

Section 889: Second Interim Rule to Require Annual Part B Compliance Certification

August 28, 2020

WHAT: The U.S. Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA) published the second interim rule relating to the implementation of Section 889(a)(1)(B) (Part B) of the National Defense Authorization Act (NDAA) for Fiscal Year 2019. Section 889 Part B went into effect on August 13, 2020. As we previously reported here, Part B prohibits any executive agency from entering into, extending or renewing a contract with an entity that uses any equipment, system, or services 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. This second interim rule requires contractors to represent annually in the System for Award Management (SAM.gov) whether they use the covered equipment or services.

WHEN: The second interim rule was published in the Federal Register on August 27, 2020 and becomes effective October 26, 2020. Comments on the interim rule are due prior to October 26, 2020.

WHAT DOES IT MEAN FOR INDUSTRY: Similar to the certification that already exists in SAM.gov for Section 889 Part A, once effective, this new interim rule will require offerors to make an annual certification in SAM.gov related to their compliance with Part B. This certification will reduce contractors' reporting and compliance burdens by replacing the offer-by-offer representations that contractors having been making since Section 889 Part B took effect on August 13, 2020.

The first interim rule added a representation to the provision at FAR 52.204-24(d)(2), requiring offerors to represent on an offer-by-offer basis if the offeror "does" or "does not" use covered

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telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services. If it represents that it does use covered equipment or services, the offeror must then provide additional disclosures. Now, a contractor will represent annually on SAM.gov, after conducting a reasonable inquiry, whether it uses covered telecommunications equipment or services, or any equipment, system, or service that uses covered telecommunications equipment or services. An offeror that selects "does not" in the new annual representation at FAR 52.204-26(c)(2), or in FAR 52.212-3(v)(2)(ii) for commercial items, can thus skip the offer-by-offer representation. Only offerors that indicate they do use covered equipment or services will be required to provide additional disclosures for specific contracts or proposals.

Wiley continues to be actively engaged in issues related to implementation of Section 889.