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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 9 and 52

[FAC 2005-79; FAR Case 2014-017; Item II; Docket No. 2014-0017, Sequence No. 1]

RIN 9000-AM70

Federal Acquisition Regulation; Prohibition on Contracting with Inverted Domestic Corporations

AGENCY: 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 provisions of the Federal Acquisition Regulation (FAR) that address the continuing 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 any subsidiary of such entity.

DATES: Effective: [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 formation of the final rule.

ADDRESSES: Submit comments identified by FAC 2005-79, FAR Case 2014-017, by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2014-017" Select the link "Comment Now" that corresponds with "FAR Case 2014-017". Follow the instructions provided at the "Comment Now" screen. Please include your name, company name (if any), and "FAR Case 2014-017" on your attached document.
- Fax: 202-501-4067.
- Mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Ms. Flowers, 1800 F Street, NW., 2nd floor, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005-79, FAR Case 2014-017, 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 2005-79, FAR Case 2014-017.

SUPPLEMENTARY INFORMATION:

I. Background

This interim rule amends the provisions of the FAR that address the continuing Governmentwide statutory prohibition (in effect since Fiscal Year (FY) 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 to any subsidiary of such entity. By separate notice, DOD, GSA, and NASA are issuing a proposed rule (FAR Case 2015-006) that would require additional actions by contractors to assist contracting officers in ensuring compliance with the statutory prohibition. An inverted domestic corporation is a corporation that meets the criteria specified in 6 U.S.C. 395(b) and (c).

In particular, this rule amends FAR 9.108 and the associated solicitation provisions and contract clauses, so that it more clearly reflects the ongoing, continuing nature of the statutory prohibition on contracting with inverted domestic corporations and their subsidiaries.

Beginning with section 745 of Division D of the Consolidated Appropriations Act, 2008 (Pub. L. 110-161), and in all subsequent fiscal years, Congress in the annual appropriations acts and continuing resolutions (CRs) has imposed a continuous Governmentwide statutory prohibition against using appropriated funds to contract with either an inverted domestic corporation (as defined in section 835 of the Homeland Security Act of 2002, codified at 6 U.S.C. 395) or a subsidiary of an inverted domestic corporation.

- In FY 2009, the statutory prohibition was continued by the FY 2009 short-term CR (Pub. L. 110-329, as extended by Pub. L. 111-6), under the general terms of the CR, and by section 743 of Division D of the Omnibus Appropriations Act, 2009 (Pub. L. 111-8).

- In FY 2010, the statutory prohibition was continued by the FY 2010 short-term CR (Pub. L. 111-68, as extended by Pub. L. 111-88), under the general terms of the CR, and by section 740 of Division C of the Consolidated Appropriations Act, 2010 (Pub. L. 111-117).

- In FY 2011, the statutory prohibition was continued by the FY 2011 short-term CR (Pub. L. 111-242, as extended by Public Laws 111-290, 111-317, 111-322, 112-4, 112-6, and 112-8) and full-year CR (Pub. L. 112-10), under the general terms of the CRs.

- In FY 2012, the statutory prohibition was continued by the FY 2012 short-term CR (Pub. L. 112-33, as extended by Public Laws 112-36, 112-67, and 112-68), under the general terms of the CR, and by section 738 of Division C of the Consolidated Appropriations Act, 2012 (Pub. L. 112-74).

- In FY 2013, the statutory prohibition was continued by the FY 2013 short-term CR (Pub. L. 112-175) and full-year CR (Pub. L. 113-6), under the general terms of the CRs.

- In FY 2014, the statutory prohibition was continued by the FY 2014 short-term CR (Pub. L. 113-46), under the general terms of the CR, and by section 733 of Division E of the Consolidated Appropriations Act, 2014 (Pub. L. 113-76).

- In FY 2015, the statutory prohibition is currently being continued by the FY 2015 short-term CR (the Continuing Appropriations Resolution, 2015; Pub. L. 113-164), under the general terms of the CR.

The prohibition on contracting with inverted domestic corporations is addressed at FAR 9.108. In the years since the Governmentwide prohibition was first enacted in FY 2008, the FAR Council has sought to update this FAR section to reflect the enactment of new appropriations acts. See

FAR Case 2008-009 which was published as an interim rule in the Federal Register at 74 FR 31561 on July 1, 2009, and as a final rule at 76 FR 31410 on May 31, 2011, and FAR Case 2012-013 published as an interim rule at 77 FR 27547 on May 10, 2012, and as a final rule at 78 FR 6185 on January 29, 2013.

Insofar as Congress has retained the statutory prohibition in place since FY 2008, this interim rule amends FAR 9.108-2, 9.108-3, and 9.108-5 to reflect the ongoing nature of the prohibition for as long as Congress extends the prohibition in its current form through subsequent appropriations action (in full-year appropriations acts and in short-term and full-year CRs).

This interim rule also makes several technical revisions to the coverage in FAR 9.108 to state more clearly when a corporation is covered by the prohibition. In particular, it eliminates unclear discussion and references in the definition of "inverted domestic corporation".

In addition, the interim rule simplifies the coverage addressing exceptions. Specifically, the interim rule deletes a long listing of exceptions that accurately reflected exceptions set forth in the applicable appropriations acts, but had become increasingly difficult

to understand with the passage of each appropriations act. Instead, the interim rule explains that each appropriations provision addressing the prohibition included an exception stating that the section shall not apply to any Federal Government contract entered into before the date of the enactment of the Act, or to any task order issued pursuant to such contract. Effectively, the prohibition does not extend to additional work that is performed under the contract if that additional work is funded by appropriations that are provided in a subsequent FY's appropriations. In light of this exception, contracting officers are instructed, as a precaution, to consult with legal counsel if a contractor becomes an inverted domestic corporation (or a subsidiary of one) during contract performance to ensure appropriate application of the prohibition.

Finally, the interim rule makes conforming changes to solicitation provisions and contract FAR clauses at 52.204-8, 52.209-2, 52.209-10, 52.213-3, and 52.212-5 so that offerors and contractors have clearer notice of the ongoing and continuing nature of the statutory prohibition on contracting with inverted domestic corporations and their subsidiaries.

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 2014-017), 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. While the revisions in the interim rule do not change the scope or meaning of the statutory prohibition, they will help to better ensure agency compliance with the Continuing Appropriations Resolution, 2015 (Pub. L. 113-164) (continuing the prohibition found in section 733 of Division E of the Consolidated Appropriations Act, 2014 (Pub. L. 113-76)). 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: 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 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 51 U.S.C. 20113.

PART 9—CONTRACTOR QUALIFICATIONS

2. Amend section 9.108-1 by revising the definition "Inverted domestic corporation" to read as follows:

9.108-1 Definitions.

* * * * *

Inverted domestic corporation means a foreign incorporated entity that meets the definition of an inverted domestic corporation under 6 U.S.C. 395(b), applied in accordance with the rules and definitions of 6 U.S.C. 395(c).

* * * * *

3. Revise section 9.108-2 to read as follows:

9.108-2 Prohibition.

(a) Section 745 of Division D of the Consolidated Appropriations Act, 2008 (Pub. L. 110-161) and its successor provisions in subsequent appropriations acts (and as extended in continuing resolutions) prohibit, on a Governmentwide basis, the use of appropriated (or otherwise

made available) funds for contracts with either an inverted domestic corporation, or a subsidiary of such a corporation, except as provided in paragraph (b) of this section and in 9.108-4 Waiver.

(b) (1) Section 745 and its successor provisions include the following exception: This section shall not apply to any Federal Government contract entered into before the date of the enactment of this Act, or to any task order issued pursuant to such contract.

(2) To ensure appropriate application of the prohibition and this exception, contracting officers should consult with legal counsel if, during the performance of a contract, a contractor becomes an inverted domestic corporation or a subsidiary of one.

4. Amend section 9.108-3 by revising paragraph (a) to read as follows:

9.108-3 Representation by the offeror.

(a) In order to be eligible for contract award, an offeror must represent that it is neither an inverted domestic corporation, nor a subsidiary of an inverted domestic corporation. Any offeror that cannot so represent is ineligible for award of a contract, unless waived in accordance with the procedures at 9.108-4.

* * * * *

5. Amend section 9.108-5 by revising the introductory text to read as follows:

9.108-5 Solicitation provision and contract clause.

The contracting officer shall—

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. Amend section 52.204-8 by revising the date of the provision and paragraph (c)(1)(v) to read as follows:

52.204-8 Annual Representations and Certifications.

* * * * *

ANNUAL REPRESENTATIONS AND CERTIFICATIONS ([INSERT ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE FEDERAL REGISTER])

* * * * *

(c)(1) * * *

(v) 52.209-2, Prohibition on Contracting with Inverted Domestic Corporations—Representation.

* * * * *

7. Amend section 52.209-2 by revising the date of the provision and paragraphs (a) and (b) to read as follows:

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

* * * * *

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

(a) Definitions. Inverted domestic corporation and subsidiary have the meaning given in the clause of this contract entitled Prohibition on Contracting with Inverted Domestic Corporations (52.209-10).

(b) Government agencies are not permitted to use appropriated (or otherwise made available) funds for contracts with either an inverted domestic corporation, or a subsidiary of an inverted domestic corporation, unless the exception at 9.108-2(b) applies or the requirement is waived in accordance with the procedures at 9.108-4.

* * * * *

8. Amend section 52.209-10 by revising the date of the clause and in paragraph (a), the definition "Inverted domestic corporation" 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**])

(a) * * *

Inverted domestic corporation means a foreign incorporated entity that meets the definition of an inverted domestic corporation under 6 U.S.C. 395(b), applied in accordance with the rules and definitions of 6 U.S.C. 395(c).

* * * * *

9. Amend section 52.212-3 by revising the date of the provision; in paragraph (a), the definition "Inverted domestic corporation" and paragraph (n)(1) to read as follows:

52.212-3 Offeror Representations and Certifications—
Commercial Items.

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS ([INSERT
ABBREVIATED MONTH AND YEAR OF DATE OF PUBLICATION IN THE FEDERAL
REGISTER])

(a) * * *

* * * * *

Inverted domestic corporation means a foreign incorporated entity that meets the definition of an inverted domestic corporation under 6 U.S.C. 395(b), applied in accordance with the rules and definitions of 6 U.S.C. 395(c).

* * * * *

(n) Prohibition on Contracting with Inverted Domestic Corporations. (1) Government agencies are not permitted to use appropriated (or otherwise made available) funds for contracts with either an inverted domestic corporation, or a subsidiary of an inverted domestic corporation, unless the exception at 9.108-2(b) applies or the requirement is waived in accordance with the procedures at 9.108-4.

* * * * *

10. Amend section 52.212-5 by—

- a. Revising the date of the clause;
- b. Redesignating paragraphs (a)(1) through (3) as paragraphs (a)(2) through (4), respectively;
- c. Adding a new paragraph (a)(1); and
- d. Removing and reserving paragraph (b)(10).

The revision and addition 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])

(a) * * *

(1) 52.209-10, Prohibition on Contracting with
Inverted Domestic Corporations ([INSERT ABBREVIATED MONTH AND YEAR
OF DATE OF PUBLICATION IN THE FEDERAL REGISTER])

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[BILLING CODE 6820-EP]

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