

AN A.S. PRATT PUBLICATION

APRIL 2020

VOL. 6 • NO. 4

PRATT'S  
**GOVERNMENT  
CONTRACTING  
LAW**  
REPORT



LexisNexis

**EDITOR'S NOTE: GSA CHANGES,  
AND MORE!**

Victoria Prussen Spears

**GSA'S BIG CHANGES FOR 2020**

Merle M. DeLancey Jr.

**GAO RULES THAT *KINGDOMWARE*  
"RULE OF TWO" DOES NOT GOVERN  
LEASEHOLD ACQUISITIONS  
CONDUCTED BY GSA ON BEHALF OF VA**

Gordon Griffin, Robert C. MacKichan Jr.,  
and Amy L. Fuentes

**NEW INTERIM FAR RULE REGARDING  
THE PROHIBITION ON CERTAIN  
CHINESE TELECOMMUNICATIONS  
SERVICES OR EQUIPMENT**

Eric S. Crusius, Christian B. Nagel, and  
Kelsey M. Hayes

**SKEPTICAL 9TH CIRCUIT HEARS  
INTERLOCUTORY APPEAL OF  
UNPRECEDENTED DENIAL OF  
GOVERNMENT MOTION TO DISMISS  
*FCA QUI TAM* CASE**

Pablo J. Davis and Tony Busch

**DEPARTMENT OF JUSTICE SETS UP  
PROCUREMENT COLLUSION STRIKE FORCE**

James W. Cooper, C. Scott Lent,  
Sonia Kuester Pfaffenroth, Craig D. Margolis,  
David Hibey, and Mathieu M. Coquelet Ruiz

**BREAKING DOWN DOJ'S FY2019  
FALSE CLAIMS ACT RECOVERIES**

Christian D. Sheehan

# PRATT'S GOVERNMENT CONTRACTING LAW REPORT

---

VOLUME 6

NUMBER 4

April 2020

---

<b>Editor's Note: GSA Changes, and More!</b> Victoria Prussen Spears	117
<b>GSA's Big Changes for 2020</b> Merle M. DeLancey Jr.	120
<b>GAO Rules That <i>Kingdomware</i> "Rule of Two" Does Not Govern Leasehold Acquisitions Conducted by GSA on Behalf of VA</b> Gordon Griffin, Robert C. MacKichan Jr., and Amy L. Fuentes	130
<b>New Interim FAR Rule Regarding the Prohibition on Certain Chinese Telecommunications Services or Equipment</b> Eric S. Crusius, Christian B. Nagel, and Kelsey M. Hayes	136
<b>Skeptical 9th Circuit Hears Interlocutory Appeal of Unprecedented Denial of Government Motion to Dismiss FCA <i>Qui Tam</i> Case</b> Pablo J. Davis and Tony Busch	139
<b>Department of Justice Sets Up Procurement Collusion Strike Force</b> James W. Cooper, C. Scott Lent, Sonia Kuester Pfaffenroth, Craig D. Margolis, David Hibey, and Mathieu M. Coquelet Ruiz	143
<b>Breaking Down DOJ's FY2019 False Claims Act Recoveries</b> Christian D. Sheehan	147

# *Editor-in-Chief, Editor & Board of Editors*

---

**EDITOR-IN-CHIEF**

**STEVEN A. MEYEROWITZ**

*President, Meyerowitz Communications Inc.*

**EDITOR**

**VICTORIA PRUSSEN SPEARS**

*Senior Vice President, Meyerowitz Communications Inc.*

**BOARD OF EDITORS**

**MARY BETH BOSCO**

*Partner, Holland & Knight LLP*

**MERLE M. DELANCEY JR.**

*Partner, Blank Rome LLP*

**DARWIN A. HINDMAN III**

*Shareholder, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC*

**J. ANDREW HOWARD**

*Partner, Alston & Bird LLP*

**KYLE R. JEFCOAT**

*Counsel, Latham & Watkins LLP*

**JOHN E. JENSEN**

*Partner, Pillsbury Winthrop Shaw Pittman LLP*

**DISMAS LOCARIA**

*Partner, Venable LLP*

**MARCIA G. MADSEN**

*Partner, Mayer Brown LLP*

**KEVIN P. MULLEN**

*Partner, Morrison & Foerster LLP*

**VINCENT J. NAPOLEON**

*Partner, Nixon Peabody LLP*

**STUART W. TURNER**

*Counsel, Arnold & Porter*

**ERIC WHYTSELL**

*Partner, Stinson Leonard Street LLP*

**WALTER A.I. WILSON**

*Senior Partner, Polsinelli PC*

PRATT'S GOVERNMENT CONTRACTING LAW REPORT is published twelve times a year by Matthew Bender & Company, Inc. Copyright 2020 Reed Elsevier Properties SA., used under license by Matthew Bender & Company, Inc. All rights reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For permission to photocopy or use material electronically from *Pratt's Government Contracting Law Report*, please access [www.copyright.com](http://www.copyright.com) or contact the Copyright Clearance Center, Inc. (CCC), 222 Rosewood Drive, Danvers, MA 01923, 978-750-8400. CCC is a not-for-profit organization that provides licenses and registration for a variety of users. For subscription information and customer service, call 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, [smeyerowitz@meyerowitzcommunications.com](mailto:smeyerowitz@meyerowitzcommunications.com), 646.539.8300. Material for publication is welcomed—articles, decisions, or other items of interest to government contractors, attorneys and law firms, in-house counsel, government lawyers, and senior business executives. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher. POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 630 Central Avenue, New Providence, NJ 07974.

# New Interim FAR Rule Regarding the Prohibition on Certain Chinese Telecommunications Services or Equipment

*By Eric S. Crusius, Christian B. Nagel, and Kelsey M. Hayes\**

*In order to reduce the burden on the contracting community, the Federal Acquisition Regulatory Council issued a second interim rule implementing Section 899(a)(1)(A) of the 2019 National Defense Authorization Act, which adds annual representations to SAM.gov relating to particular Chinese manufacturers of telecommunications services or equipment.*

The Federal Acquisition Regulatory Council (“FAR Council”) issued a second interim rule implementing Section 899(a)(1)(A) of the 2019 National Defense Authorization Act. The interim rule adds annual representations to SAM.gov relating to particular Chinese manufacturers of telecommunications services or equipment.

## **BACKGROUND**

Section 899(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 telecommunication equipment or services as a substantial or essential component of any system, or as a critical technology as part of any system” unless an exception applies or a waiver has been granted.

These prohibitions became effective on August 13, 2019, via the publication of FAR Circular 2019-05, which created FAR subpart 4.21 and the corresponding solicitation provision and contract clause at FAR 52.204-24 and FAR 52.204-25.

## **THE INTERIM RULE**

To recap, the provision at FAR 52.204-24 requires an offeror to represent, on an offer-by-offer basis, whether it will or will not provide any “covered telecommunications equipment or services to the Government in the performance of any contract, subcontract or other contractual instrument resulting from this solicitation.”

---

\* Eric S. Crusius is a partner at Holland & Knight LLP who focuses his practice on a wide range of government contract matters, including bid protests, claims and disputes, compliance issues and sub-prime issues. Christian B. Nagel is a government contracts partner at the firm advising businesses on a broad range of legal issues involving their relationship with the government. Kelsey M. Hayes is a litigation associate at the firm focusing her practice on government contracts. The authors may be contacted at [eric.crusius@hkllaw.com](mailto:eric.crusius@hkllaw.com), [christian.nagel@hkllaw.com](mailto:christian.nagel@hkllaw.com), and [kelsey.hayes@hkllaw.com](mailto:kelsey.hayes@hkllaw.com), respectively.

If an offeror represents that it *will* provide covered telecommunications equipment or services, the offeror must make certain additional disclosures. “Covered telecommunications equipment or services” is defined to include:

- (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.

Notably, the definition includes “any subsidiary or affiliate” of the five Chinese entities named, *without naming the entities’ subsidiaries or affiliates*. It also includes yet to be identified entities that the Secretary of Defense, after consultation, reasonably believes to be connected to the Chinese government. This will, of course, require contractors to continuously monitor the government’s identification of new entities and the impact that has on its supply chain.

It also will be interesting to see if the government will utilize the process it established and utilize the newly-formed Federal Acquisition Security Council to identify new entities. One of the Council’s primary tasks is to identify offerors and products/services that should be removed from the government’s supply chain.

### **THE NEW INTERIM RULE**

The portion of the initial interim rule memorialized in FAR 52.204-24 that required a new certification in every offer was apparently found to be unduly burdensome.

Instead, the new interim rule aims to reduce the burden on the contracting community by allowing an offeror to represent annually, via SAM.gov, whether it provides covered telecommunications equipment or services. The new annual

representation, FAR 52.204-26, requires an offeror to represent whether it *does* or *does not* "provide covered telecommunications equipment or services as part of its offered products or services to the Government in the performance of any contract, subcontract, or other contractual instrument."

If an offeror represents that it *does not* provide covered telecommunications equipment or services to the government in response to FAR 52.204-26, or in the new paragraph (v) added to FAR 52.212-3, then it is not required to complete the representations in FAR 52.204-24.

If the offeror represents that it *does* provide covered telecommunications equipment or services, or has not made any representation in FAR 52.204-26 or FAR 52.212-3(v), it must still complete the representations required by FAR 52.204-24. The purpose of this is to only require those offerors that *do* provide covered telecommunications equipment or services to the government to complete FAR 52.204-24.

The interim rule states that the government will add the banned entities to SAM.gov's excluded parties list, "with an appropriate notation to identify that the prohibition is limited to certain products and services—the entity itself is not excluded." The representation at FAR 52.204-26 requires an offeror to review the list of excluded parties in SAM.gov and confirm whether the equipment or services it is providing the government come from one of these entities.

Notably, the amendment adding paragraph (d) to FAR 4.2102 provides that the government will list the banned entities, "including *known* subsidiaries or affiliates," in SAM.gov. The definition of "covered telecommunications equipment or services," to include *any* subsidiary or affiliate of the five Chinese entities named, however, remains unchanged.

The interim rule also sets forth procedures at FAR 4.2103 for contracting officers to follow. The procedures provide that a contracting officer "may rely" on a contractor's representation in response to FAR 52.204-24, FAR 52.204-26, or FAR 52.212-3(v), "unless the contracting officer has a reason to question the representation."

Thus, while the definition of "covered telecommunications equipment or services" is not as definitive as it could be, it seems that an offeror's review of the entities listed in SAM.gov (including all *known* subsidiaries or affiliates), and representation that it is not providing covered equipment or services from these entities, should serve to satisfy the government's requests.

The interim rule will reduce the burden on offerors that do not provide covered telecommunications equipment or services by eliminating the need to complete FAR 52.204-24 in response to every offer.