



# Prohibitions on Expending FEMA Award Funds for Covered Telecommunications Equipment or Services

## FEMA Policy #405-143-1

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### BACKGROUND

In 2018, Congress enacted legislation that prohibited obligating or expending federal award funds on certain telecommunications products or from certain entities for national security reasons. The statute and implementing regulations, as they apply to FEMA recipients and subrecipients, provide for two distinct prohibitions: 1) to prevent the use of federal award funds to procure or obtain covered telecommunications equipment or services; and 2) to prevent the use of federal award funds to contract with an entity that uses covered telecommunication equipment or services. This policy supersedes FEMA Interim Policy 405-143-1, *Prohibitions on Expending FEMA Award Funds for Covered Telecommunications Equipment or Services*, issued November 24, 2020.

### PURPOSE

The purpose of this policy is to provide guidance to FEMA's recipients and subrecipients and their contractors and subcontractors on prohibitions regarding certain telecommunications and video surveillance equipment and services beginning on or after August 13, 2020. These prohibitions are described in the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (FY 2019 NDAA)<sup>1</sup>, and 2 Code of Federal Regulations (CFR) Part 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.<sup>2</sup>

### PRINCIPLES

The following principles underpin this policy:

- A. Balance protecting national security, including homeland security and critical infrastructure, with the addition of required duties and limitations on FEMA's recipients and subrecipients.

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<sup>1</sup> [Pub. L. No. 115-232 \(2018\)](#), Under section 889(a), these prohibitions also apply to federal procurements, and those prohibitions went into effect on Aug. 13, 2019. The General Services Administration, Department of Defense, and National Aeronautics and Space Administration have already amended the *Federal Acquisition Regulation* (FAR) and issued other guidance to implement these prohibitions. For additional information on the FAR provisions, see 48 CFR. §§ 4.2100-4.2105, 52.204-24 – 52.204-26.

<sup>2</sup> The new regulation at 2 CFR § 200.216 prohibits recipients and subrecipients from obligating or expending loan or grant funds; however, the updated regulations at 2 CFR. § 200.1 define the terms "recipient" and "subrecipient" in relation to the term federal award, which itself is defined in relation to the term federal financial assistance. Per the updated 2 CFR § 200.1, federal financial assistance, specifically for purposes of § 200.216, means grants, cooperative agreements, loans, and loan guarantees.



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- B. Provide clarity on how the statutory and regulatory prohibitions apply to recipients and subrecipients of FEMA grants, cooperative agreements, loans, and loan guarantees (collectively referred to in this policy as “FEMA awards” or “FEMA award funds”).
- C. Reduce complexity by issuing a single policy for all FEMA awards, subject to limited programmatic variations.
- D. Draw on existing regulations and guidance applicable to federal procurements, as appropriate, to promote consistent interpretation and definitions across the Federal Government.

## REQUIREMENTS

### A. APPLICABILITY

Outcome: To ensure these prohibitions are implemented in accordance with the statute and clarify when and to whom these prohibitions apply.

- 1. Under all open and future FEMA awards, this policy applies to:
  - a. Purchase orders, contracts, subcontracts, or similar acquisition actions:
    - i. That are new, renewed or extended on or after August 13, 2020;
    - ii. For all goods or services of any dollar amount; and
    - iii. By any FEMA recipient or subrecipient or their contractor or subcontractor under FEMA awards.

### B. PROHIBITIONS

Outcome: To describe the statutory and regulatory prohibitions that apply to FEMA awards.

- 1. Effective August 13, 2020, FEMA recipients and subrecipients, as well as their contractors and subcontractors, may not obligate or expend any FEMA award funds to:
  - a. 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 of any system;
  - b. Enter into, extend, or renew 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 of any system; or
  - c. Enter into, extend, or renew contracts with entities that use covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.<sup>3</sup>

### C. EXCEPTIONS

Outcome: To explain the statutory exceptions to the prohibitions.

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<sup>3</sup> The statute prohibits obligating or expending any FEMA award funds on covered telecommunications and equipment; therefore, these prohibitions flow down to a recipient’s or subrecipient’s contractors and subcontractors.



1. By statute, the prohibitions do not apply to:
  - a. A service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or
  - b. Telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.
2. By necessary implication and regulation, the prohibitions do not apply to:
  - a. Covered telecommunications equipment or services that:
    - i. Are not used as a substantial or essential component of any system; and
    - ii. Are not used as critical technology of any system.
  - b. Other telecommunications equipment or services that are not considered covered telecommunications equipment or services.<sup>4</sup>

## **D. REPLACEMENT OF COVERED TELECOMMUNICATIONS EQUIPMENT OR SERVICES**

Outcome: To explain the statutory requirement to prioritize available funding for replacement equipment or services.

1. Section 889(b)(2) of the FY 2019 NDAA directs federal agencies to prioritize available funding and technical support to assist recipients and subrecipients as is reasonably necessary to:
  - a. Transition from covered telecommunications equipment or services and procure replacement equipment or services; and
  - b. Sustain communications service to users and customers.
2. Depending on the specific FEMA program, recipients and subrecipients may be permitted to use FEMA award funds to purchase replacement equipment or services.
  - a. Recipients and subrecipients should refer to program guidance or contact the applicable program office to determine whether replacement equipment or services is eligible under that program.

## **E. CONTRACT PROVISION**

Outcome: To communicate that the regulation requires FEMA recipients and subrecipients and their contractors and subcontractors to include a contract provision in all FEMA-funded contracts and subcontracts, including any purchase orders.<sup>5</sup>

1. For purchases in support of declarations and FEMA awards issued on or after November 12, 2020, for all new, extended, or renewed contracts using FEMA funds, especially for covered telecommunications equipment or services:

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<sup>4</sup> The regulation at [2 CFR § 200.471](#) describes telecommunications and video surveillance costs as generally allowable under the cost principles except when they are covered by the prohibitions in the FY 2019 NDAA and [2 CFR § 200.216](#).

<sup>5</sup> [2 CFR Part 200, Appendix II](#) and [2 CFR § 200.327](#).



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- a. FEMA recipients and subrecipients are required to include a provision in their contracts explaining the prohibitions under section 889 of the FY 2019 NDAA and as clarified in this policy.
  - b. This also applies to subcontracts under any new, extended, or renewed contract.
2. For the required contract provision, recipients and subrecipients may draft their own provision that meets the requirements of the FY 2019 NDAA and 2 CFR § 200.216 to include in contracts and subcontracts. Alternatively, they may include language from FEMA's [Contract Provision Guide](#) (June 2021) in their contracts and subcontracts. Recipients and subrecipients should also consult their own contracting officials or legal counsel when incorporating any contract provision.

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May 10, 2022



## ADDITIONAL INFORMATION

### REVIEW CYCLE

FEMA Policy 405-143-1, *Prohibitions on Expending FEMA Award Funds for Covered Telecommunications Equipment or Services*, will be reviewed, reissued, revised, or rescinded within four years of the issue date.

### AUTHORITIES

- A. Section 889 of the [John S. McCain National Defense Authorization Act for Fiscal Year 2019 \(FY 2019 NDAA\)](#), Pub. L. No. 115-232 (2018).
- B. 2 CFR §§ 200.1, 200.216, 200.317 – 200.327, 200.471.
- C. 2 CFR Part 200, Appendix II.
- D. [OMB Final Guidance, Guidance for Grants and Agreements](#), 85 Fed. Reg. 49506 (August 13, 2020).

### REFERENCES

48 CFR §§ 4.2100-4.2105 (FAR definitions implementing section 889, requirements for solicitation provisions and contract clauses), 52.204-24-52.204-26 (FAR language required for contract clauses).

### DEFINITIONS

**Backhaul** means intermediate links between the core network, or backbone network, and the small subnetworks at the edge of the network (e.g., connecting cell phones/towers to the core telephone network). Backhaul can be wireless (e.g., microwave) or wired (e.g., fiber optic, coaxial cable, Ethernet).<sup>6</sup>

**Covered foreign country** means the People's Republic of China.<sup>7</sup>

**Covered telecommunications equipment or services** means—

- a. Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation, (or any subsidiary or affiliate of such entities);
- b. 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

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<sup>6</sup> 48 CFR § 4.2101. FEMA notes that the FAR does not technically apply to grants, cooperative agreements, or loans, but its definitions are still useful in FEMA's implementation of section 889 to its awards in the absence of other applicable definitions.

<sup>7</sup> FY 2019 NDAA § 889(f)(2).



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Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities);

- c. Telecommunications or video surveillance services provided by such entities or using such equipment; or
- d. 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.<sup>8</sup>

**Critical Technology** means—

- a. Defense articles or defense services included on the United States Munitions List set forth in the *International Traffic in Arms Regulations* under subchapter M of chapter I of title 22, CFR;
- b. Items included on the Commerce Control List set forth in Supplement No. 1 to part 774 of the *Export Administration Regulations* under subchapter C of chapter VII of title 15 CFR, and controlled –
  - (i) Pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology; or
  - (ii) For reasons relating to regional stability or surreptitious listening;
- c. Specially designed and prepared nuclear equipment, parts and components, materials, software, and technology covered by part 810 of title 10 CFR (relating to assistance to foreign atomic energy activities);
- d. Nuclear facilities, equipment, and material covered by part 110 of title 10 CFR (relating to export and import of nuclear equipment and material);
- e. Select agents and toxins covered by part 331 of title 7CFR part 121 of title 9 of such Code, or part 73 of title 42 of such Code; or
- f. Emerging and foundational technologies controlled pursuant to section 1758 of the *Export Control Reform Act of 2018* (50 United States Code 4817).<sup>9</sup>

**Interconnection arrangements** means arrangements governing the physical connection of two or more networks to allow the use of another's network to hand off traffic where it is

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<sup>8</sup> FY 2019 NDAA § 889(f)(3).

<sup>9</sup> 48 CFR § 4.2101.



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ultimately delivered (e.g., connection of a customer of telephone provider A to a customer of telephone company B) or sharing data and other information resources.<sup>10</sup>

**Roaming** means cellular communications services (e.g., voice, video, data) received from a visited network when unable to connect to the facilities of the home network either because signal coverage is too weak or because traffic is too high.<sup>11</sup>

**Substantial or essential component** means any component necessary for the proper function or performance of a piece of equipment, system, or service.<sup>12</sup>

**Telecommunications equipment or services** means telecommunications or video surveillance equipment or services, such as, but not limited to, mobile phones, land lines, internet, video surveillance, and cloud servers.<sup>13</sup>

## MONITORING

FEMA will monitor the implementation and compliance of this policy through its regular programmatic monitoring procedures.

## QUESTIONS

Questions regarding this policy may be directed to the GPD Policy mailbox at [fema-gpd-policy@fema.dhs.gov](mailto:fema-gpd-policy@fema.dhs.gov).

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<sup>10</sup> 48 CFR § 4.2101.

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> See 2 CFR §§ 200.1, 200.471.