

New Section 889 restrictions included in updated Uniform Guidance regulations from the Office of Management and Budget

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On August 13, 2020, the Office of Management and Budget (OMB) released new revisions¹ to its Guidance for Grants and Agreements set forth under 2 CFR (commonly referred to as the Uniform Guidance).

The Uniform Guidance governs the terms of federal funding issued by agencies, including grants, cooperative agreements, federal loans, and non-cash assistance awards.

This includes federal awards to state and local government agencies, which are generally required to flow down certain provisions of the Uniform Guidance to organizations that they contract with.

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Accordingly, the guidance is relevant both when an organization receives funding directly from the Government and when an organization receives funding from a federally funded state or local program.

Among other notable changes to the Uniform Guidance is the implementation of Section 889(b) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 through the addition of 2 CFR § 200.216, which prohibits federal award recipients from using loan or grant funds to enter into contracts (or to extend or renew contracts) with entities that use covered telecommunications equipment or services.²

Because of its impact on state and local procurements, as well as on billions of dollars in other federal funding distributed to agencies, this is expected to significantly expand the reach of the Section 889 statutory prohibition, which we have covered in several other prior blog posts.³

OMB's guidance is somewhat contradictory with regard to the implementation of Section 889 in the Uniform Guidance.

On the one hand, the preamble states that new section, 2 CFR § 200.216, is intended to "prohibit Federal award recipients from using government funds to enter into contracts (or extend or renew contracts) with *entities that use* covered telecommunications equipment or services."

Further, OMB states that "[t]his prohibition applies even if the contract is not intended to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services" indicating that OMB intended for the restrictions to apply to telecommunications equipment or services used by an entity even if that entity is providing non-connected commodities.

On the other hand, the actual language in 2 CFR § 200.216 does not refer to a restriction on entering into contracts with *entities that use* covered telecommunications equipment and services.

Rather, the prohibition in section 200.216 is limited to the use of federal funds to procure or contract for covered telecommunications equipment or services. The regulatory prohibition, which closely mirrors the statutory language in Section 889(b)(1) states:

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.

Thus, although the preamble indicates a broader intention, the actual regulatory language appears to impose only the limitations of Section 889(a)(1)(A) on recipients.

Similarly, although not entirely clear, the language of the statute can be read to limit the loan and grant fund prohibition to Part A's procurement ban.

In addition, 2 CFR § 200.216 also does not appear to prohibit the procurement or use of covered telecommunications equipment or services where the equipment or services is purchased using non-federal funds.

Consistent with this approach, the new guidance clarifies that telecommunications and video surveillance costs associated with purchases prohibited by 2 CFR § 200.216 are unallowable. (2 CFR § 200.471.)

In recognition of the costs associated with complying with the prohibitions on covered technology and the importance of ensuring users continue to have access to communications services, the Uniform Guidance requires federal awarding agencies to work with OMB to prioritize funding and technical support to assist affected businesses, institutions, and organizations.

The funds should be prioritized as “reasonably necessary” to help affected entities transition from covered technologies to replacement technologies.

Recipients of federal funds should be mindful of the new prohibitions contained in 2 CFR § 200.216 and ensure that they are appropriately segregating their costs going forward, particularly as compliance with the new provision will almost certainly be closely evaluated by auditors, awarding agencies, and pass-through entities alike.

Entities that contract with state and local governments will need to be mindful of the new requirements and may begin to see in the short term new contract language incorporating the requirements of 2 CFR § 200.216 from state and local agencies where federal funds are being used, such as state and local transportation projects which commonly receive funding from the Federal Transit Administration.

Notes

¹ <https://bit.ly/2GkmCdk>

² Other notable changes to the regulations not discussed in depth in this post include among others: (i) expanding the ability of award recipients to elect use of a de minimis 10% indirect cost rate even where they have previously held Negotiated Indirect Cost Rate Agreements with federal agencies (2 CFR § 200.414); (ii) expanding the definition of fixed amount awards to allow Federal awarding agencies to apply the provision to both grant agreements and cooperative agreements (2 CFR § 200.201); (iii) making technical clarifications to key definitions within the regulations such as “recipient,” “subsidiary,” and “period of performance” (2 CFR § 200.201); and (iv) raising the micro-purchase threshold to \$10,000 and the simplified acquisition threshold to \$250,000, as well as allow recipients to request approval to operate under a micro purchase threshold in excess of \$10,000 (2 CFR § 200.320).

³ <https://bit.ly/31Vac3T>

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