

Higher Education Federal Contractors: Is Your Supply Chain Compliant With the National Defense Authorization Act?

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President Donald Trump signed the [John S. McCain National Defense Authorization Act for Fiscal Year 2019](#) (NDAA) (Pub. L. No. 115-232) into law on August 13, 2018. Section 889 of the NDAA applies to schools, including hospital systems, labs, and research affiliates, receiving federal contracts, grants, and loans. Specifically, § 889(a)(1)(A), which went into effect on August 13, 2019, prohibits an executive agency from “procur[ing] or obtain[ing] or extend[ing] or renew[ing] 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 a part of any system.” Under the NDAA, covered telecommunications equipment or services includes any telecommunications equipment produced by five Chinese companies and their subsidiaries and affiliates.

While complying with § 889(a)(1)(A) will be challenging to some higher education federal contractors already, § 889(a)(1)(B)—which becomes effective on August 13, 2020—will likely complicate things even more. Under the latter subsection, the federal government is prohibited from “enter[ing] into a contract (or extend[ing] or renew[ing] 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 does not define “system,” but the NDAA prohibits telecommunications equipment produced by the 5 Chinese companies and their subsidiaries and affiliates in government facilities, physical security surveillance of critical infrastructure, and other national security purposes. Therefore, an executive agency could extend the limitation of “system” to a federal contractor’s internal systems if the contractor processes, stores, or transmits government information in its own systems.

A federal contractor can request a one-time waiver from the executive agency if it “provides a compelling justification for the additional time to implement the requirements” and “submits to the head of the executive agency ... a full and complete laydown of the presences of covered telecommunications or video surveillance equipment or services in the entity’s supply chain and a phase-out plan to eliminate such covered telecommunications or video surveillance equipment or services from the entity’s systems.” This waiver is available for a period of not more than two years after the respective effective dates of §§ 889(a)(1)(A) and 889(a)(1)(B). After the waiver period expires, only the Director of National Intelligence may provide a waiver “if the Director determines the waiver is in the national security interests of the United States.”

Takeaway

The lesson for higher education federal contractors is as follows: a temporary waiver for a period of not more than two years after the effective dates of subparts (A) and (B) of section 898(a)(1) can be requested from the executive agency under certain circumstances, but ultimately only time will tell how stringently the government will enforce the NDAA because of the ambiguity in the statute.

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