

ACC NCR Forum Government Contracts Mergers & Acquisitions: Navigating During the Return to Normalcy

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Introductions



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Agenda

- Overview of the Government Contracts M&A Market
- How Acquiring a Government Contractor is Different From a Commercial Deal
- Deal Structure and Negotiating the Purchase Agreement
- CFIUS
- National Security/Classified Contracts
- Conducting Government Contracts Diligence
- Recurring Issues and Risk Areas
 - Small Business Acquisitions
 - Pending Proposals
 - GSA Schedule/Multiple Award Contracts
 - OCIs
 - Past Performance
 - Intellectual Property
 - CARES Act Relief – Section 3610
 - Distressed Government Contractors
 - Cybersecurity
 - Supply Chain
 - Section 889

Purpose of Acquisitions

- Increase scale to meet agency enterprise-wide requirements and to perform highly technical work
- Add-ons of new, complementary or augmented technology and services competencies
- Acquire employees with specialized technology skills and/or high-level security clearances
- Strengthen position within core agency customers
- Acquire contract vehicles
- Access new customers
 - DOD
 - Civilian Agencies (DOS; DHS; DOJ; HHS; DVA; NASA; EPA; other)
 - Intelligence Community
- Compete in consolidating market segment

Unique Considerations in Acquiring a Government Contractor

- **Limitations on Assignment**
 - Anti-Assignment Act
 - Novation Requirements
- **Government-Unique Compliance Obligations**
 - Representations and Certifications
 - Disclosure Requirements
 - Socioeconomic Requirements
- **Right to Terminate for Convenience**
- **Absence of Standard Commercial Terms**
- **Competition Requirements**
 - Formal past performance evaluations
 - Price almost always matters
- **Federal Budget Process**
- **Audit Rights and Investigations**
 - Potential affiliate exposure
- **Government Enforcement Arsenal**
 - False Claims Act (Qui Tam Suits)
 - Suspension/Debarment
 - Termination for Default/Cause
 - Non-Exercise of Options
 - Cost Disallowance/Contract Re-Pricing
- **Implications for Foreign Ownership/Investment**
 - CFIUS
 - DCSA
 - ITAR

Deal Structure and Negotiations

Deal Structure – Novation Requirements

- Stock vs. Asset Purchase
- Mergers (including reverse triangular mergers)
- Reorganizations
- Conversions (from corp to LLC)

Purchase Agreement

- **Definitions**

- Government Contracts
- Knowledge: actual/constructive; parties
- Fraud

- **Government Contracts Rep and Warranty/Disclosure Schedules**

- Buy vs. Sell Side
- Scope/Government Contracts Profile
- Listing of Government Contracts
- Additional Focus:
 - IP
 - Compliance with Laws
- Look-back
- Knowledge Qualifiers and Materiality Qualifiers

- **Covenants**

- Noncompete
- Cooperation: between sign/closing, after closing

- **Closing Conditions**

- Employees: retention, incentives
- Consents: Government
 - e.g., HSR, FOCI, CFIUS
 - Third parties
- Target-specific issues

- **Purchase Price**

- Contingent Consideration: Earn-outs/Milestones
- Effect of Indemnification
 - Escrows (incl. PPP)
 - Holdbacks
 - Clawbacks

Rep and Warranty Insurance

- **Deal Dynamics**

- Allocation of risk can make a Buyer more attractive
- Nature of Seller: collectability (number, deep pockets, continuing employment), rollover equity (“no claims” declaration)

- **Diligence Requirements**

- Reliance on Buyer diligence (memo)
- Independent diligence by Underwriters may be limited due to nature of business (clearances)

- **Negotiation of Reps and Warranties**

- Transparency of the parties and Disclosure Schedules
- Knowledge/materiality
- Underwriters may require certain language (or exclude from coverage)

- **Expectations of Underwriters**

- Typical exclusions:
 - Disclosed matters, fraud, covenants
 - Special areas: employment, environmental, cybersecurity, CARES Act/PPP compliance, among others

Committee on Foreign Investment in the United States (CFIUS)

What is CFIUS's Role?

- CFIUS has authority to review investments by “foreign persons” in “US businesses”
 - A “foreign person” can be a US entity owned or controlled, directly or indirectly, by a foreign individual or entity
 - A “US business” can be a collection of assets in the United States
- CFIUS must evaluate the national security risks of such investments and may recommend that the President block or interfere with them
- The President can order divestiture of a completed transaction based on a CFIUS recommendation
- CFIUS reviews are **mandatory** for some transactions
- For other transactions, the parties may want to request CFIUS's review, so they can obtain assurance that the President will not interfere

What is CFIUS's Jurisdictional Scope?

CFIUS has jurisdiction to review investments that either:

- Results in **control** by a foreign person over a US business
- Provides a foreign person who is investing in a “TID US Business” with:
 - access to material nonpublic technical information;
 - representation on the target's board of directors or equivalent governing body; or
 - involvement in the target's decision-making about:
 - Use, development, acquisition, or release of **critical technologies**;
 - Use, development, acquisition, safekeeping or release of “**sensitive personal data**” of **US citizens**; or
 - Management, operation, manufacture, or supply of **critical infrastructure**.

TID Business is an entity that does any of the following:

- Produces, designs, tests, fabricates, or develops any critical **Technologies**
- Owns, operates, manufactures, supplies or services critical **Infrastructure**
- Maintains or collects sensitive personal **Data**

When is a CFIUS Filing Mandatory?

- If a foreign person in which a foreign government has a voting interest of 49% or more will acquire a voting interest of 25% or more in a TID US Business, **or**
- The target is a TID Business that produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies and:
 - The target could not, without obtaining US regulatory authorization (a license), export or otherwise transfer any of the “critical technologies” to the foreign investor, and
 - The foreign investor will gain any of the following:
 - access to material nonpublic technical information;
 - representation on the target’s board of directors or equivalent governing body; or
 - involvement in the target’s decision-making about:
 - Use, development, acquisition, or release of critical technologies;
 - Use, development, acquisition, safekeeping or release of “sensitive personal data” of US citizens; or
 - Management, operation, manufacture, or supply of critical infrastructure.
- Exceptions:
 - Investor is an “excepted investor”, or an investment fund managed and controlled exclusively by US nationals
 - Target is a cleared company that is subject to an SCA, SSA, VTA or Proxy Agreement
- **Penalties for failure to file: up to twice the value of the transaction**

How Long Do CFIUS Reviews Take?

- Declarations:
 - Short-form filings
 - CFIUS has 30 days to review
 - CFIUS may then close the review or request the parties to file a Notice
- Notices:
 - More detailed, longer submissions
 - CFIUS has 45 days to review
 - CFIUS may then decide to launch an additional, 45-day investigation
 - Investigation may be extended once by 15 days
 - CFIUS then must terminate all action or recommend that the President interfere
 - President must act within 15 days

National Security: Foreign Investment and Classified Contracts

NISPOM Merger & Acquisition Reporting

- **Any target company that holds a facility security clearance (FCL) must report to its cognizant security agency (CSA):**
 - If negotiations commence with a “foreign interest” (including a US entity controlled by a foreign person/entity) about an acquisition of the target by the foreign interest
 - *Any* change in ownership that affects **control** of company
 - Any change in information previously submitted regarding key personnel
- **SF 328, Certificate Pertaining to Foreign Interests:**
 - Report any change of ownership of 5% or more of “total capital commitment”; other information pertaining to foreign relationships
 - If public company, whether SEC Schedule 13D/13G has been received from foreign investor

Foreign Ownership, Control, or Influence (FOCI)

- *“A U.S. Company is considered to be under FOCI whenever a foreign interest has the power, direct or indirect, whether or not exercised, and whether or not exercisable through ownership the U.S. company’s securities, by contractual arrangements or other means, to direct or decide matters affecting the management or operations of that company in a manner which may result in unauthorized access to classified information or may adversely affect the performance of classified contracts.”*
- If investment in a cleared company will result in FOCI, the parties must implement FOCI-mitigation measures
- Factors relevant to consideration of extent and type of FOCI-mitigation required:
 - Level of clearance (e.g., Secret, Top Secret)
 - Nationality of foreign investors/foreign government interests
 - Ownership structure/affiliates
 - Board/Advisory Board seats

FOCI-Mitigation Measures

- **Board Resolution**

- Precludes foreign interest from influencing performance on classified contracts
- Excludes foreign interest from representation on governing board

- **Special Security Agreements (SSA)/Security Control Agreements (SCA)**

- **SSA** (where foreign investor controls the cleared company): foreign investor may be represented on cleared company's board, but representative(s) must be outnumbered by "Outside Directors" (US citizens with security clearances approved by CSA)
- **SCA** (where minority foreign investor has right to representation on cleared company's board): at least one Outside Director must be appointed for each foreign investor representative on board

- **Proxy Agreement**

- Foreign owner relinquishes voting rights to Proxy Holders, who must be cleared US citizens approved by the cognizant security agency (CSA)
- Foreign owner retains a beneficial interest, but no board representation; Proxy Holders comprise the board of the cleared company (only the Proxy Holders may appoint additional board members)

DDTC (ITAR) Notification Requirements

- **ITAR registrants must notify DDTC within **5 days** of material change in information contained in registration statement, including within 5 days of transaction closing.**
 - Either one or two filings are required, depending on whether Buyer and Seller, or just one, were registered prior to closing.
 - When an unregistered Buyer is acquiring a part of a registered Seller, planning is essential.
 - **In some cases filing a new DS-2032 registration for the Buyer 30-60 days or more prior to closing** may be prudent to avoid potential disruption to the business.
- **ITAR registrants must notify DDTC at least **60 days** before a foreign person acquires ownership or control of the registrant.**
 - Usually this is filed by the US seller being acquired
 - But the foreign buyer must be involved and, in some cases, may need to file a separate 60-day notice (if it already has a US registered subsidiary)

Conducting Government Contracts Diligence

Due Diligence Process

- Background Information:
 - Confidential Information Memorandum (“CIM”) or Confidential Information Presentation (“CIP”)
- Public Information:
 - Seller’s website
 - US Government databases:
 - SAM; beta.SAM.gov (FPDS); FAPIIS; GSA Schedules e-Library
 - Use Seller’s DUNS/Cage Code
 - **SAM registration**: Entity Overview; Representations and Certifications
 - Small business (FAR 52.212-3; FAR 52.219-1)
 - Immediate Owner/Highest-Level Owner (FAR 52.204-17)
- Document and Information Requests
- Data Room
- Interviews
- Disclosure Schedules

Government Contracts Portfolio

- Amount and Percentage of Government Business
- Pipeline
- Prime contracts vs. subcontracts
- Types of contracts
 - Fixed-Price/Cost Reimbursement/T&M
 - GSA Schedules; multiple award IDIQ contracts (single agency or GWACs)
 - OTAs
 - SBIR
- Subject Matter
 - Supplies vs. Services
 - Commercial or Non-Commercial
- Customer Agencies
- Small business status and award of any total or partial “set-aside” contracts
- Audits, investigations, claims, disputes, litigation
- Voluntary/Mandatory Disclosures
- Compliance Program/Internal Controls
- Classified (level) vs. Unclassified
- Pending Bids/Protests
- Export controls registration and licenses (DDTC; BIS)

Assessment

Are any identified problems/risks potential deal breakers, or can they be managed?

- Resolution of pending audits, investigations, litigation
- Potential liabilities (e.g., False Claims; defective pricing; false certifications)
- Potential suspension or debarment
- Voluntary/mandatory disclosures
- Negative past performance ratings
- Potential terminations
- OCIs and related integration issues
- Rights in critical IP
- Export control violations

Assessment (cont.)

Is the business sustainable?

- Expiration dates of key contracts
- Pending proposals
- Sole source or competitive awards
- Federal budget/agency priorities
- Dependence on small business status
- Dependence on large IDIQs
- Importance of key personnel/retaining staff and key personnel
- Relationships with procuring agencies
- OCIs
- Adequacy of accounting systems for both fixed-price and cost-type contracts
- Adequacy of internal controls in key risk areas
- Qualification for classified work (FOCI)

Recurring Issues and Risk Areas

Issues

- Small Business Acquisitions
- Pending Proposals
- GSA Schedule/Multiple Award Contracts
- OCIs
- Past Performance
- Intellectual Property
- CARES Act – Section 3610
- Distressed Government Contractors
- Cybersecurity
- Supply Chain
- Section 889

Small Business Acquisitions

Small Business Acquisitions: Assessing Reliance on Status

- **How heavily does the small business rely on its size and/or socioeconomic status?**
 - Has the firm received small business set-aside awards and/or socioeconomic set-aside awards, e.g., 8(a) set-asides?
 - Has the firm received SBIR funding? If so, to which phase has it progressed?
 - Are the firm's subcontracting relationships dependent on its status?
 - Even if the firm's prime contracts/subcontracts were not based on status, does the status help drive revenue?
 - Do agencies rely on the firm's status to achieve "credit" towards small business/socioeconomic goals?
 - Do prime contractors/higher-tier subcontractors rely on status of firm to satisfy SB Subcontracting Plan targets?
- **Will the small business be able to successfully compete on "full and open" procurements?**
 - "Nobody else can do what we do/has what we have."
 - "We're critical to the agency's mission."
 - "We haven't won anything based solely on our small business status."
 - "We have such an excellent relationship with the customer, that our size doesn't matter."

Small Business Acquisitions: Historical Compliance

Size/Status Representations

- **Require disclosure of representations, certifications, etc. (including SAM registrations)**
- **Assess contemporaneous accuracy**
 - Independently owned and operated
 - Size standards – by NAICS code
 - Manufacturing/products - number of employees (average over last 12 – transition to 24 months)
 - Services - average annual receipts (currently past 3 or 5 years)
 - Socioeconomic status - WOSB, EDWOSB, VOSB, SDVOSB, SDBC/8(a), HUBZone
 - Ownership and control requirements

Limitations on Subcontracting

Affiliation

- **Ownership**
 - 50% or more of voting stock
 - Minority owner with less than 50%, but large as compared to other holdings (rebuttable presumption)
- **Control**
 - Affirmative or Negative
 - “Totality of circumstances”
 - Factors include--
 - Common management
 - Contractual relationships
 - Economic dependence
- **Ostensible subcontractor rule**
- **Exceptions**
 - Mentor-Protégé Program/Joint Ventures
 - Small business owned by SBIC

Small Business Acquisitions – Impact of Loss of Status

- **Existing contracts**

- General rule: size/socioeconomic status determined as of date of initial proposal – status remains throughout life of contract
- But recertification is required in certain situations
 - Following merger/acquisition, contractor must update its status with CO within 30 days of change and update its SAM representations
 - For long-term contracts (more than 5 years), contractor must recertify 60-120 days before end of term
- Following recertification as other than small, agency cannot “count” additional spend (options, orders, modifications) toward its subcontracting goals
 - Agencies may choose not to exercise options
 - Agencies may require recertification for orders under IDIQ contracts—generally discretionary, but under new rule, agencies must require recertification where work under IDIQ was not previously set aside
 - Prime contractors/higher-tier subcontractors may require notice, look for alternative sources
- Special rules for 8(a) firms: T for C on transfers of ownership or control, unless waived by SBA

- **Pending proposals**

- Small business must recertify if status changes after submission of proposal but before award
- Merger, sale, acquisition within 180 days of offer = no longer eligible
- Merger, sale, acquisition more than 180 days of offer = eligible, but award not counted towards small business goals

Pending Proposals

Pending Proposals

- Risks that transaction could affect pending proposals:
 - Disqualification, downgrading by agency
 - Post-award protest challenge by competitor
 - Lack of standing to protest problematic requirements or award to competitor
- GAO: offeror must provide notice, and agency must evaluate impact, where planned transaction is ***“imminent and essentially certain”***
 - When does that occur?
 - Generally, upon signing, at the latest, but fact specific inquiry
 - Disclosure to SEC likely triggers
 - Is firm really required to disclose, or is it cost-benefit decision?
- Agency will evaluate:
 - Effect of acquisition on offeror’s proposal, performance of prospective contract
 - Offeror’s ability to perform contract in accordance with the evaluated proposal

Pending Proposals – Key Factors

- 1) Cost structure/billing rates
- 2) Technical capabilities/approach
- 3) Financial resources
- 4) Processes (QA, security, staffing/training, contract administration)
- 5) Back-office support (finance, legal, compliance, etc.)
- 6) Management team
- 7) Proposed key personnel
- 8) Corporate experience
- 9) Past performance references
- 10) Intellectual property (owned and licensed)
- 11) Facilities (including secure facilities)
- 12) OCIs

GSA Schedule and Multiple Award Contracts

GSA Schedules and Multiple Award Contracts

Liability Risks from Legacy Compliance Issues:

- Defective pricing
- Price reductions liability
- False Claims Act liability (e.g., TAA)
- Commercial Sales Practices (CSP) Format
 - Sales/Pricing/Discount Information
 - Basis of Award Customer/Customer of Comparability
- Price Reductions Clause
- Industrial Funding Fee
- Labor category compliance

Transfer/Transition Risks and Challenges

- Audits/renewals
- Eligibility
 - Set-aside orders
 - Future orders
 - “Off-ramps”/”Graduation” terms
- Novations
 - Umbrella contracts
 - Basic ordering agreements
 - Orders

Organizational Conflicts of Interest

Organizational Conflicts of Interest (OCIs)

- **Types of OCIs per GAO**

- Biased ground rules
- Impaired objectivity
- Unequal access to information

- **Focus of diligence assessment:**

- Seller's existing OCI contract clauses/restrictions
- Seller's existing OCI mitigation plans (and records related to compliance with them)
- For acquisitions, implications of combining businesses (under common ownership) – creating OCIs?
 - Consider existing business and future plans of both seller and acquirer (and all affiliates) (“Clean Team” may be necessary to allow sharing detailed information)
 - Consider whether foreseeable OCIs will be mitigable, and if so, how (e.g., firewalls, exclusions, “walled-off” subcontracting, divestiture)
 - Consider how to get as comfortable as possible – discuss with customers in some cases
- For divestitures, implications of separating businesses (from common ownership) – alleviating OCIs?

Past Performance

Past Performance

- **Assessing a firm's past performance record**
 - Relevance of past performance
 - Agencies, programs
 - Type of work – “size, scope, and complexity”
 - Management/employees
 - Quality of past performance
 - Contractor Performance Assessment Reporting System - ratings and narratives
 - Satisfied customers?
 - Cost control issues?
 - Federal Awardee Performance and Integrity Information System
 - Responses to negative ratings?
 - Terminations?
 - Other performance or responsibility problems?
- **Assessing implications of transaction on value/utility of past performance record**

Intellectual Property

Intellectual Property

Federal contractors require extra level of IP diligence – usually with focus on:

- **Federal funding of IP**
 - Technical data, including Operations, Maintenance, Installation, Training (OMIT) data
 - Software (key question: all or a segregable portion of code/program?)
 - Subject inventions/patents (Bayh-Dole Act often is foundation)
- **Implications of any US Government rights**
 - Applicable rules (FAR, DFARS, DOE/NASA, SBIR, OTA, etc.) + Level of funding (mixed or full) = USG license rights
 - Spectrum of license rights – Unlimited, Government Purpose, Limited/Restricted, SBIR, Commercial or Specially Negotiated/OTA
 - Distinguish license rights from deliverables
- **Compliance with marking requirements – prescribed legends**

CARES Act Section 3610

CARES Act Section 3610

- **Overview of Section 3610: CARES Act provision unique to federal contractors**
 - Congress empowered agencies, but did not entitle contractors to relief or provide special appropriation
 - Agency must agree to provide section 3610 relief (although contractor may be entitled to relief under existing clauses and other theories)
 - Implementation varies by agency, but generally must show inability to work at a contractor or USG site and inability to telework
 - Relief limited to 40 hours/week, inclusive of sick leave, at “minimum applicable billing rates”—with reduction for at least billable, productive hours
 - Relief must be reduced by other federal payment, allowance, tax, or other credit identifiable with COVID-19 PHE
- **If firm received section 3610 relief or seeks to include such relief in a valuation, diligence should consider:**
 - Authorization to charge for section 3610 relief and method for doing so (e.g., cost reimbursement, FFP CLIN)
 - Sufficiency of contemporaneous documentation – related to entitlement (satisfaction of the elements, ideally for each affected employee) and quantum (segregation of costs)
 - Avoidance of “double dipping”—e.g., charging twice for same employee, claiming PPP forgiveness and 3610
 - Availability of funding

Distressed Government Contractors

Distressed Government Contractors and Bankruptcy

- **Bankruptcy Concepts and Interplay with Federal Contracting**
 - Automatic Stay
 - Anti-Discrimination Rule
 - Assumption (and Assumption and Transfer) of Contracts
- **Opportunities for Buyers and Sellers**
 - Special Protections During Bankruptcy
 - Limits on Successor Liability
 - Section 363 Asset Sales
- **Challenges for Buyers and Sellers**
 - Negative Responsibility Determinations
 - Compliance Shortcuts Due to Lack of Resources
 - Logistics of Transition Services

Cybersecurity

Security and Cybersecurity Requirements

- **FAR 52.204-21, Basic Safeguarding of Covered Contractor Information Systems (June 2016)**
- **DFARS 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Report (Oct 2016)**
 - Covers “Controlled Unclassified Information” (CUI)
 - Requires System Security Plans (SSPs) and Plan of Action (POA) for unsatisfied requirements
 - NIST-SP 800-171
- **DoD interim rule effective Nov. 30, 2020; covers non-COTS**
 - NIST-SP 800-171 Assessment Methodology
 - Solicitation Clause: DFARS 252.204-7019, *Notice of NIST SP 800-171 DoD Assessment Requirements*
 - Contract Clause: DFARS 252.204-7020, *NIST SP 800-171 DoD Assessment Requirements*
 - Must have current assessment (no more than 3 years old) in Supplier Performance Risk Systems (SPRS)
 - Cybersecurity Maturity Model Certification (“CMMC”)
 - DFARS 252.204-7021, *Contractor Compliance with the Cybersecurity Maturity Model Certification Level Requirement*
 - Goodbye to self-assessments and POAs

What Is the CMMC?

Cybersecurity Maturity Model Certification

- Released by Defense (DoD) January 1, 2020
- Comprehensive framework of cybersecurity controls and policies
 - 17 domains that generally align with NIST SP 800-171's 14 families of security controls
- Sourced from a variety of cybersecurity standards, including FAR 52.204-21, NIST- SP 800-171, ISO 27001, and ISO 27032
- **5 “Maturity Levels”**
 - Level 1: FAR 52.204-21
 - Level 3: CUI – All 110 NIST SP 800-171 security controls + 20
 - Level 2: Transition between Levels 1 and 3
 - Levels 4 and 5: Most sophisticated; not on DoD's radar
- Companies that process, store, or transmit Controlled Unclassified Information (CUI) will be required to achieve Maturity Level 3 (similar to current DFARS 252.204-7012 requirements for NIST SP 800-171)
- CMMC may be used in civilian agency procurements:
 - GSA Polaris Small Business GWAC
 - 8(a) STARS III
 - DHS supply chain security pilot programs

Supply Chain

Supply Chain Security

- **Buy American Act/US Content Requirements**

- FAR 52.225-1, Buy American Act—Supplies (Jan 2021)
 - BAA: 55% component cost; 95% for products made of iron and steel
 - “Final assembly” in the U.S.
 - New Executive Order 14005: will change to new domestic value-added test (including value of US-based labor)
- FAR 52.225-5, Trade Agreements
- “Substantial transformation”
- DFARS clauses

- **Human Trafficking: FAR 52.222-50, *Combating Trafficking in Person***

- Includes prohibition on charging recruitment fees

- **Counterfeit electronic parts**

- DFARS 252.246-7007, *Contractor Counterfeit Electronic Part Detection and Avoidance System*
 - Included in all contracts for: (1) electronic parts; (2) end items, components, parts, or assemblies containing electronic parts; or (3) services, where the contractor will supply electronic parts or components, parts, or assemblies containing electronic parts as part of the service
 - Applies to CAS-covered prime contracts and subcontracts

Section 889

Section 889: NDAA FY 2019

- *Purpose: to eliminate a perceived threat to the supply chain and national security by certain Chinese companies.*
- **“Covered telecommunications equipment and services”:**
 - *Telecommunications equipment produced by*
 - Huawei Technologies Company
 - ZTE Corporation
 - *For the purpose of public safety, security of Government facilities, physical surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications produced by*
 - Dahua Technology Company
 - Hytera Communications Corporation
 - Hangzhou Hikvision Digital Technology Company
- Prohibitions on Government Purchases (Part A) and Contractor Use (Part B)
- Required Representations on “provision” and “use”/annual SAM Certification
- Contract Reporting Requirement during Contract Performance

Part A: *Providing* “Covered Telecommunications Equipment or Services” to the Government

- Part A: federal agencies “may not—procure or obtain covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.”
- Companies must represent whether they will “***provide covered telecommunications equipment or services to the Government in the performance of any contract, subcontract or other contractual instrument.***”
 - The representation is broader than the prohibition, thereby affording the contracting officer an opportunity to assess whether the use is permissible.
- Limited exceptions:
 - If service “connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements”
 - “Telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets ...”
- Applies to acquisitions of commercial items, including COTS

Part B: *Using* “Covered Telecommunications Equipment or Services”

- Part B: prohibits federal agencies from entering into a contract (or extending or renewing an existing 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.”
- For purposes of Part B, companies must represent whether or not they will “***use covered telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services***” generally.
 - Use not limited to a company’s government contracts
 - Requires contractors eliminate use of “**covered telecommunications equipment or services**” provided by the named companies, even if that use is limited to the company's commercial business
- Company must conduct “**Reasonable Inquiry**”

Q&A



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