

insights

TYPES NOT MAPPED YET July 12, 2023 | TTR not mapped yet | Jayna Marie Rust

Federal Contractors: 14 Common FAR 52.204-27 (the “TikTok ban”) Questions Answered

By this point, many companies have come to realize that they and their employees are subject to the Federal Government’s recent ban on TikTok ¹, which may apply not only to Government- and company-owned devices but also to employee-owned devices. Yet, many questions persist as companies struggle to implement the vague language in the ban and are caught between employee frustrations and “a national security measure to protect Government information and information and communication technology systems.”

Although the interim rule leaves open a number of questions, some can be answered. Below are answers to a number of common questions as well as insight into what is still unanswered.

Does the TikTok ban apply to my company?

The ban applies if you have a contract with the ban in it.

How would I know if a contract contains the ban?

It is likely in a contract by reference to *FAR 52.204-27, Prohibition on a ByteDance Covered Application*, but it may also be included via reference to Section 102 of Public Law 117-328 or OMB Memorandum M-23-13.

Do all Federal contracts have the ban in them?

No. But, on June 2, 2023, agencies were instructed that they must include FAR 52.204-27 in the following contracts:

- In solicitations issued on or after June 2, 2023 and contracts awarded after that date,
- In existing indefinite-delivery, indefinite quantity contracts by July 3, and
- When exercising an option or modifying an existing contract or task or delivery order to extend the period of performance.

Thus, if your company has a contract that falls under those requirements, it likely has the ban in it. It may also have the ban even if it does not fall under those requirements.

At this point, the Government has not directed that the ban be extended to Federal grants or contracts under Federal grants.

Is the ban supposed to be in contracts below the simplified acquisition threshold?

Yes.

Is the ban supposed to be in contracts for the acquisition of commercial products or services?

Yes, including for the acquisition of COTS (commercially available off-the-shelf) items.

What does it prohibit the Contractor (and its employees) from doing?

Per FAR 52.204-27, “The Contractor is prohibited from having or using a covered application on any information technology owned or managed by the Government, or on any information technology used or provided by the Contractor under this contract, including the equipment provided by the Contractor’s employees”

The rule’s definition of “information technology” excludes “equipment acquired by a Federal contractor incidental to a Federal contract.” What does “incidental” mean?

The interim rule does not define that term. Given the other language in the clause, it is clear that information technology “used . . . by the Contractor” under the covered contract would not be considered “incidental” under the interim rule. Thus the “incidental” carveout appears to be somewhat limited in usefulness at this point.

Does the FAR clause mean that we need to prohibit covered information technology from accessing the TikTok website too?

Yes. Even though the clause itself is not explicit in this regard, the FAR Council’s commentary to the rule states that the rule requires contractors “to prohibit the presence or use of a covered application or the URLs associated with a covered application”

How are we supposed to implement the ban with our employees?

The clause does not set out specific steps for implementing the ban. But the FAR Council’s commentary to the rule states that it expects contractors to leverage existing technology, policies, and procedures, including communications with employees and trainings. It also states that the FAR Council anticipates contractors will do an initial review of technology and policies but only need to do a periodic review of policies thereafter.

Must we flow this ban down to our subcontractors?

Yes. FAR 52.204-27 requires contractors to include the substance of the clause “in all subcontracts” and to require the subcontractors to also flow down the clause to lower-tier subcontractors.

Do we have to conduct a supply chain review?

No. The FAR Council commentary states, “The changes made by this rule do not require a contractor to review its supply chain. Additionally, there is no reporting requirement by a contractor” The FAR Council also notes that this is different than the requirements under the Kaspersky and Huawei (Section 889) bans implemented under *FAR 52.204-23, Prohibition on Contracting for Hardware, Software, and Services Developed or Provided by Kaspersky Lab and Other Covered Entities*, and *FAR 52.204-25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment*.

Might there be other apps added to the ban in the future?

Yes. The OMB memorandum issued prior to this FAR clause asked agencies to report if they believe other applications should be considered for a ban.

Will the rule change any time soon?

Potentially. This is only an interim rule, which means that the Government has not yet finalized the rule. Final rules sometimes address issues that industry points out via comments.

Can we comment on this rule?

Yes. Comments are due by August 1, 2023, and comments will “be considered in the formation of the final rule.”

Jayna Marie Rust is a partner in Thompson Coburn’s Washington, D.C. office. She counsels clients on Federal contract- and grant-administration matters, including labor and employment issues specific to contractors. She also assists contractors and other entities in preparing comments to proposed and interim rules.

1. The ban originated in the Consolidated Appropriations Act, 2023 (Pub. L. 117- 328), Section 102 of Division R, which was signed into law on December 29, 2022; the subsequent Office of Management and Budget (OMB) Memorandum M-23-13, “No TikTok on Government Devices,” which was issued on February 27, 2023; and Federal Acquisition Regulation: Prohibition on a ByteDance Covered Application, 88 Fed. Reg. 36,430 (June 2, 2023) (to be codified at 48 C.F.R. Parts 4, 13, 39 , and 52). [↗](#)

authorsTest

jayna

Jayna Marie Rust