

Broad Defense Policy Restrictions Put Higher Ed At Legal Risk

By **Jonathan Aronie**

On Aug. 13, 2018, President Donald Trump signed into law the National Defense Authorization Act of 2019. While fiscal year NDAs are tracked, analyzed and picked apart with great care by the federal contracting community, colleges and universities typically pay them little mind.

But ignoring the 2019 NDAA would be a big mistake, for tucked within its more than 1,000 sections is Section 889, a provision that covers schools receiving federal contracts and grants, including their labs, research affiliates and hospital systems.



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Section 889 severely restricts a school's ability to sell products to the federal government that incorporate technology from certain Chinese companies, and to perform services for the government that use such products. Starting in August 2020, the rule expands to prohibit the government from contracting with any entity that even uses the covered technology for its own internal purposes.

Section 889 has two key subsections, Part A and Part B. Effective August 2019, Part A prohibits the federal government from purchasing products incorporating Chinese technology produced by Huawei Technologies Company or ZTE Corporation (as well as three other Chinese companies).

Part A also prohibits the purchase by the federal government of services — whether funded by a contract or by a grant — that use covered technology. Services, in this context, would include things like running a lab for NASA, performing research and development work for the U.S. Department of Defense, or providing health care services to the U.S. Department of Veterans Affairs.

Beyond prohibiting entities from selling to the government equipment or services that incorporate covered technology, Section 889 Part A incorporates two related administrative requirements:

- It requires every offeror to represent prior to award whether or not it will provide covered equipment or services as part of its offer and, if so, to furnish additional detail about the covered equipment or services.
- It mandates that entities report (within one business day) any covered equipment or services discovered during the course of contract performance.

In fiscal year 2018, the U.S. government spent more than \$10 billion on contracts involving colleges and universities, and provided more than \$41 billion in grants to colleges and universities. So it's fair to say higher education on the whole will be impacted by Part A of Section 889.

But compliance will become even more challenging in August 2020, when Part B goes into effect. In contrast to Part A, which focuses on products and services provided to the

government (either through a procurement or a grant), Part B focuses on entities that use the covered products or services, whether or not in the context of a federal contract.

The statutory language is quite broad:

[The government shall not] enter into a contract (or extend or renew 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.

Notably, the prohibition includes no exception for internal uses unrelated to federal contracting. It contains no nexus requirement that would limit its application to uses "in connection with" a contract or subcontract.

The only real limitation on Part B is that, as written, it applies only to entities that sell goods and services, and not to grant recipients. (Part A, the basic prohibition, in contrast, applies to grant recipients and contractors.)

Driven by understandable public disbelief over the scope of Part B, the U.S. General Services Administration held a public industry engagement forum in late November 2019. It was not a rule-making event, but an opportunity for the GSA to hear from interested organizations concerning the potential impact of the law. The event was attended by about 100 contractors, manufacturers and government officials, but few if any representatives from higher education were in attendance.

Yet, Section 889 clearly has tentacles that reach into most every major college and university in the U.S. since most do one or more of the following:

- Sell products to or perform services (including research) for the government.
- Operate a health system that participates in VA or other federal contracting programs.
- Run or otherwise support a government laboratory.
- Receive federal grants (research or otherwise).
- Participate in nonprocurement contracts, including cooperative agreements, cooperative research and development agreements, and other transaction authority agreements.
- Sell products or services to a company that sells to the government.

- Lease property to the government.

Schools that perform any of these functions will have their work cut out for them. Just think how many things on a campus might incorporate technology produced by Huawei or ZTE (to name just two of the five companies covered by the law).

Obviously, a school's computers, routers, phones, printers, surveillance systems and security systems might incorporate covered technology, but the list goes well beyond those items. The rule could cover a school's smart thermostats, the cars in its fleet and the copiers in its student center.

It could cover the phones, tablets and computers used by professors, administrators, lab techs and coaches. If a university has a hospital, it could cover the doctors' and nurses' computers as well as the medical devices that monitor patient care. And if the school is a contractor (versus a grant recipient), it will cover these items whether or not they are used on a federal contract.

While compliance with such a far-reaching rule may seem costly, and it will be, not complying with the rule will be even more so. As a strictly contractual matter, a school's failure to submit an accurate representation constitutes a breach of contract, that can lead to cancellation, termination and a host of financial consequences.

However, the primary fear for most colleges and universities will be the potential for a False Claims Act violation. Higher education has had its share of False Claims Act cases already, and Section 889 gives opportunistic plaintiffs yet another sandbox to play in. And while the government may be inclined to give contractors an adjustment period before opening intrusive audits and investigations, plaintiffs lawyers will not be so generous.

As Section 889 Part A already is in effect, and Part B goes into effect in less than one year, colleges and university need to take immediate action to ensure compliance. The following steps probably should be part of the plan.

First, determine whether the school sells goods or services to the United States, and/or performs grants for the United States. In making this assessment, consider not only traditional federal contracts, but also research grants from U.S. agencies like the U.S. Department of Defense, the U.S. Department of Health and Human Services, and the U.S. Department of Agriculture; cooperative agreements with agencies like the U.S. Department of Energy; healthcare services provided to agencies like the VA or the Defense Health Agency; or lab management or support for agencies like the U.S. Air Force or NASA.

Second, categorize direct and indirect purchases by risk (e.g., the purchase of a hammer is low risk; the purchase of a multifunction copier may be medium risk; the purchase of a router likely is high risk).

Third, develop a standard, written risk-based process for evaluating the content of the various products. Perhaps the process calls for no diligence with respect to low risk items, obtaining a certification from sellers from which medium risk items are procured, and obtaining a certification coupled with additional due diligence for high risk items. Whatever the approach, it should be memorialized in writing and applied consistently.

Fourth, solicit the necessary representation from the appropriate distributors or manufacturers, and ensure a process is in place to track the requests and the responses.

Fifth, educate the school's purchasing/procurement professionals to ensure they are up to speed on Part A and Part B of Section 889.

Adopting a robust, risk-based compliance approach along these lines not only will help reduce the likelihood of noncompliance, but will help demonstrate a reasonable, good-faith effort to comply should the school's compliance efforts turn out to be less than perfectly implemented.

The federal regulations implementing Section 889 continue to evolve. The government issued an initial interim rule in August 2019, and then followed up with a second interim rule in early December. One or more rules covering Part B are expected in early- to mid-2020. That doesn't give colleges and universities much time to get their technological houses in order. Of course, Part A and its implementing regulations already are in effect, so one could say those houses already should be in order.

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