend or renew a contract) with an entity that uses any equipment, system, or service that **uses** covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.”
- Section 889(b)(1), also effective August 13, 2020, further provides that executive agencies “may not obligate or expend loan or grant funds to procure or obtain, extend or renew a contract to procure or obtain, or enter into a contract (or extend or renew a contract) to procure or obtain the equipment, services, or systems described in subsection (a).”

This second phase of § 889’s implementation has sparked controversy and concern among many in the U.S. defense industrial base (and beyond) about the potential breadth of the term “uses” in paragraph (a)(1)(B). As written, the prohibition could potentially apply whether or not the would-be recipient of federal funds “uses” covered equipment in any way related to its federal contract or government interconnections.

Against this backdrop, the DOD, GSA, and NASA [announced](#) that they will hold a public, town-hall-style meeting on July 19, 2019, to solicit “feedback from stakeholders to inform effective implementation of the prohibition in paragraph (a)(1)(B).”

The Federal Register notice also notes that paragraph (a)(1)(A) of § 889 will be implemented separately through FAR Case 2018-017.

The agencies note that the potential impact of § 889(a)(1)(B) “may vary across affected stakeholder communities, including information and communications technology vendors, security services vendors, and other vendors who provide **unrelated** goods and services but rely on information and communications technology and security services **as incidental but essential components of their operations.**”

They further call for comments on the following points:

- *Beyond the statutory language of the prohibition, what additional information or guidance do you view as necessary to effectively comply with paragraph (a)(1)(B) of section 889?*
- *To what extent will compliance with the prohibition in paragraph (a)(1)(B) of section 889 incur additional cost or other burden in providing goods or services to the federal government? Please be specific in describing the impact.*
- *To what extent do you currently have insight into existing systems and their components, sufficient to ensure compliance with paragraph (a)(1)(B) of section 889?*
- *To what extent do you currently have direct control over existing systems in use (e.g., physical security systems) and their components, as contrasted with contracting for services that are provided by a separate entity (e.g., landlords, subcontractors)?*
- *To the extent that there are gaps in insight or control described in response to the previous questions, how much time do you anticipate will be needed to establish the required insight or control to ensure compliance with paragraph (a)(1)(B) of section 889?*

- *Will the requirement to comply with the prohibition in paragraph (a)(1)(B) impact your willingness to offer goods and services to the federal government as of the stated effective date? Please be specific in describing the impact (e.g., what types of products or services might no longer be offered, or offered in a modified form, and why).*
- *To what extent does your response to the above question change if you are given more time?*
- *What other challenges do you anticipate facing in effectively meeting the implementation date of August 13, 2020?*

According to the notice, in-person attendees will be provided an opportunity to provide prepared comments and PowerPoint presentations during the discussion “as time allows.” Participants who wish to make a presentation must submit an electronic copy via email no later than **Monday, July 8, 2019**. Further, attendees providing presentations, including prepared comments, shall be limited to ten minutes.

### **Conclusion**

Given the potentially sweeping scope of § 889, and in particular paragraph (a)(1)(B), industry stakeholders should consider engaging the agencies who will ultimately be involved in drafting, promulgating, and enforcing regulations implementing § 889

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