



# Preliminary Analysis for SIA Members: NDAA Prohibition Acquisition Rules

## What SIA Members Need to Know About the Federal Procurement Prohibition

This **preliminary analysis** covers the interim final rule implementing Section 889(a)(1)(A) of the National Defense Authorization Act (NDAA) for Fiscal 2019 (P.L. 115-232) which prohibits procurement of certain Chinese telecommunications and video surveillance products. This rule was published and became effective August 13, 2019. This analysis focuses specifically on the video surveillance equipment and services covered, and SIA will update this analysis with additional insight or information as needed.

### Key documents:

[Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment \(FAR Case 2018-017\)](#)

GSA: The General Services Administration (GSA) issued [implementation rules specifically applicable to GSA contractors](#), which deviate in some ways from the FAR

### Key text of the prohibition:

As stated in the rule, "Section 889(a)(1)(A) prohibits agencies 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 a critical technology as part of any system, on or after August 13, 2019."

Covered equipment or services is defined in the statute (and the rule) as:

1. Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities);
2. 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);
3. Telecommunications or video surveillance services provided by such entities or using such equipment; or
4. 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.

## Top Takeaways for Security Contractors

1. **Effective Date – August 13, 2019.** All solicitations and resulting contracts issued on or after August 13, 2019, will include clauses prohibiting the procurement of covered equipment and services and the requiring offeror “representation” (see below). Contract awards on or after that date will also include the clauses if the solicitation was issued prior to August 13. **Existing indefinite delivery contracts will be modified to include these clauses applicable to orders where performance will occur on or after that date.**
2. **“Representation” and Disclosure Requirements. Beginning August 13, 2019,** new contracts will include a requirement that all offerors provide a representation (self-certification) as to whether any of their offerings to the federal government include “covered telecommunications equipment or services” as defined in the statute, which also extends to subcontracts. If included, contractors will be required to provide additional detail, offer-by-offer through order-level representations and disclosures, about the products and an explanation of their proposed use. This would include any factors relevant to a government determination as to whether such use would be permissible under the terms of the prohibition, or if a waiver request may be appropriate for example. GSA specifically will phase in representation and disclosure requirements by the end of the first quarter of fiscal year 2020, and limit order-level representations for indefinite delivery contracts to “high-risk” categories most likely to include information technology or communication technology, which includes schedule 70 and schedule 84 contracts commonly utilized in the security industry. Order-level representations are also required for other contracts where information technology or communication technology is potentially included.
3. **Reporting Requirements.** Beginning August 13, 2019, contractors are required to report any covered equipment or services provided if discovered during the course of contract performance. Contractors and subcontractors are required to report the discovery of any covered equipment, system, or services in the course of the performance of the government contract within one day of discovery or notification. Within 10 days of the report, the contractor must also explain mitigation actions taken or recommended.
4. **Prohibition Applies Below the Federal Micro-Purchase Threshold and Regardless of the COTS Exemption.** The scope of the prohibition across federal contracting mechanisms is quite broad, extending to purchases below the minimum purchasing threshold (amounts up to \$10,000 in 2019) that are normally exempt from federal procurement rules and **regardless of the commercial-off-the-shelf (COTS) waiver often utilized for commercially available information technology products** (up to \$180,000 in 2019).
5. **Waivers: Government-Only.** The FAR Rule clarifies that one-time, two-year waivers under Section 889(d) are only available for government entities (g., requirements office, contracting office), when granted by agencies. Contractors and companies cannot obtain waivers. Such waivers would allow the continued procurement of covered equipment after August 13, 2019, and can be granted by agency heads, if the request offers a compelling justification and is accompanied by a phase-out plan. The Director of National Intelligence may also provide a waiver if the Director determines the waiver is in the national security interests of the United States.
6. **Agency-Specific Representation, Disclosure and other Implementing Rules Could Vary Significantly.** The FAR Rule acknowledges that some agencies may need to tailor the approach to the information collected through the representations based on their unique missions. GSA has already issued its tailored implementation rules; other agencies may follow.

## Frequently Asked Questions (FAQS)

### Q: Exactly what video surveillance equipment is covered by the ban?

A: Video surveillance equipment produced by Chinese firms **Hikvision, Dahua and Hytera** is specifically identified as covered equipment, when used for the purposes of “*public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes.*”

### Q: Is equipment provided by these firms as original equipment manufacturers (OEMs) covered by the ban?

A: While not addressed directly in the language of the statute or the FAR rule, it should be assumed that products for which these firms are the OEM would also be considered covered equipment. The inclusion of OEM information within the disclosure requirements for contractors providing covered equipment indicates such products are within its scope. **SIA recommends that systems integrators check directly with equipment manufacturers or distributors for the latest and most accurate information on the eligibility of specific products for federal purchase.**

**Q: Does the federal ban require the removal of existing equipment?**

**A:** There is no mandate included in Section 889 or the interim rule requiring the removal of existing equipment. However, given the procurement prohibition in effect beginning August 13, eventual replacement is expected through the normal tech refresh cycle for such equipment, and it is possible agencies may decide on their own to initiate replacement. Additionally, a plan for replacement would be required from government entities seeking an agency waiver to allow continued procurement of the covered equipment after August 13.

**Q: Outside of an agency waiver, are there situations where procurement of covered video surveillance products would not be prohibited?**

**A:** The FAR rule does not adequately clarify the specific circumstances under which procurement of covered items would (or potentially would not) be prohibited i.e. for the “purpose of public safety, security of Government facilities, physical security surveillance of critical infrastructure, and other national security purposes.” Notably however, the rule allows contractors to explain the proposed use of covered equipment and “any factors relevant to determining if such use would be permissible under the prohibition.” As a result, we expect agency-specific guidance will provide additional insight on this issue when applied in specific cases.

**Q: Can federal grants be used to purchase equipment prohibited by Section 889?**

**A:** Currently, yes. However, use of federal grant funds for covered equipment will be restricted through subsequent federal rulemaking to implement remaining provisions of Section 889, expected to be implemented by August 13, 2020.

**Q: Are state and local governments restricted by the procurement prohibitions in Section 889?**

**A:** No, the restriction is limited to federal procurement, federal contracts and use of federal grant and loan funds.

**Q: What about video surveillance equipment utilizing HiSilicon chips?**

**A:** Many of today’s video surveillance products utilize chips manufactured by HiSilicon (a semiconductor company that is a subsidiary of Huawei). Any telecommunications equipment produced by Huawei and its subsidiaries is clearly prohibited. However, since the chips are instead components of video surveillance products, it is unclear whether the scope of the prohibition extends to such equipment if it is not produced by one of the Chinese companies (Hikvision, Dahua and Hytera) currently identified in the definition of covered video surveillance products. SIA expects agency-specific guidance to be instructive, and SIA will seek additional clarity on this issue as implementation continues.

**Q: Does the FAR rule impact the ability of integrators to perform federal work using compliant products, if they also provide video surveillance products to non-federal customers that do not meet the federal requirements?**

**A:** Not currently. However, the federal government has yet to clarify its approach to implementing subsection (a)(1)(B) which prohibits contracting with entities that “use” covered equipment. This subsection and remaining provisions applicable to the use of grant and loan funds are expected to go into effect August 13, 2020, following a second rulemaking process. Subsection (a)(1)(B) appears to prohibit use in the performance of federal contracts that may not involve the direct purchase of video surveillance equipment or services by the government. SIA has urged policymakers to ensure the contracting prohibition will not be applicable to non-federal sales or use of covered equipment by a government contractor that is unrelated to federal work.

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