



ACQUISITION
AND SUSTAINMENT

THE UNDER SECRETARY OF DEFENSE

3010 DEFENSE PENTAGON
WASHINGTON, DC 20301-3010

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MEMORANDUM FOR CHIEF MANAGEMENT OFFICER OF THE DEPARTMENT OF
DEFENSE

SECRETARIES OF THE MILITARY DEPARTMENTS
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CHIEF OF THE NATIONAL GUARD BUREAU
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DEFENSE
ASSISTANT SECRETARY OF DEFENSE FOR LEGISLATIVE
AFFAIRS
DIRECTOR OF NET ASSESSMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Implementation of Waiver Procedures for the Section 889(a)(1)(B) Prohibitions on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment

Section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year 2019 prohibits entering into contracts with entities that use certain telecommunications and video surveillance services or equipment. This memorandum supplements the guidance published in the memorandum of November 2, 2019, similar subject, to provide guidance regarding the waiver procedures for section 889(a)(1)(B). The waiver processes and procedures for section 889(a)(1)(A) are unchanged by this memorandum.

Interim FAR rule 2019-009, published on July, 14, 2020, implements the section 889(a)(1)(B) contracting prohibitions in Federal Acquisition Regulation (FAR) subpart 4.21, "Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment," with an effective date of August 13, 2020. Section 889(d)(1) and FAR 4.2104 authorize the head of an executive agency to waive the contracting prohibitions in section 889(a) on a one-time basis for a period not to exceed two years after the effective date of the prohibition, subject to certain requirements.

Implementing guidance for exercising the limited statutory authority to waive the section 889(a)(1)(B) contracting prohibition temporarily is provided in the attachment to this memorandum.


Ellen M. Lord

Attachment:
Waiver and Reporting Procedures

ATTACHMENT 1

WAIVER AUTHORITIES AND REPORTING REQUIREMENTS FOR THE STATUTORY CONTRACTING PROHIBITION IN SECTION 889(a)(1)(B)

Section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 prohibits contracting with entities that use certain telecommunications and video surveillance services or equipment. The waiver procedures set forth in this memorandum only apply to waivers of the prohibitions set forth in section 889(a)(1)(B).

1. DoD Waiver Authority and Scope:

- a) In accordance with section 889(d)(1), these prohibitions may be waived by the head of an executive agency on a one-time basis, with respect to an entity requesting a waiver for a period not to exceed two years after the prohibition effective date. The objective outcome for implementing the section 889 prohibitions is a complete phase-out of covered telecommunications or video surveillance equipment from use within the Department's full supply chain.
- b) After completion of review by the Section 889 Waiver Task Force set forth in Section 2 below, the Secretaries of the Military Departments may approve section 889 waivers for their subordinate entities in accordance with section 889(f)(4) and section 133 of title 41, United States Code (U.S.C.). The Secretary of Defense may approve waivers for the 4th estate.
- c) There are no restrictions on the delegation of this waiver authority.

2. Section 889 Waiver Task Force

- a) A Section 889 Waiver Task Force (Task Force) shall be established and shall function as the central clearing house for all section 889(a)(1)(B) waiver requests within the Department of Defense, including all Military Departments and DoD Components. The Task Force will provide consistency in the waiver process to minimize confusion, will facilitate proper notification to and consultation with the Office of the Director of National Intelligence (ODNI), and will facilitate notification to the Federal Acquisition Security Council (FASC), as required by FAR 4.2104.
- b) To support establishment of the Task Force, the following Services and Components will submit a primary and two alternate names to the Under Secretary of Defense(Acquisition & Sustainment) (USD(A&S)) no later than August 18, 2020:
 - i. Department of the Army
 - ii. Department of the Navy (DON)

- iii. Department of the Air Force
 - iv. DoD Chief Information Officer (CIO)
 - v. Under Secretary of Defense (Intelligence and Security) (USD(I&S))
 - vi. Under Secretary of Defense (Research and Engineering) (USD(R&E))
 - vii. USD(A&S), Chief Information Security Office for Acquisition & Sustainment (CISO(A&S))
 - viii. USD(A&S), Defense Pricing and Contracting (DP&C)
 - ix. Defense Contract Management Agency (DCMA)
 - x. Defense Logistics Agency (DLA)
- c) The CISO(A&S) will provide Executive Secretary functions to the Task Force and will hold the first meeting no later than August 18, 2020.
 - d) The USD(I&S) will chair waiver meetings pertaining to video surveillance equipment or services, and the DoD CIO will chair waiver meetings pertaining to telecommunications equipment. The Task Force meeting will be co-chaired for waivers pertaining to both video surveillance equipment or services and telecommunications equipment.
 - e) Component head-approved waiver requests will be staffed through the Task Force for review and approval by the Secretary of Defense. Military Department waiver requests will be staffed for review through the Task Force, after which the waiver request will be returned to the Military Department for review and approval by the head of the Military Department.

3. Waiver Period:

- a) The maximum waiver period allowed by section 889(d)(1) for waivers from the prohibition at 889(a)(1)(B) is up to two years or until August 13, 2022, whichever comes first. In no instance may the DoD waiver authority approve a waiver from the prohibition at 889(a)(1)(B) extending beyond August 13, 2022.
- b) The Director of National Intelligence (DNI) may provide a section 889 waiver on a later date, based on a determination that the waiver is in the national security of the United States. All Military Department and Component requests for DNI waiver approval of section 889(a)(1)(B) shall be staffed for review by the Task Force in accordance with Section 2 of this memorandum.

4. Waiver Processing and Reporting Requirements:

- a) An executive agency waiver may be approved only on the basis of a compelling justification for additional time to implement the procurement prohibitions.
- b) Waiver requests must include the compelling justification and a full and complete laydown, or description, of the extent or presence of covered telecommunications or video surveillance equipment in the relevant supply chain and a phase-out plan to eliminate the equipment from the relevant systems.
- c) Prior to executing a waiver to the prohibitions in section 889(a)(1)(B), the head of the executive agency shall—
 - i. Designate a senior agency official for supply chain risk management, responsible for ensuring the agency effectively carries out the supply chain risk management functions and responsibilities described in law, regulation, and policy; and
 - ii. Establish participation in an information-sharing environment when and as required by the Federal Acquisition Security Council (FASC) to facilitate interagency sharing of relevant acquisition supply chain risk information;
 - iii. Notify and consult with the ODNI on the waiver request using ODNI guidance, briefings, best practices, or direct inquiry, as appropriate, except for emergency procurements as described in FAR 4.2104; and
 - iv. Notify the ODNI and FASC 15 days prior to granting the waiver that it intends to grant the waiver, except for emergency procurements as described in FAR 4.2104.
- d) The DoD waiver authority shall, not later than 30 days after waiver approval, submit in accordance with agency procedures to the appropriate congressional committees—
 - i. An attestation that granting the waiver would not, to the agency's knowledge having conducted the necessary due diligence as directed by statute and regulation, present a material increase in risk to U.S. national security.
 - ii. The full and complete laydown or description of the presence of covered telecommunications or video surveillance equipment or services in the relevant supply chain, to include a description of each category of covered technology equipment or services discovered after a reasonable inquiry, as well as each category of equipment, system, or

service used by the entity in which such covered technology is found after conducting a reasonable inquiry; and

- iii. The phase-out plan to eliminate such covered telecommunications or video surveillance equipment or services from the relevant systems.
- e) For emergency procurements, in addition to the requirements above, the DoD waiver authority shall make a determination that the ODNI notification and consultation requirements and the FASC notification requirements are impracticable due to an emergency condition; and within 30 days of award, notify the ODNI and the FASC of the waiver issued under emergency conditions.
- f) To facilitate recognition and appropriate routing, waiver requests must also identify the program name and mission area supported by the waiver from the following list:
 - i. nuclear deterrence (including nuclear command, control, and communications, integrated tactical warning and attack assessment, and continuity of government)
 - ii. homeland defense (including ballistic missile defense)
 - iii. DoD telecommunications network infrastructure
 - iv. physical security of DoD installations and facilities
 - v. defense business systems
 - vi. weapons systems
 - vii. other products and services
- g) For Military Department waivers, the Service Secretary will submit the approved waiver, laydown, and phase-out plan to the Task Force within two days of approval, and will report directly to the appropriate Congressional committees within 30 days of approval.
- h) Section 889 requires that each waiver be submitted to the appropriate congressional committees within 30 days of approval. The term “appropriate congressional committees” means:
 - i. the Committee on Banking, Housing, and Urban Affairs, the Committee on Foreign Relations, and the Committee on Homeland Security and Governmental Affairs of the Senate; and

- ii. the Committee on Financial Services, the Committee on Foreign Affairs, and the Committee on Oversight and Government Reform of the House of Representatives.