



This document is scheduled to be published in the Federal Register on 05/10/2012 and available online at <http://federalregister.gov/a/2012-11148>, and on [FDsys.gov](http://FDsys.gov)

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 9 and 52

[FAC 2005-59; FAR Case 2012-013; Item I; Docket 2012-0013, Sequence 1]

RIN 9000-AM22

Federal Acquisition Regulation; Prohibition on Contracting with Inverted Domestic Corporations

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Interim rule.

**SUMMARY:** DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement a section of the Consolidated Appropriations Act, 2012, that prohibits the award of contracts using appropriated funds to any foreign incorporated entity that is treated as an inverted domestic corporation or to any subsidiary of such entity.

**DATES:** Effective Date: [Insert date of publication in the FEDERAL REGISTER.]

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before [insert

**date 60 days after FEDERAL REGISTER publication date]** to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005-59, FAR Case 2012-013 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by searching "FAR Case 2012-013". Select the link "Submit a Comment" that corresponds with "FAR Case 2012-013".

Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2012-013" on your attached document.

- Fax: 202-501-4067.
- Mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, NE., 7th floor, Washington, DC 20417.

Instructions: Please submit comments only and cite FAC 2005-59, FAR Case 2012-013, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** Mr. Michael O. Jackson, Procurement Analyst, at 202-208-4949, for clarification of content. For information pertaining to status or

publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-59, FAR Case 2012-013.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

This rule implements section 738 of Division C of the Consolidated Appropriations Act, 2012 (Pub. L. 112-74), which was signed on December 23, 2011. The same Governmentwide restrictions are already incorporated in the FAR for funds appropriated in Fiscal Years 2008 through 2010, under FAR Case 2008-009, which published as an interim rule in the Federal Register at 74 FR 31561 on July 1, 2009, and as a final rule which published in the Federal Register at 76 FR 31410 on May 31, 2011.

Section 738 of Division C extends to the use of Federal appropriated funds for Fiscal Year 2012, the prohibition against contracting with any inverted domestic corporation, as defined at section 835(b) of the Homeland Security Act of 2002 (Pub. L. 107-296, 6 U.S.C. 395(b)) or any subsidiary of such an entity.

An inverted domestic corporation is one that used to be incorporated in the United States, or used to be a partnership in the United States, but now is incorporated in a foreign country, or is a subsidiary whose parent

corporation is incorporated in a foreign country. See the definition of inverted domestic corporation at FAR 9.108-1.

As in past consolidated appropriations acts that prohibited contracting with inverted domestic corporations, the prohibition does not apply when using Fiscal Year 2012 funds for a contract entered into before the date the funds were appropriated (December 23, 2011), or for any order issued pursuant to such contract. A paragraph has been added to FAR 52.209-10, Prohibition on Contracting with Inverted Domestic Corporations, to refer to the FAR 9.108-2 exceptions to the prohibition.

## **II. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and

Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

### **III. Regulatory Flexibility Act**

The Department of Defense (DoD), the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because this rule will only impact an offeror that is an inverted domestic corporation and wants to do business with the Government. It is expected that the number of entities impacted by this rule will be minimal. Small business concerns are unlikely to have been incorporated in the United States and then reincorporated in a tax haven; the major players in these transactions are reportedly the very large multinational corporations. No domestic entities will be impacted by this rule. For the definition of "small business," the Regulatory Flexibility Act refers to the Small Business Act, which in turn allows the U.S. Small Business Administration (SBA) Administrator to specify detailed definitions or standards (5 USC 601(3) and 15 U.S.C. 632(a)). The SBA regulations at 13 CFR 121.105 discuss who is a small business: "(a)(1) Except for small agricultural

cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor." Therefore, an Initial Regulatory Flexibility Analysis has not been performed. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (FAR Case 2012-013), in correspondence.

#### **IV. Paperwork Reduction Act**

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

## **V. Determination to Issue an Interim Rule**

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because it implements section 738 of Division C of Pub. L. 112-74, which went into effect on December 23, 2011. Contracting officers who violate this prohibition may be subject to prosecution for violation of the Anti-Deficiency Act. However, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

### **List of Subjects in 48 CFR Parts 9 and 52**

Government procurement.

Dated: May 3, 2012

Laura Auletta,  
Director,  
Office of Governmentwide  
Acquisition Policy,  
Office of Acquisition Policy,  
Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 9 and 52 as set forth below:

1. The authority citation for 48 CFR parts 9 and 52 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

**PART 9—CONTRACTOR QUALIFICATIONS**

2. Amend section 9.108-2 by—

- a. In paragraph (a), revising the first sentence; and removing from the second sentence "2008 and 2009" and adding "2008 through 2010" in its place; and
- b. Adding paragraph (b)(4).

The revised and added text reads as follows:

**9.108-2 Prohibition.**

(a) Section 738 of Division C of the Consolidated Appropriations Act, 2012 (Pub. L. 112-74) prohibits the use of 2012 appropriated funds for contracting with any foreign incorporated entity that is treated as an inverted domestic corporation, or with a subsidiary of such a corporation. \*

\* \*

(b) \* \* \*

(4) When using Fiscal Year 2012 funds for any contract entered into before December 23, 2011, or for any order issued pursuant to such contract.

**9.108-3 [Amended]**

3. Amend section 9.108-3 by removing from paragraph (a) "funds, an" and adding "funds or Fiscal Year 2012 funds, an" in its place.

**9.108-5 [Amended]**

4. Amend section 9.108-5 by removing from the introductory text "2010, unless" and adding "2010 or in Fiscal Year 2012, unless" in its place.

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

**52.204-8 [Amended]**

5. Amend section 52.204-8 by revising the date of the provision to read "**( [INSERT ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE FEDERAL REGISTER] )**"; and removing from paragraph (c) (1) (v) "2008, 2009 or 2010" and adding "2008, 2009, 2010, or 2012" in its place.

6. Amend section 52.209-10 by revising the date of the clause; and adding paragraph (c) to read as follows:

**52.209-10 Prohibition on Contracting with Inverted Domestic Corporations.**

\* \* \* \* \*

PROHIBITION ON CONTRACTING WITH INVERTED DOMESTIC CORPORATIONS ( **[INSERT ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE FEDERAL REGISTER]** )

\* \* \* \* \*

(c) Exceptions to this prohibition are located at 9.108-2.

\* \* \* \* \*

7. Amend section 52.212-5 by revising the date of the clause, and paragraph (b) (8) to read as follows:

**52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.**

\* \* \* \* \*

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS ([INSERT ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE FEDERAL REGISTER])

\* \* \* \* \*

(b) \* \* \*

\_\_\_(8) 52.209-10, Prohibition on Contracting with Inverted Domestic Corporations ([INSERT ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE FEDERAL REGISTER]) (section 738 of Division C of Pub. L. 112-74, section 740 of Division C of Pub. L. 111-117, section 743 of Division D of Pub. L. 111-8, and section 745 of Division D of Pub. L. 110-161).

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[BILLING CODE 6820-EP]

[FR Doc. 2012-11148 Filed 05/09/2012 at 8:45 am; Publication Date: 05/10/2012]