

RAIN-2020-G05

EPA Implementation of Prohibition on Certain Telecommunication and Video Surveillance Services or Equipment and Termination Provisions from Office of Management and Budget Final Guidance ([85 FR 49506](#))

Notification Date: August 28, 2020

Effective Date: August 13, 2020

Purpose: This Recipient/Applicant Information Notice (RAIN) informs recipients and applicants of EPA's implementation of two Office of Management and Budget (OMB) Final Guidance requirements that became effective upon publication in the Federal Register on August 13, 2020: (1) Prohibition of Certain Telecommunication and Video Surveillance Services or Equipment and (2) Termination Provisions.

Summary: OMB revised 2 CFR 200 to align with section 889 of the National Defense Authorization Act for FY 2019 ([NDAA 2019](#)) which prohibits executive Agency heads from obligating or expending 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 prohibited systems identified in NDAA 2019. Effective August 13, 2020, OMB added a new section, 2 CFR 200.216, *Prohibition on certain telecommunication and video surveillance services or equipment*, which prohibits Federal award recipients from using loan or grant funds to enter into contracts (or extend or renew contracts) with entities that use covered telecommunications equipment or services. This prohibition applies even if the contract is not intended to procure or obtain any equipment, system, or service that uses covered telecommunications equipment or services. These prohibitions extend to subrecipients including borrowers under EPA funded revolving loan programs as well as contributions to meet a required cost share under an EPA assistance agreement. The regulation allows EPA, subject to the availability of funds, to provide support to assist recipients transition from covered telecommunications and services.

Certain prohibited equipment, systems, or services, including equipment, systems, or services produced or provided by entities identified in NDAA 2019 are recorded in the [System for Award Management](#) exclusion list.

OMB also revised 2 CFR 200.340(a)(2), *Termination*, to strengthen the ability of the Federal awarding agency to terminate Federal awards, to the greatest extent authorized by law, when the Federal award no longer effectuates the program goals or Federal awarding agency priorities. The intent of this change is to ensure that Federal awarding agencies prioritize ongoing support to Federal awards that meet program goals. EPA will implement this provision in a term and condition consistent with the guidance at 2 CFR 200.340(b). For instance, following the issuance of a Federal award, if evidence reveals that a specific award objective is ineffective at achieving program goals, it may be in the government's interest to terminate the Federal award. Further, additional evidence may cause the Federal awarding agency to significantly question the feasibility of the intended objective of the award, such that it may be in the interest of the government to terminate the Federal award. Other similar circumstances may indicate that termination under 2 CFR 200.340(a)(2) is warranted.

Action: Effective August 13, 2020, all EPA assistance agreement recipients must comply with the OMB revised regulation at [2 CFR 200.216](#) and are subject to the regulation at [2 CFR 200.340](#).

Special Note: 2 CFR 200.216 applies to EPA recipients and subrecipients obligations and expenditures on or after August 13, 2020. It is the sole responsibility of pass-through entities receiving EPA funds to communicate this requirement to their subrecipients including borrowers under EPA funded revolving loan fund programs. EPA does not have a direct relationship with subrecipients.

To fully implement these regulatory requirements, EPA has updated our [General Terms and Conditions](#).

EPA recipients should contact the Grants Specialist listed on their award document if they believe they need EPA support to transition from covered telecommunications equipment and services to comply with 2 CFR 200.216.

Prohibition on Covered Telecommunications and Video Surveillance Services or Equipment

Grants and Loans

This document is designed to address common questions regarding the Office of Management and Budget’s (OMB) implementation of section 889(b) of the National Defense Authorization Act (NDAA) of Fiscal Year 2019, Pub. L. No. 115—232, for grants and loans through the updates to section 200.216 of Title 2 of the Code of Federal Regulations (2 CFR).

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Q-1. What are “covered telecommunications equipment or services”?

Section 889 of the NDAA of 2019 defines “covered telecommunications equipment or services” to mean telecommunications and video surveillance equipment or services produced by Huawei Technologies Company, ZTE Corporation, Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities).

“Covered telecommunications equipment or services” also includes telecommunications or video surveillance equipment or services provided by an entity that the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity that is owned or controlled by the government of a covered foreign country. Additional entities identified as covered entities will be identified as described in Q-2.

Q-2. How do you know if an entity has been added to the list of covered entities?

Entities added to this list will be incorporated into the excluded parties list in the System for Award Management (SAM) (www.sam.gov). When a user conducts a search of the excluded parties list, a record will appear describing the nature of the exclusion for any entity identified as covered by this prohibition.

Q-3. What is the covered foreign country?

The People’s Republic of China.

Q-4. Can this prohibition be waived for grants and loans?

Unlike Federal procurement, the prohibition cannot be waived for Federal assistance such as grants and loans.

Q-5. Is it mandatory to include a specific provision in Federal awards and notices of funding opportunity issued on or after August 13, 2020?

The Federal awarding agency must take positive steps to ensure that recipients are aware of the requirements associated with this provision as of August 13, 2020. While referencing 2 CFR Part 200 may likely suffice, including a specific provision may be a best practice in order to ensure clarity, especially because this is a new requirement.

Q-6. Does the Section 889 prohibition apply to existing Federal awards as of August 13, 2020?

Yes. The section 889 prohibition on covered telecommunications and video surveillance services or equipment is effective on all expenditures charged to Federal awards as of August 13, 2020.

Q-7. Will this prohibition impact fixed amount awards where payment is based upon the achievement of milestones and not based on actual costs?

Yes, the prohibition on covered telecommunications and video surveillance services or equipment applies and the recipient’s budget must not include the cost of covered telecommunications and video surveillance services or equipment in their fixed amount award.

Q-8. Can a Federal award be provided to a recipient when they use covered telecommunications equipment or services?

Yes, as long as the Federal award does not pay for the covered telecommunications and video surveillance services or equipment that the recipient uses. If the Federal agency suspects that the goods and services being procured under the award may in fact be prohibited, it must take appropriate action, consistent with its policies and procedures, and in accordance with the guidance in 2 CFR Part 200.

Q-9. Do existing Federal awards need to be amended to include the provision after August 13, 2020?

This prohibition applies to existing Federal awards. Federal awarding agencies must ensure that recipients are aware of this prohibition and determine if an amendment is needed on a case by case basis.

Q-10. If a Federal award issued prior to August 13, 2020 is amended for non-financial purposes (i.e., no cost extension or scope), does the amendment need to include this prohibition?

This prohibition applies to existing Federal awards. Federal awarding agencies must ensure that recipients are aware of this prohibition and determine if an amendment is needed on a case by case basis.

Q-11. If a Federal award issued prior to August 13, 2020 is amended for the purposes of adding supplemental funds, does the amendment need to include this prohibition?

This prohibition applies to existing Federal awards. Federal awarding agencies must ensure that recipients are aware of this prohibition and determine if an amendment is needed on a case by case basis.

Q-12. Can a Federal award be used to procure goods or services, unrelated to prohibited services or equipment, from an entity that uses such equipment and services?

Yes.

Q-13. Do recipients need to certify that goods or services procured under a Federal award are not for covered telecommunications equipment or services?

Yes, when the recipient signs an award agreement they are certifying that they will comply with all applicable laws, rules, and regulations, including the prohibition on covered telecommunications equipment and services. If the Federal agency suspects that the goods and services being procured under the award may in fact be prohibited, it must follow its own policies and procedures to take appropriate action that aligns with the guidance in 2 CFR Part 200. OMB is separately evaluating the certifications and representations statement in SAM and will make any necessary updates.

Q-14. Can recipients use the costs associated with covered telecommunications equipment or services or equipment to meet their cost sharing or match requirements?

No, such costs are unallowable costs.

Q-15. Can recipients use program income generated by a Federal award to cover the costs associated with covered telecommunications equipment or equipment?

No. Program income must be used for allowable costs in accordance with 2 CFR §200.307.

Q-16. Will this prohibition impact awards that use the de minimis indirect cost rate, as the 10% is based on modified total direct costs (MTDC) and not specific indirect costs elements?

No, the prohibition on covered telecommunications and video surveillance services or equipment does not affect a non-Federal entity's use of the de minimis indirect cost rate; however, the non-Federal entity must review its costs used to determine its de minimis indirect cost rate to ensure that unallowable costs are not included in the calculation. The MTDC cannot include unallowable costs in its calculation of the de minimis indirect cost rate.

Q-17. When a recipient normally charges prohibited services or equipment through their indirect cost pool, can a Federal award cover the same recipient's indirect costs?

No, like other unallowable costs, covered telecommunications and video surveillance services or equipment costs must not be charged either directly or indirectly to Federal awards. The recipient must separately negotiate an indirect cost rate for their Federal awards that excludes these costs from the indirect cost pool and base amount chargeable to its Federal award(s).

Q-18. How will covered telecommunications equipment or services as a new unallowable expense be implemented for indirect cost rates?

Federally approved indirect cost rate agreements generally do not need to be reopened or amended, but may need to be adjusted in accordance with 2 CFR § 200.411. The non-Federal entity must review its current indirect cost rate proposal or previously negotiated rate to ensure that it does not include expenses associated with covered telecommunications equipment or services because the non-Federal entity must certify that the costs included in its proposal are allowable.¹

- If a non-Federal entity has not included the covered telecommunications equipment or services, then it should include a statement with each indirect cost proposal affirming that it has not included any costs described in 2 CFR §200.216.
- If a non-Federal entity finds that it has included the covered telecommunications equipment or services in an indirect cost proposal currently under review or a previously negotiated rate, then it should immediately contact the cognizant agency for indirect costs to revise the indirect cost proposal or negotiated rate.

Q-19. How will Federal agencies identify covered telecommunications and video surveillance services or equipment as unallowable costs in the negotiation and random audit selection of indirect costs?

Federal agencies must adapt their policies and procedures to review the costs associated with the prohibited telecommunications and video surveillance services or equipment. 2 CFR Part 200 requires the recipient to certify that all costs within the negotiated indirect cost rate are allowable in accordance with 2 CFR Part 200, Subpart E (Cost Principles). The covered telecommunications and video surveillance services or equipment mentioned in Sec. 889 of the NDAA of 2019 are considered unallowable under 2 CFR Part 200, Subpart E (Cost Principles).

¹ 2 C.F.R. Part 200, Appendix III (F), Certification; Appendix IV (D), Certification of Indirect (F&A) Costs; Appendix VII (D.3), Required Certification.

Q-20. What are the Federal awarding agencies' responsibilities to monitor adherence to this provision?

Federal awarding agencies are responsible for the implementation of this provision, as they are for the other compliance requirements in 2 CFR Part 200, and must incorporate oversight of this provision into their existing the monitoring and compliance oversight of Federal awards. Adherence to these new requirements will also be reviewed for costs incurred on or after August 13, 2020 in future Single Audits and other audits of recipient spending.

Q-21. How should a Federal awarding agency handle a recipient that procured covered telecommunications equipment or services or equipment under a Federal award?

If a recipient procures covered technology under a Federal award, the Federal awarding agency must follow its policies and procedures associated with monitoring Federal awards and, when appropriate, pursue remedies for noncompliance, which must align with the guidance provided in 2 CFR Part 200.