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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 52

[FAR Case 2015-006; Docket No. 2014-0051; Sequence No. 1]

RIN 9000-AM85

**Federal Acquisition Regulation; Prohibition on Contracting
with Inverted Domestic Corporations—Representation and
Notification**

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

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to require additional actions by contractors to assist contracting officers in ensuring compliance with the Governmentwide statutory prohibition on the use of appropriated (or otherwise made available) funds for contracts with any foreign incorporated entity that is an inverted domestic corporation or to any subsidiary of such entity.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before **[Insert 60 days after**

publication in the FEDERAL REGISTER] to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2015-006 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2015-006". Select the link "Comment Now" that corresponds with "FAR Case 2015-006". Follow the instructions provided at the "Comment Now" screen. Please include your name, company name (if any), and "FAR Case 2015-006" on your attached document.

- Fax: 202-501-4067.

- Mail: General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Ms. Hada Flowers, 1800 F Street, NW., 2nd floor, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR Case 2015-006, 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 FAR Case 2015-006.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to revise the provisions of the FAR that address the continuing Governmentwide statutory prohibition (in effect since fiscal year 2008) on the use of appropriated (or otherwise made available) funds for contracts with any foreign incorporated entity that is an inverted domestic corporation (under section 835 of the Homeland Security Act of 2002, codified at 6 U.S.C. 395) or any subsidiary of such entity. By separate notice, DOD, GSA, and NASA have issued an interim rule (FAR Case 2014-017) that more clearly reflects the ongoing and continuing nature of this statutory prohibition.

An inverted domestic corporation is a corporation that meets the criteria specified in 6 U.S.C. 395(b) and (c). To date, an offeror has been required to include a statement in its offer (found at FAR 52.209-2(c) and 52.212-3(n)(2)) representing that by signing the offer, the offeror is representing that it is not an inverted domestic corporation or a subsidiary of an inverted domestic corporation. To increase the Government's ability to

identify an offeror's status as an inverted domestic corporation, this rule proposes to change the representation to require an affirmative act by the offeror to complete two yes/no check-off boxes on whether it is an inverted domestic corporation, or a subsidiary of one, so that the Government will know which corporations are subject to the contracting prohibition. (Contracting officers would be allowed to continue relying on the offeror's representation unless there is an independent reason to question it.)

In accordance with FAR 4.1201(b)(1), 52.204-8, and 52.212-3, offerors would continue to be required to represent their current status at the earlier of an offer submission or the annual anniversary of their registration in the System for Award Management (SAM). This existing requirement, coupled with the proposed new more specific representation, will better ensure clear, current, accurate, and complete disclosure by offerors of whether or not they are an inverted domestic corporation, for consideration by a contracting officer before making a new contract award.

In addition, the rule proposes to add a new paragraph to FAR clause 52.209-10 that would require the contractor, when the contractor becomes an inverted domestic

corporation during contract performance, to give written notification of its change in status as an inverted domestic corporation to the contracting officer within five business days from the date of the inversion event.

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 a significant regulatory action and, therefore, was 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

DoD, GSA, and 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 small entities impacted by this rule will be minimal. Small business concerns are unlikely to have been incorporated in the United States (or, if a partnership, established in the United States) and then subsequently incorporated in a foreign country; the major participants in these transactions are reportedly 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 U.S.C. 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 2015-006), in correspondence.

IV. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies because the proposed rule contains information collection requirements. Accordingly, the Regulatory Secretariat Division will submit a request for approval of a new information collection requirement concerning Prohibition on Contracting with Inverted Domestic Corporations to the Office of Management and Budget.

A. Public Reporting Burden

The public reporting burden for this collection of information is estimated to average .2 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden estimated as follows:

Respondents: 352,000.

Responses per respondent: Approximately 1.

Total annual responses: 352,002.

Preparation hours per response: Approximately .2.

Total response Burden Hours: 70,410.

B. Request for Comments Regarding Paperwork Burden.

Submit comments, including suggestions for reducing this burden, not later than **[insert date 60 days after publication in the FEDERAL REGISTER]** to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Ms. Hada Flowers, 1800 F Street, NW., 2nd floor, Washington, DC 20405.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the FAR, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requesters may obtain a copy of the supporting statement from the General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Ms. Hada Flowers, 1800 F Street, NW., 2nd floor, Washington, DC 20405.

Please cite OMB Control Number 9000-00XX, Prohibition on Contracting with Inverted Domestic Corporations, in all correspondence.

List of Subject in 48 CFR Part 52

Government procurement.

Dated: December 5, 2014.

William Clark,
Acting Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA are proposing to amend 48 CFR part 52 as set forth below:

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

1. The authority citation for 48 CFR part 52 continues to read as follows:

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

2. Amend section 52.209-2 by revising the date of the provision and paragraph (c) to read as follows:

52.209-2 Prohibition on Contracting with Inverted Domestic Corporations—Representation.

* * * * *

PROHIBITION ON CONTRACTING WITH INVERTED DOMESTIC CORPORATIONS—
REPRESENTATION (DATE)

* * * * *

(c) Representation. The offeror represents that—

(1) It is, is not an inverted domestic corporation; and

(2) It is, is not a subsidiary of an inverted domestic corporation.

(End of Provision)

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

52.209-10 Prohibition on Contracting with Inverted Domestic Corporations.

* * * * *

PROHIBITION ON CONTRACTING WITH INVERTED DOMESTIC CORPORATIONS (**DATE**)

* * * * *

(d) In the event the Contractor becomes either an inverted domestic corporation, or a subsidiary of an inverted domestic corporation during contract performance, the Contractor shall give written notice to the Contracting Officer within five business days from the date of the inversion event.

* * * * *

4. Amend section 52.212-3 by revising the date of the provision; and paragraph (n)(2) to read as follows:

52.212-3 Offeror Representations and Certifications—Commercial Items.

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS (**DATE**)

* * * * *

(n) * * *

(2) Representation. The offeror represents that—

(i) It is, is not an inverted domestic corporation; and

(ii) It is, is not a subsidiary of an inverted domestic corporation.

* * * * *

5. Amend section 52.212-5 by revising the date of the clause and paragraph (a)(1) to read as follows:

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

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CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE
ORDERS—COMMERCIAL ITEMS (**DATE**)

(a) * * *

(1) [52.209-10](#), Prohibition on Contracting with
Inverted Domestic Corporations (DATE) (section 745 of
Division D of Pub. L. 110-161 and its successor provisions
in subsequent appropriations acts and continuing
resolutions).

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[BILLING CODE 6820-EP]

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