



PERSONNEL AND
READINESS

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

May 31, 2022
Incorporating Change 1, April 28, 2023

MEMORANDUM FOR SENIOR PENTAGON LEADERSHIP
DEFENSE AGENCY AND DOD FIELD ACTIVITY DIRECTORS

SUBJECT: Directive-type Memorandum 22-002 – “Nonappropriated Fund Procurement Implementation of Section 889 of the National Defense Authorization Act for Fiscal Year 2019 (Public Law 115-232)”

References: See Attachment 1.

Purpose. In accordance with the authority in DoD Directive 5124.02 and Section 1065 of Title 10, United States Code (U.S.C.), this directive-type memorandum (DTM):

- Establishes policy, assigns responsibilities, and provides procedures for the implementation of Section 889 of Public Law 115-232 (41 U.S.C. 3901 note prec.), also known as the John S. McCain National Defense Authorization Act for Fiscal Year 2019, to nonappropriated fund instrumentality (NAFI) procurements.
- This DTM cancels the August 3, 2018 Performing the Duties of the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) Memorandum, “Establishment of the Nonappropriated Fund Vendor Risk Vetting Panel.”
- This DTM is effective May 31, 2022 and supersedes any contradictory guidance in DoD Instruction (DoDI) 4105.67; it must be incorporated into DoDI 4105.67. This DTM will expire effective May 31, 2024.

Applicability. This DTM applies to OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this DTM as the “DoD Components”).

Definitions. See Glossary.

Policy.

- Section 889(a)(1)(A) operates to prohibit a NAFI from procuring or obtaining, including for purposes of resale only, or extending or renewing 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 unless a waiver is granted or an exception or waiver applies.

- Section 889(a)(1)(B) operates to prohibit a NAFI from entering into a contract, or extending or renewing 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, unless a waiver is granted or an exception applies. This prohibition is based on the entity's use of covered telecommunications equipment or services, regardless of whether that use is pursuant to or in connection with contract performance.
- Exceptions. The above-referenced prohibitions:
 - Do not prohibit a NAFI 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; and
 - Do not cover telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets such equipment transmits or otherwise handles.
- The Section 889(a)(1) procurement prohibitions apply regardless of dollar threshold or procurement method, (e.g., contract, agreement, or purchase card), unless a waiver is granted or an exception applies.
- To ensure compliance with the Section 889(a), prohibitions, nonappropriated fund (NAF) contracting officers must follow the procedures in Attachment 3.

Responsibilities. See Attachment 2.

Summary of Change 1. This change extends the expiration date for the DTM to May 31, 2024.

Procedures. See Attachment 3.

Releasability. Cleared for public release. Available on the Directives Division Website at <https://www.esd.whs.mil/DD/>.



Gilbert R. Cisneros, Jr.
Under Secretary of Defense for Personnel and
Readiness

Attachments:
As stated

ATTACHMENT 1

REFERENCES

Code of Federal Regulations, Title 7, Part 331
Code of Federal Regulations, Title 9, Part 121
Code of Federal Regulations, Title 10
Code of Federal Regulations, Title 15, Chapter VII, Subchapter C
Code of Federal Regulations, Title 22, Chapter I, Subchapter M
Code of Federal Regulations, Title 42, Part 73
DoD Directive 5124.02, “Under Secretary of Defense for Personnel and Readiness (USD(P&R)),” June 23, 2008
DoD Instruction 4105.67, “Non-appropriated Fund (NAF) Procurement Policy and Procedure,” February 26, 2014, as amended
Public Law 115-232, “John S. McCain National Defense Authorization Act for Fiscal Year 2019,” August 13, 2018
United States Code, Title 10, Section 1065
United States Code, Title 41, Section 133
United States Code, Title 50, Section 4817 (also known as “Section 1758 of the Export Control Reform Act of 2018”)

ATTACHMENT 2
RESPONSIBILITIES

1. USD(P&R). The USD(P&R) serves as the point of contact in the OSD for NAF procurement policy in accordance with DoDI 4105.67.

2. ASSISTANT SECRETARY OF DEFENSE FOR MANPOWER AND RESERVE AFFAIRS. Under the authority, direction, and control of the USD(P&R), the Assistant Secretary of Defense for Manpower and Reserve Affairs establishes guidance for the proper administration and management of NAF procurements as in accordance with DoDI 4105.67.

3. DOD COMPONENT HEADS. The DoD Components responsibilities for NAF procurement policy implementation are in accordance with DoDI 4105.67.

ATTACHMENT 3

PROCEDURES

1. NAFI PROCUREMENT.

a. Before executing a contract, agreement, or modification to extend the period of performance on an existing contract or agreement, and before issuing a delivery or task order, NAF contracting officers must obtain representations from the offeror regarding both its provision of covered telecommunications equipment in connection with the pending award (“889(a)(1)(A) representation”), as well as its use of covered telecommunications equipment (“889(a)(1)(B) representation”).

b. If the offeror states in its 889(a)(1)(A) representation that it will provide covered telecommunications equipment or services, or states in its 889(a)(1)(B) representation that it does use covered telecommunications equipment or services, the NAF contracting officer must obtain additional information as needed to determine if the covered telecommunications equipment or services at issue are being used as a substantial or essential component of any system or as critical technology as part of any system, or if an exception applies.

c. The contracting officer must not award a contract or agreement, or execute a modification to extend the period of performance on an existing contract or agreement, or issue a task or delivery order to an offeror that has represented “will” in its 889(a)(1)(A) representation, or “does” in its 889(a)(1)(b) representation, unless the contracting officer, in consultation with the program office or requiring activity, determines that:

(1) The offeror is not using the covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as of part of any system; or

(2) An exception applies.

d. If the contracting officer is unable to make the determination described in Paragraph 3.1.c., then award must not be made to that offeror unless a waiver is granted.

e. The contracting officer may rely on the 889(a)(1)(A) and 889(a)(1)(B) representations the offeror provided, unless the contracting officer has reason to question the representations. In such cases, the contracting officer will follow NAF Component procedures (e.g., consult the requiring activity and legal counsel).

f. Contracting officers must include appropriate provisions and clauses in NAFI solicitations and contracts to implement the requirements of this DTM.

g. Additional considerations include:

(1) Contracts awarded before August 13, 2018, are not subject to the Section 889(a) prohibitions until an option period is exercised or the contract is otherwise extended or renewed by the contracting officer after the applicable effective date set forth in Section 889(c).

(2) NAF purchase card transactions are subject to the Section 889 prohibitions and require appropriate supporting documentation. The supporting documentation must include at minimum, but is not limited to, both the 889(a)(1)(A) and 889(a)(1)(B) representations, unless a waiver is granted or an exception applies.

(3) The Section 889(a)(1)(A) prohibition applies to all items and services being procured, including items and services provided by either the prime vendor or subcontractors at any tier. The Section 889(a)(1)(B) prohibition applies only to the prime contractor and does not apply to subcontractors.

(4) For the purposes of applying the Section 889(a)(1)(B) prohibitions, an entity's use of the relevant equipment, system, or services is not limited to use in the performance of work under a NAF contract.

2. WAIVERS. Section 889(d) permits two limited and structured opportunities for waivers.

a. Section 889(d)(1) allows executive agencies to grant a one-time waiver from the prohibitions in Section 889(a)(1) on a case-by-case basis for a period not to exceed 2 years after the effective date of Sections 889(a)(1)(A) and 889(a)(1)(B) set forth in Section 889(c).

(1) If granted a waiver, NAFIs must comply with the Section 889(a)(1) prohibitions if the waiver expires or is rescinded. An executive agency waiver may only be granted based on:

(a) A compelling justification for the additional time to implement the requirements of the Section 889(a) prohibitions that are being waived;

(b) A full and complete laydown of the presences of covered telecommunications or video surveillance equipment or services in the relevant supply chain; and

(c) A phase-out plan to eliminate such covered telecommunications equipment or services from the relevant systems.

(2) The 889(d)(1) authority to provide waivers for Section 889(a)(1)(A) expired under Section 889(c) and is no longer available for use. The 889(d)(1) authority to provide waivers for Section 889(a)(1)(B) remains available until August 13, 2022.

b. Section 889(d)(2) permits the Director of National Intelligence to provide a waiver if the Director determines the waiver is in the national security interests of the United States. The 889(d)(2) waiver authority does not expire. This authority is separate and distinct from that granted to an executive agency head pursuant to Section 889(d)(1).

GLOSSARYPART I. ABBREVIATIONS AND ACRONYMS

ACRONYM	MEANING
DoDI	DoD instruction
DTM	directive-type memorandum
NAF	nonappropriated fund
NAFI	nonappropriated fund instrumentality
U.S.C.	United States Code
USD(P&R)	Under Secretary of Defense for Personnel and Readiness

PART II. DEFINITIONS

Unless otherwise noted, these terms and their definitions are for the purpose of this issuance.

TERM	DEFINITION
889(a)(1)(A) representation	An affirmative representation from the offeror that it either “will” or “will not” provide covered telecommunications equipment or services in the performance of the resulting contract, agreement, task order, or delivery order.
889(a)(1)(B) representation	An affirmative representation from the offeror based on a reasonable inquiry that it either “does” or “does not” use covered telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services.
backhaul	Intermediate links between the core network, or backbone network, and the small subnetworks at the edge of the network (e.g., connecting cell phones and cell phone towers to the core telephone network). Backhaul can be wireless (e.g., microwave) or wired (e.g., fiber optic, coaxial cable, Ethernet).
covered telecommunications equipment or services	Telecommunication equipment produced by Huawei Technologies Company or Zhongxing Telecommunications Equipment (ZTE) Corporation (or any subsidiary or affiliate of such entities); 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

TERM	DEFINITION
	<p>Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities);</p> <p>Telecommunications or video surveillance services provided by such entities or using such equipment; or</p> <p>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.</p>
covered foreign country	<p>The People’s Republic of China.</p>
critical technology	<p>Defense articles or defense services included on the United States Munitions List set forth in the International Traffic in Arms Regulations pursuant to Subchapter M of Chapter I of Title 22, Code of Federal Regulations; or</p> <p>Items included on the Commerce Control List set forth in Supplement No. 1 to Part 774 of the Export Administration Regulations pursuant to Subchapter C of Chapter VII of Title 15, Code of Federal Regulations, and controlled:</p> <ol style="list-style-type: none">(1) Pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology;(2) For reasons relating to regional stability or surreptitious listening;(3) Specially designed and prepared nuclear equipment, parts and components, materials, software, and technology covered by Part 810 of Title 10, Code of Federal Regulations (relating to assistance to foreign atomic energy activities);(4) Nuclear facilities, equipment, and material covered by Part 110 of Title 10, Code of Federal Regulations (relating to export and import of nuclear equipment and material);

TERM	DEFINITION
	(5) Select agents and toxins covered by Part 331 of Title 7, Code of Federal Regulations; Part 121 of Title 9, Code of Federal Regulations; or Part 73 of Title 42, Code of Federal Regulations; or
	(6) Emerging and foundational technologies controlled pursuant to Section 4817 of Title 50, U.S.C., also known as Section 1758 of the Export Control Reform Act of 2018.
executive agency	Defined in Section 133 of Title 41, U.S.C.
interconnection arrangement	An arrangement governing the physical connection of two or more networks to allow the use of another’s network to hand off traffic where it is 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.
reasonable inquiry	An inquiry designed to uncover any information in the entity’s possession about the identity of the producer or provider of covered telecommunications equipment or services used by the entity that excludes the need to include an internal or third-party audit.
roaming	Cellular communications services (e.g., voice, video, and 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.
substantial or essential component	Any covered telecommunications equipment necessary for the proper function or performance of a piece of equipment, system, or service.