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**PUBLIC CONTRACTS**

**Annual Review 2022**

**January 24 – 27, 2022**

## SESSION 4

# GRANTS AND COOPERATIVE AGREEMENTS

TUESDAY, JANUARY 25, 2022  
2:00 PM to 2:50 PM

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Alan Chvotkin  
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# DAY 2

**12:00 p.m. Costs, Pricing & Audits**

**2:00 p.m. Grants & Cooperative Agreements**

**3:00 p.m. Cybersecurity & IT**

**TUESDAY, JANUARY 25, 2022**

**12:00 PM to 5:00 PM**

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# Developments in Grant Management

# Grants are Contracts

- Federal awarding agencies generally incorporate statutory and national policy requirements, sometimes referred to as public policy requirements, by reference into the notice of award.
  - ▷ Ex: The NIH details public policy requirements at 4.1 Public Policy Requirements and Objectives in the NIH Grants Policy Statement (NIHGPS).
- Examples of public policy requirements applicable to federal awards include:
  - ▷ Animal Welfare Requirements
  - ▷ Civil Rights Protections
  - ▷ Financial Conflict of Interest
  - ▷ Fly America Act
  - ▷ Research Misconduct
- Government initiatives and socio-economic policies are advanced by grant performance – for example, minority business development in the new Infrastructure Act.

## Subpart D – Post Federal Award Requirements

Subpart D of 2 CFR 200 contains the administrative requirements for federal grants and cooperative agreements. Subpart D is organized by topical sections:

- ▷ Standards for Financial Program Management, 2 CFR 200.300-200.309
- ▷ Property Standards, 2 CFR 200.310-200.316
- ▷ Procurement Standards, 2 CFR 200.317-200.326
- ▷ Performance and Financial Monitoring and Reporting, 2 CFR 200.327-200.329
- ▷ Subrecipient Monitoring and Management, 2 CFR 200.330-200.332
- ▷ Record Retention and Access, 2 CFR 200.333-200.337
- ▷ Remedies for Noncompliance, 2 CFR 200.338-200.342
- ▷ Closeout, 2 CFR 200.343
- ▷ Post-Closeout Adjustment and Continuing Responsibilities, 2 CFR 200.334
- ▷ Collections of Amount Due, 2 CFR 200.345

## Grant Managers Should Focus on Incorporated Clauses

- Cost Reimbursement Clauses – Allowable Costs & Cost Principles
- Rated Order Requirements
- Management of IP
  - ▷ 2 CFR 200.448
  - ▷ Bayh-Dole Act

# Infrastructure Investment and Jobs Act

- On November 15, 2021, President Biden signed the \$1.2 trillion Infrastructure Investment and Jobs Act (“Infrastructure Act”).
- The Infrastructure Act expands the domestic preference requirements governing federal grants and contracts and adds more stringent domestic content and Buy America rules to all federally funded infrastructure and public works projects.
  - ▶ Buy American Act: Provisions impose a domestic preference on all infrastructure projects that receive federal funding at federal, state, and local levels.
  - ▶ Berry Amendment: Provisions ensure all PPE purchased by Departments of Homeland Security, Health and Human Services, and Veterans Affairs are Berry Amendment-compliant (containing 100% domestic content).
- Others

# Infrastructure Act – Grant Programs and Funding

- The Infrastructure Act includes funding for new grant programs (formula and competitive) and increased funding for existing grant programs (competitive).
- Most of these funds will flow through these federal programs to states with contracts and grants being awarded by primarily state, tribal, and local or regional governmental entities and with some direct federal funding and private-public projects also being available.
- Project Delivery and Financing
  - ▷ Alternative Contracting Methods: The Infrastructure Act allows the U.S. Secretary of Transportation to use alternative contracting methods available to a state, notwithstanding the FAR, including project bundling, design-build contracting, and long-term concession agreements.
  - ▷ Use of Other Transaction (“OT”) Funding: At the local level, each federal government authority may be able to execute an initial OT Agreement (“OTA”) up to \$250M. There are three (3) primary types of OTAs:
    - ▷ Prototyping OTA
    - ▷ R&D Agreements
    - ▷ Production OTA

## Conclusion

- Given the level of Infrastructure Act funds and funding programs available, organizations should be actively assessing:
  - ▷ The benefits to be sought from the Infrastructure Act;
  - ▷ Which funding programs will achieve the organization's goals;
  - ▷ How to tie the benefits and goals to the identified funding programs;
  - ▷ Public and private partners who are seeking the same outcomes; and
  - ▷ Community support for the identified projects.
- Organizations who pair these strategic planning steps with effective grant and legal strategies will be in the best position to receive the benefits Congress has authorized under the Infrastructure Act.

# Updates on Section 889 Compliance



## Section 889 – Overview

- National Defense Authorization Act (NDAA) for Fiscal Year 2019 (Pub. L. 115-232).
- Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment.
- Became public law on August 13, 2018.
- Intended to mitigate supply chain risks caused by foreign intelligence threats.

# Section 889 – Grants

## Section 889(b)(1) – Prohibition on Loan and Grant Funds

- The head of an executive agency may not obligate or expend 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 systems described in subsection (a).

## Section 889(b)(2) – Prioritize Funding and Support to Assist Affected Entities

- In implementing the prohibition in paragraph (1), heads of executive agencies administering loan, grant, or subsidy programs, including the heads of the Federal Communications Commission, the Department of Agriculture, the Department of Homeland Security, the Small Business Administration, and the Department of Commerce, shall prioritize available funding and technical support to assist affected businesses, institutions and organizations as is reasonably necessary for those affected entities to transition from covered communications equipment and services, to procure replacement equipment and services, and to ensure that communications services to users and customers is sustained.

## Section 889(b)(2) – Exceptions

- Same exceptions as for contracts applies to loan and grant funds.

# Section 889 – Contracts

## Section 889(a)(2) – Exceptions

- The prohibitions do not:
  - “prohibit the head of an executive agency from procuring with an entity to provide a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements”; or
  - “cover 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.”

## Section 889(a)(1) – Prohibition on Use and Procurement

- The head of an executive agency may not:
  - (A) “procure or obtain or 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 as part of any system”; or
    - Referred to as “**Part A**”
  - (B) “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.”
    - Referred to as “**Part B**”

## Section 889 – Definitions

The term “**covered telecommunications equipment or services**” means any of the following:

- 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 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.
- 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 the 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.

Section 889(f)(3).

The term “**covered foreign country**” means the People’s Republic of China. Section 889(f)(2).

## Section 889 – Effective Dates

- (b)(1) – two years after date of enactment
  - August 13, 2020
- (a)(1)(A) (“Part A”) – one year after date of enactment
  - August 13, 2019
- (a)(1)(B) (“Part B”) – two years after date of enactment
  - August 13, 2020

## Section 889 – Waivers

- “The head of an executive agency may, on a one-time basis, waive the requirements under sub-section (a) with respect to an entity that requests such a waiver. The waiver may be provided, for a period of not more than two years after the effective dates . . . if the entity seeking the waiver—
  - (A) provides a compelling justification for the additional time to implement the requirements under such subsection, as determined by the head of the executive agency; and
  - (B) submits to the head of the executive agency, who shall not later than 30 days thereafter submit to the appropriate congressional committees, a full and complete laydown of the presences of covered telecommunications or video surveillance equipment or services in the entity’s supply chain and a phase-out plan to eliminate such covered telecommunications or video surveillance equipment or services from the entity’s systems.”
- The Director of National Intelligence (DNI) may issue a waiver past the effective dates if the DNI determines the waiver is in the national security interests of the United States.

# Revised Uniform Guidance— 2 C.F.R. § 200.216

- a) Recipients and subrecipients are prohibited from obligating or expending loan or grant funds to:
- (1) Procure or obtain;
  - (2) Extend or renew a contract to procure or obtain; or
  - (3) Enter into a contract (or extend or renew a contract) to procure or obtain equipment, services, or systems 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. As described in Public Law 115-232, section 889, covered telecommunications equipment is telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities).
    - (i) 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).
    - (ii) Telecommunications or video surveillance services provided by such entities or using such equipment.
    - (iii) Telecommunications or video surveillance equipment or services produced or 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 owned or controlled by, or otherwise connected to, the government of a covered foreign country.

## 2 C.F.R. § 200.216 *cont'd*

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(b) In implementing the prohibition under Public Law 115-232, section 889, subsection (f), paragraph (1), heads of executive agencies administering loan, grant, or subsidy programs shall prioritize available funding and technical support to assist affected businesses, institutions and organizations as is reasonably necessary for those affected entities to transition from covered communications equipment and services, to procure replacement equipment and services, and to ensure that communications service to users and customers is sustained.

(c) See Public Law 115-232, section 889 for additional information.

(d) See also §200.471.



- United States Agency for International Development (“USAID”) FAQs:
  - Section 889 will only apply to awards issued on or after August 13, 2020.
  - Confirms that recipients and subrecipients (unlike contractors) may use prohibited supplies and services, but cannot use award funds to pay for prohibited supplies or services.
  - Recipients and subrecipients may not use cost share or program income to pay for covered prohibited supplies or services.
  - While the revisions to ADS 303 do not include an express flow down requirement for U.S. based recipients, the FAQs confirm that the recipients and subrecipients are subject to the prohibition.

- USAID's Waiver:
  - USAID received a telecommunications waiver for internet and phone services, which was originally scheduled to expire on September 30, 2020.
  - The Agency has received approval to extend this waiver through September 30, 2022.
  - The waiver does not impact FAR requirements for contractors to make representations and provide disclosure information, nor does it alter the requirement to provide a compelling justification for additional time to comply with Part B.
  - For grants, the AO will incorporate special award requirements into the assistance award that specify the allowability of costs for internet and telephone services for new awards made during the duration of the waiver.
  - As of September 30, 2022, the Agency statutory waiver authority ends and the Agency will not enter into any contracts with contractors using covered technology. For contractors that wish to continue to do business with USAID, it is important to phase out the use of covered technology.

## Takeaways for Grants

- Unlike the Part B prohibition, recipients may still use covered supplies and services, but they simply may not purchase such items with grant funds.
  - That said, recipients should be cognizant of what is included in their indirect cost pools.
- While the revisions to the Uniform Guidance do not include an express requirement for recipients to flow down the restriction, the prohibition applies to recipients and subrecipients.
- Similarly, it would be prudent to impose the restriction on any contracts.
- Unlike the regulations for contractors, there is no separate certification requirement.
- Confirm whether your funding source has issued any specific guidance, like USAID.
- Some clients have inquired about firewalls and other mitigation measures, no guidance issued to date indicating that these would be acceptable means for compliance.

## Takeaways for Grants cont'd

- Some clients have inquired about firewalls and other mitigation measures, no guidance issued to date indicating that these would be acceptable means for compliance.
- USAID Section 889 Q&As do state the following with respect to “technical risk mitigations measures like encrypting all traffic” going through internet service providers that use prohibited equipment:
  - **Question:**

Regarding technical risk mitigations measures like encrypting all traffic going through ISPs [internet service providers] that uses prohibited equipment, does that count as an acceptable method to be compliant with 889?
  - **Answer (9/18/2020):**

**No.** To be compliant, contractors must not use covered technology and if they do, they must make the representation at FAR 52.204-24 that they are using covered technology in its supply chain, then a waiver must be approved. *Technical risk mitigation like encryption does not meet compliance. However, such information could be helpful in obtaining a waiver.*

# Implications

- So, what does this mean?
  - Disallowance of certain costs (grants)

## CERTIFICATIONS

Express or Implied

- Where there are certifications there are enforcement actions for non-compliance:
  - Termination for cause
  - False Claims Act liability—potential for treble damages
  - Suspension and/or debarment

# Guidance

- Identify what applies to you?
  - Contract rules?
  - Grant rules?
    - Note: Contractors under grants are subject to the grant rules.
  - Both?
- Application to:
  - Your organization
  - Those doing business for you (subcontractor, subrecipients, etc.).

# Guidance – Your Subrecipients and Subcontractors Under Grants

- Under a grant
  - Similar to the contracts side:
    - Put your buyers/relevant employees on notice of the restriction.
    - Review the list of excluded parties in SAM for entities excluded from receiving awards for covered telecommunications equipment or services.
    - For existing subcontracts, amend them to include a representation that subcontractors will not satisfy the obligations with covered telecommunications equipment or services.
    - Include a representation and certification in all new subcontracts that provides that your subcontractors will not satisfy the obligations with covered telecommunications equipment or services.
  - BUT, if such equipment must necessarily be purchased, the cost of such is funded from a non-federal source (nor using a cost share portion of a federal award).
    - This includes excluding any such costs from an allowable indirect cost pool.
  - Note: Even though no separate certification, certification will likely be implied (inferred as compliant when submitting to the USG for reimbursement), so compliance is paramount.

# Whistleblower Protection Act and Grants

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# Whistleblower Protection Act Overview

- Whistleblower Protection Act - 41 U.S.C. 4712
- Applies to acquisition and assistance awards and applies regardless of whether the FAR clause is included in the award
- FAR Clause 52.203-17 requires flowdown
- Agencies have begun including the FAR Clause equivalent in assistance awards
- Protects whistleblowers
- Prohibits Agencies from granting or contracting with entities that use confidentiality agreements that prohibit or hinder reporting fraud waste or abuse to federal officials

## Who Does the WPP Protect?

- Employees
- Personal service contractors
- Potentially independent contractors

# What Conduct is Protected?

- ▶ WPP prohibits employers from discharging, demoting, or otherwise discriminating against employees as a reprisal for disclosing information that the employee *reasonably believes* is evidence of:
  - ▶ (1) gross mismanagement of a Federal contract or grant
  - ▶ (2) a gross waste of Federal funds
  - ▶ (3) an abuse of authority relating to a Federal contract or grant
  - ▶ (4) a substantial and specific danger to public health or safety
  - ▶ (5) a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant.  
wrongdoing

# Who Can the Whistleblower Disclose To?

- ▷ (1) a Member of Congress or a representative of a committee of Congress
- ▷ (2) an Inspector General
- ▷ (3) the Government A grantee Accountability Office
- ▷ (4) Federal employee responsible for contract or grant oversight or management at the relevant agency
- ▷ (5) an authorized official of the Department of Justice or other law enforcement agency
- ▷ (6) court or grand jury
- ▷ (7) a management official or other employee of the contractor, subcontractor, or grantee who has the responsibility to investigate, discover, or address misconduct

# Mandatory OIG Investigations for Complaints

- Complaints of retaliation go to the OIG
- OIG **MUST** investigate complaints of reprisal unless the OIG determines the complaint is frivolous or was previously addressed in a government proceeding
- OIGs must share the report with the contractor or grantee when they share it with the agency
- Statute mandates timeframes for OIG investigations and reports

# What Remedies Are Available?

- The head of the Federal agency decides whether the WPP was violated

- Agency can require the implementer to:

- ▶ (1) take affirmative action to abate the reprisal
- ▶ (2) reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken
- ▶ (3) pay the person an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the executive agency

- Agency can compel compliance by filing in district court

- Whistleblower may bring a de novo action at law or equity in Federal district court and will be afforded a jury trial if requested

# What Should You Do Now to Comply?

- Revise your employee and independent consultant agreements to incorporate the rights and remedies of WPP
- Ensure that all of your subcontract and subgrant templates include the mandatory WPP flowdowns
- Ensure that your confidentiality and non-disclosure clauses and agreements incorporate an exception for protected disclosures

# What Should You Do Now Cont'd

- Update your whistleblower policy, posters, training and awareness materials to incorporate WPP protections and remedies
- Train your HR teams and leaders on WPP and their responsibility to not retaliate against whistleblowers
- Studiously abide by mandatory reporting requirements for fraud, waste and abuse. Timely reporting credible allegations as required by your contracts and grants and handling complaints of fraud, waste, abuse and other ethical concerns consistent with best practice and within established processes overseen by trusted, trained and independent professionals remains the best way to prevent employees from complaining to the OIG and the best way to be prepared when they do
- Check with your insurance broker to determine whether your Directors and Officers Insurance will cover the costs of responding to an OIG investigation
- Ensure that personnel decisions and their reasons are free from any form of retaliation



# THANK YOU!

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