



Prohibitions on Expending FEMA Award Funds for Covered Telecommunications Equipment or Services (Interim)

FEMA Policy #405-143-1

BACKGROUND

In 2018, Congress enacted legislation that prohibited obligating or expending federal award funds on certain telecommunications products or from certain entities for national security reasons. The statute and implementing regulations, as they apply to FEMA recipients and subrecipients, provides for two distinct prohibitions: 1) to prevent the use of federal award funds to procure or obtain covered technology; and 2) to prevent the use of federal award funds to contract with an entity that uses covered technology.

PURPOSE

The purpose of this policy is to provide guidance to FEMA’s recipients and subrecipients and their contractors and subcontractors on prohibitions regarding certain telecommunications and video surveillance equipment and services beginning on or after Aug. 13, 2020. These prohibitions are described in section 889(b)(1) of the [John S. McCain National Defense Authorization Act for Fiscal Year 2019 \(FY 2019 NDAA\)](#)¹ and 2 C.F.R. § 200.216.²

PRINCIPLES

The following principles underpin this policy:

- A. Balance protecting national security, including homeland security and critical infrastructure, with the addition of required duties and limitations on FEMA’s recipients and subrecipients.

¹ Pub. L. No. 115-232 (2018). Under section 889(a), these prohibitions also apply to federal procurements, and those prohibitions went into effect on Aug. 13, 2019. The General Services Administration, Department of Defense, and National Aeronautics and Space Administration have already amended the Federal Acquisition Regulation (FAR) and issued other guidance to implement these prohibitions. For additional information on these amendments, see [FAR Interim Rule](#), Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment, 84 Fed. Reg. 40,216 (Aug. 13, 2019) (amending the FAR to add sections 4.2100 – 4.2105 and 52.204-24 and 52.204-25, among other sections) and [FAR Interim Rule](#), Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment, 85 Fed. Reg. 42,665 (July 14, 2020) (amending the FAR to require contracting officers to include contract provisions in sections 52.204-24 and 52.204-25).

² On Aug. 13, 2020, the Office of Management and Budget (OMB) released updates to various Parts of Title 2 of the Code of Federal Regulations (C.F.R.), including updates to 2 C.F.R. Part 200. Most of the provisions are effective Nov. 12, 2020, but the new regulation at 2 C.F.R. § 200.216 implementing the FY 2019 NDAA went into effect Aug. 13, 2020. See [OMB Final Guidance, Guidance for Grants and Agreements](#), 85 Fed. Reg. 49,506 (Aug. 13, 2020).



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- B. Provide clarity on how the statutory and regulatory prohibitions apply to recipients and subrecipients of FEMA grants, cooperative agreements, loans, and loan guarantees (collectively referred to in this policy as “FEMA awards” or “FEMA award funds”).³
- C. Reduce complexity by issuing a single policy for all FEMA awards, subject to limited programmatic variations.
- D. Draw on existing regulations and guidance applicable to federal procurements, as appropriate, to promote consistent interpretation and definitions across the Federal Government.

REQUIREMENTS

A. APPLICABILITY

Outcome: To ensure these prohibitions are implemented in accordance with the statute and clarify when and to whom these prohibitions apply.

- 1. Under all open and future FEMA awards, this policy applies to:
 - a. Purchase orders, contracts, subcontracts, or similar acquisition actions:
 - i. That are new, renewed, or extended on or after Aug. 13, 2020;
 - ii. For all goods or services of any dollar amount; and
 - iii. By any FEMA recipient or subrecipient or their contractor or subcontractor under FEMA awards.

B. PROHIBITIONS

Outcome: To describe the statutory and regulatory prohibitions that apply to FEMA awards.

- 1. Effective Aug. 13, 2020, FEMA recipients and subrecipients, as well as their contractors and subcontractors,⁴ may not obligate or expend any FEMA award funds to:
 - a. 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 of any system;
 - b. Enter into, extend, or renew a contract to procure or obtain any equipment, system, or service that uses covered telecommunications equipment or services as a

³ The new regulation at 2 C.F.R. § 200.216 prohibits recipients and subrecipients from obligating or expending loan or grant funds; however, the updated regulations at 2 C.F.R. § 200.1 define the terms “recipient” and “subrecipient” in relation to the term federal award, which itself is defined in relation to the term federal financial assistance. Per the updated 2 C.F.R. § 200.1, federal financial assistance, specifically for purposes of § 200.216, means grants, cooperative agreements, loans, and loan guarantees. See 85 Fed. Reg. at 49,531, 49,532, 49,535.

⁴ Because the statute prohibits obligating or expending any FEMA award funds, these prohibitions also flow down to a recipient’s or subrecipient’s contractors and subcontractors.



substantial or essential component of any system, or as critical technology of any system; or

- c. Enter into, extend, or renew contracts with entities that use covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.

C. EXCEPTIONS

Outcome: To explain the statutory exceptions to the prohibitions.

1. By statute, the prohibitions do not apply to:

- a. A service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or
- b. Telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.

2. By necessary implication and regulation, the prohibitions do not apply to:

- a. Covered telecommunications equipment or services that:
 - i. Are not used as a substantial or essential component of any system; and
 - ii. Are not used as critical technology of any system.
- b. Other telecommunications equipment or services that are not considered covered telecommunications equipment or services.⁵

D. REPLACEMENT OF COVERED TELECOMMUNICATIONS EQUIPMENT OR SERVICES

Outcome: To explain the statutory requirement to prioritize available funding for replacement equipment or services.

1. Section 889(b)(2) of the FY 2019 NDAA directs federal agencies to prioritize available funding and technical support to assist recipients and subrecipients as is reasonably necessary to:

- a. Transition from covered telecommunications equipment or services and procure replacement equipment or services; and
- b. Sustain communications service to users and customers.

⁵ The new regulation at 2 C.F.R. § 200.471 describes telecommunications and video surveillance costs as generally allowable under the cost principles except when they are covered by the prohibitions in the FY 2019 NDAA and 2 C.F.R. § 200.216. See 85 Fed. Reg. at 49,570.



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2. Depending on the specific FEMA program, recipients and subrecipients may be permitted to use FEMA award funds to purchase replacement equipment or services.
 - a. Recipients and subrecipients should refer to program guidance or contact the applicable program office to determine whether replacement equipment or services is eligible under that program.

E. CONTRACT PROVISION

Outcome: To communicate that FEMA recipients and subrecipients and their contractors and subcontractors are required per 2 C.F.R. Part 200, Appendix II⁶ to include a contract provision in all FEMA-funded contracts and subcontracts, including any purchase orders.

1. On or after Aug. 13, 2020, for all new, extended, or renewed contracts using FEMA funds, especially for covered telecommunications equipment or services:
 - a. FEMA recipients and subrecipients are required to include a provision in their contracts explaining the prohibitions under section 889 of the NDAA and as clarified in this policy.
 - b. This also applies to subcontracts under any new, extended, or renewed contract.
2. For the required contract provision, recipients and subrecipients may draft their own provision that meets the requirements of the FY 2019 NDAA and 2 C.F.R. § 200.216 to include in contracts and subcontracts. Alternatively, they may use language from the appendix to this policy to include in contracts and subcontracts. Recipients and subrecipients should also consult their own contracting officials or legal counsel when incorporating any contract provision.

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⁶ See 85 Fed. Reg. at 49,577.



ADDITIONAL INFORMATION

REVIEW CYCLE

This is an interim policy and will be evaluated within one year from its publication and will be issued as a permanent policy or incorporated into other existing guidance.

AUTHORITIES

- A. Section 889 of the [John S. McCain National Defense Authorization Act for Fiscal Year 2019 \(FY 2019 NDAA\)](#), Pub. L. No. 115-232 (2018).
- B. 2 C.F.R. §§ 200.1, 200.216, 200.317 – 200.327, 200.471.
- C. 2 C.F.R. Part 200, Appendix II.
- D. [OMB Final Guidance, Guidance for Grants and Agreements](#), 85 Fed. Reg. 49,506 (Aug. 13, 2020).

REFERENCES

- A. 48 C.F.R. §§ 4.2101 (FAR definitions implementing section 889), 4.2105 (FAR requirements for solicitation provisions and contract clauses), 52.204-25 (FAR language required for contract clause).
- B. [FAR Interim Rule](#), Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment, 84 Fed. Reg. 40,216 (Aug. 13, 2019) (amending the FAR to add sections 4.2100 – 4.2105 and 52.204-24 and 52.204-25, among other sections).
- C. [FAR Interim Rule](#), Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment, 85 Fed. Reg. 42,665 (July 14, 2020) (amending the FAR to add definitions to section 4.2101 and require contracting officers to include contract provisions in sections 52.204-24 and 52.204-25).

DEFINITIONS

Backhaul means intermediate links between the core network, or backbone network, and the small subnetworks at the edge of the network (e.g., connecting cell phones/towers to the core



telephone network). Backhaul can be wireless (e.g., microwave) or wired (e.g., fiber optic, coaxial cable, Ethernet).⁷

Covered foreign country means the People’s Republic of China.⁸

Covered telecommunications equipment or services means—

- a. Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation, (or any subsidiary or affiliate of such entities);
- b. 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);
- c. Telecommunications or video surveillance services provided by such entities or using such equipment; or
- d. Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of 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.⁹

Interconnection arrangements means arrangements governing the physical connection of two or more networks to allow the use of another's network to hand off traffic where it is ultimately delivered (e.g., connection of a customer of telephone provider A to a customer of telephone company B) or sharing data and other information resources.¹⁰

Roaming means cellular communications services (e.g., voice, video, data) received from a visited network when unable to connect to the facilities of the home network either because signal coverage is too weak or because traffic is too high.¹¹

Substantial or essential component means any component necessary for the proper function or performance of a piece of equipment, system, or service.¹²

⁷ 48 C.F.R. § 4.2101; 85 Fed. Reg. at 42,676. FEMA notes that the FAR does not technically apply to grants, cooperative agreements, or loans, but its definitions are still useful in FEMA’s implementation of section 889 to its awards in the absence of other applicable definitions.

⁸ FY 2019 NDAA § 889(f)(2).

⁹ FY 2019 NDAA § 889(f)(3).

¹⁰ 48 C.F.R. § 4.2101; 85 Fed. Reg. at 42,676.

¹¹ 48 C.F.R. § 4.2101; 85 Fed. Reg. at 42,676-77.

¹² 48 C.F.R. § 4.2101; 84 Fed. Reg. at 40,221.



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Telecommunications equipment or services means telecommunications or video surveillance equipment or services, such as, but not limited to, mobile phones, land lines, internet, video surveillance, and cloud servers.¹³

MONITORING AND EVALUATION

FEMA will monitor the implementation of this policy through close coordination with various program offices, regional staff, and, as appropriate, interagency partners and non-federal stakeholders. FEMA will consider feedback, as appropriate, from these entities when issuing a final policy.

QUESTIONS

Questions regarding this policy may be directed to your assigned FEMA program analyst or grants management specialist or the Centralized Scheduling and Information Desk (CSID) at askcsid@fema.dhs.gov or (800) 368-6498.

APPENDICES

Appendix A: Contract Provision Regarding Prohibition on Contracting for Covered Telecommunications Equipment or Services¹⁴

¹³ See 2 C.F.R. §§ 200.1, 200.471; 85 Fed. Reg. at 49,536, 49,570.

¹⁴ The language in this appendix is based the language in the FAR. See 48 C.F.R. § 52.204-25; 84 Fed. Reg. at 40,222; 85 Fed. Reg. at 42,679.



APPENDIX A

Contract Provision Regarding Prohibition on Contracting for Covered Telecommunications Equipment or Services

For FEMA awards, recipients and subrecipients, as well as their contractors and subcontractors, may use the following contract provision in new, extended, or renewed contracts and subcontracts.

PROHIBITION ON CONTRACTING FOR COVERED TELECOMMUNICATIONS EQUIPMENT OR SERVICES

- (a) *Definitions.* As used in this clause, the terms backhaul; covered foreign country; covered telecommunications equipment or services; interconnection arrangements; roaming; substantial or essential component; and telecommunications equipment or services have the meaning as defined in FEMA Policy, #405-143-1 Prohibitions on Expending FEMA Award Funds for Covered Telecommunications Equipment or Services As used in this clause—
- (b) *Prohibitions.*
- (1) Section 889(b) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, and 2 C.F.R. § 200.216 prohibit the head of an executive agency on or after Aug.13, 2020, from obligating or expending grant, cooperative agreement, loan, or loan guarantee funds on certain telecommunications products or from certain entities for national security reasons.
 - (2) Unless an exception in paragraph (c) of this clause applies, the contractor and its subcontractors may not use grant, cooperative agreement, loan, or loan guarantee funds from the Federal Emergency Management Agency to:
 - (i) 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 of any system;
 - (ii) Enter into, 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 of any system;
 - (iii) Enter into, extend, or renew contracts with entities that use covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system; or
 - (iv) Provide, as part of its performance of this contract, subcontract, or other contractual instrument, 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.



(c) *Exceptions.*

(1) This clause does not prohibit contractors from providing—

- a. A service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or
- b. Telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.

(2) By necessary implication and regulation, the prohibitions also do not apply to:

- a. Covered telecommunications equipment or services that:
 - i. Are not used as a substantial or essential component of any system; and
 - ii. Are not used as critical technology of any system.
- b. Other telecommunications equipment or services that are not considered covered telecommunications equipment or services.

(d) *Reporting requirement.*

(1) In the event the contractor identifies covered telecommunications equipment or services used as a substantial or essential component of any system, or as critical technology as part of any system, during contract performance, or the contractor is notified of such by a subcontractor at any tier or by any other source, the contractor shall report the information in paragraph (d)(2) of this clause to the recipient or subrecipient, unless elsewhere in this contract are established procedures for reporting the information.

(2) The Contractor shall report the following information pursuant to paragraph (d)(1) of this clause:

- (i) Within one business day from the date of such identification or notification: The contract number; the order number(s), if applicable; supplier name; supplier unique entity identifier (if known); supplier Commercial and Government Entity (CAGE) code (if known); brand; model number (original equipment manufacturer number, manufacturer part number, or wholesaler number); item description; and any readily available information about mitigation actions undertaken or recommended.
- (ii) Within 10 business days of submitting the information in paragraph (d)(2)(i) of this clause: Any further available information about mitigation actions undertaken or recommended. In addition, the contractor shall describe the efforts it undertook to prevent use or submission of covered telecommunications equipment or services, and any additional efforts that will be incorporated to prevent future use or submission of covered telecommunications equipment or services.



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(e) *Subcontracts*. The Contractor shall insert the substance of this clause, including this paragraph (e), in all subcontracts and other contractual instruments.