



BILLING CODE: 6820-EP

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 12, 25, 29, and 52

[FAR Case 2016-013; Docket No. FAR-2016-0013, Sequence No.1]

RIN 9000-AN38

Federal Acquisition Regulation: Tax on Certain Foreign

Procurement

AGENCY: 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 withhold a 2 percent tax on contract payments made by the United States Government to foreign persons pursuant to certain contracts. This rule applies to Federal government contracts for goods or services that are awarded to foreign persons.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the addresses shown below on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2016-013 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2016-013". Select the link "Comment Now" that corresponds with "FAR Case 2016-013". Follow the instructions provided on the screen. Please include your name, company name (if any), and "FAR Case 2016-013" on your attached document.
- Mail: General Services Administration, Regulatory Secretariat Division (MVCB), ATTN: Lois Mandell, 1800 F Street NW., 2nd Floor, Washington, DC 20405.

Instructions: Please submit comments only and cite "FAR Case 2016-013" 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. To confirm receipt of your comment(s), please check <http://www.regulations.gov>, approximately 2 to 3 days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202-969-7207 or zenaida.delgado@gsa.gov for clarification of content. For information pertaining to

status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite "FAR Case 2016-013".

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to amend the FAR to implement the Department of the Treasury final regulations published in the *Federal Register* at 81 FR 55133 on August 18, 2016, under section 5000C of the Internal Revenue Code relating to the 2 percent tax on payments made by the United States (U.S.) Government to foreign entities pursuant to certain contracts. This proposed rule only addresses the collection of the section 5000C tax from contract payments on certain foreign contracts by withholding up to 2 percent of the payment. The agency merely withholds the tax for the Internal Revenue Service (IRS). All substantive issues regarding the underlying section 5000C tax, e.g., the imposition of, and exemption from the tax, are matters under the jurisdiction of the IRS. FAR 29.204 and 29.402-3 give more information on the contracts that are covered, and exemptions or exceptions that might apply.

On January 2, 2011, section 301 of the James Zadroga 9/11 Health and Compensation Act of 2010, Public Law 111-347 (the Act), added section 5000C to the Internal Revenue Code (Code). 26 U.S.C. 5000C, Imposition of tax on certain foreign

procurement, and its implementing regulations at 26 CFR 1.5000C-1 through 1.5000C-7, imposed, unless exempted, a 2 percent excise tax of the amount of a specified Federal procurement payment on any foreign person receiving such payment. 26 CFR 1.5000C-1(c) defines the term *specified Federal procurement payment* as any payment made pursuant to a contract with the U.S. Government for goods or services if the goods are manufactured or produced, or the services are provided, in any country that is not a party to an international procurement agreement with the United States (see FAR 25.003 for the definitions of "World Trade Organization Government Procurement Agreement (WTO GPA) country" and "Free Trade Agreement country", per the IRS definition at 1.5000C-1(a)(8)). Section 301(a)(3) of the Act provides that section 5000C applies to payments received pursuant to contracts entered into on and after the date of enactment of the Act, January 2, 2011. Additionally, section 301(c) of the Act states that this section must be applied in a manner consistent with U.S. obligations under international agreements. Section 5000C(d)(1) provides that the amount deducted and withheld under chapter 3 shall be increased by the amount of tax imposed under 26 U.S.C. section 5000C.

DoD, GSA, and NASA issued a final rule under FAR Case 2011-011, Unallowability of Costs Associated With Foreign Contractor Excise Tax, amending the FAR to disallow the cost associated

with the 2 percent excise tax on certain foreign procurements. The final rule was published in the Federal Register at 78 FR 6189 on January 29, 2013.

II. Discussion and Analysis

As required by the Code, DoD, GSA, and NASA are proposing to implement the withholding of a 2 percent tax on payments made by the U.S. Government to foreign persons pursuant to certain contracts.

A. The following summarizes the proposed changes to FAR parts 1, 12, 25, and 29:

1. Adds segments for the new provision FAR 52.229-WW, Tax on Certain Foreign Procurements—Notice and Representation, and the new clause at FAR 52.229-XX, Tax on Certain Foreign Procurements, at FAR 1.106, OMB approval under the Paperwork Reduction Act.

2. Adds the new provision FAR 52.229-WW, Tax on Certain Foreign Procurements—Notice and Representation, to paragraph (d) in FAR 12.301, Solicitation provisions and contract clauses for the acquisition of commercial items.

3. Adds a new section 25.1003, Tax on certain foreign procurements, under subpart 25.10, Additional Foreign Acquisition Regulations, that provides a reference to a new FAR section at FAR 29.204.

4. Adds a new section at FAR 29.204, Federal excise tax on specific foreign contract payments, explaining the excise tax requirements to contracting officers.

5. Adds a new section 29.402-3, Tax on certain foreign procurements, under 29.402, Foreign contracts, to prescribe the use of the new provision FAR 52.229-WW, Tax on Certain Foreign Procurements—Notice and Representation, and the new clause at FAR 52.229-XX, Tax on Certain Foreign Procurements.

B. The following summarizes proposed changes to FAR part 52.

1. Amends paragraph (b) of the clause at FAR 52.212-5, Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items, to add the new clause 52.229-XX, Tax on Certain Foreign Procurements.

2. Adds a new provision at FAR 52.229-WW, Tax on Certain Foreign Procurements—Notice and Representation, to notify offerors of the excise tax withholding requirements and to have them represent whether they are a foreign person; and whether they would claim an exemption on the Department of the Treasury Internal Revenue Service Form W-14, Certificate of Foreign Contracting Party Receiving Federal Procurement Payments. This form is available at www.irs.gov/w14.

3. Adds a new clause at FAR 52.229-XX, Tax on Certain Foreign Procurements, to establish the excise tax withholding requirements in the FAR.

III. Expected Impact of the Rule

Acquiring agencies are required to withhold the excise tax under 26 U.S.C. 5000C. The exemptions from the withholding in the IRS regulations at 26 CFR 1.5000C-1(d)(1) through (d)(4) are captured under the new provision prescription at FAR 29.402-3(a). If any of the conditions listed at FAR 29.402-3(a) are met, the payments under the contract will not be subject to the withholding. The other exemptions at 26 CFR 1.5000C-1(d), (d)(5) through (d)(7), must be claimed by the offeror by submitting an IRS Form W-14 with the offer. If no exemption applies or is claimed, contractors will be subject to the tax and will be required to complete IRS Form W-14, and submit this form with each voucher or invoice for the agency to withhold the tax as appropriate.

Federal Procurement Data System (FPDS) data for Fiscal Year (FY) 2018 was obtained for contracts valued over \$150,000 awarded to foreign vendors. There were 8,395 total awards made to a total of 1,595 unique foreign entities. The IRS regulations defined the term "international procurement agreement" as the World Trade Organization GPA (WTO GPA) within the meaning of FAR 25.400(a)(1) and any free trade agreement to

which the United States is a party that includes government procurement obligations that provide appropriate competitive government procurement opportunities to U.S. goods, services, and suppliers. Excluding the countries listed in the definitions of "World Trade Organization Government Procurement Agreement (WTO GPA) country" and "Free Trade Agreement country" in FAR 25.003 (see exemption at 26 CFR 1.5000C-1(d)(7)), a more accurate number of impacted entities may be estimated to be 461 unique foreign vendors. This number is minimal when compared to the total number of unique vendors for FY 2018 of 142,051, or approximately 0.32 percent. The FAR regulation covers withholding, not the imposition of the tax, which was implemented in the IRS regulation. Any monies which the contractor thinks a contracting agency has wrongfully withheld can be reclaimed by the contractor when it files its U.S. tax return.

IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

Pursuant to 41 U.S.C. 1905-1907, a provision of law is not applicable to: contracts or subcontracts in amounts not greater than the simplified acquisition threshold (SAT) (as defined in FAR 2.101); and the acquisition of commercial items, including COTS items. However, the provision of law is applicable when

the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1905-1907 and states that the law applies to contracts or subcontracts in amounts not greater than the SAT, or the acquisition of commercial items including COTS items; (iii) the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT and for acquisition of commercial items; or the Administrator for Federal Procurement Policy makes a written determination that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items from this law. United States tax laws contain criminal and civil penalties; thus, commercial items, including commercially available off-the-shelf items, are subject to the new provision and clause unless otherwise exempted.

The new provision and clause are not applicable to acquisitions using simplified acquisition procedures that do not exceed the simplified acquisition threshold because the IRS regulations at 26 CFR 1.5000C-1(d)(1) exempted them from the tax - see the prescriptions at FAR 29.402-3(a)(1) and (b)(1).

V. 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.

VI. Executive Order 13771

This proposed rule is not expected to be an E.O. 13771 regulatory action, because this rule imposes de minimis costs on the public as explained in section III, Expected Impact of the Rule, of this preamble. The FAR Council invites comments from the regulated community on the analysis provided in this rule.

VII. Regulatory Flexibility Act

The Treasury final rule concluded that a Regulatory Flexibility Analysis was not required and that the rule will not have a significant economic impact on a substantial number of small entities. The Treasury final rule stated that because section 5000C(a) of the Internal Revenue Code applies to foreign persons, regardless of the size of the entity, only a limited number of small foreign entities that received specified Federal procurement payments are affected by the regulation. FPDS data

for FY 2018 shows only 59 unique small foreign entities were awarded contracts valued over \$150,000. This rule is not expected to have a significant economic impact on a substantial number of small entities based in the United States because this only applies to Federal government contracts for goods or services that are awarded to foreign persons. The FAR regulation covers withholding, not the imposition of the tax, which was implemented in the IRS regulation. Any monies which the contractor thinks a contracting agency has wrongfully withheld can be reclaimed by the contractor when it files its U.S. tax return. DoD, GSA, and NASA have, however, prepared an Initial Regulatory Flexibility Analysis (IRFA) of the FAR rule consistent with 5 U.S.C. 603, which is summarized as follows:

DoD, GSA, and NASA are proposing to amend the FAR to withhold a 2 percent tax on payments made by the U.S. Government to foreign persons pursuant to certain contracts.

The objective is to implement a final rule issued by the Department of the Treasury (published at 81 FR 55133) that implements section 301 of the James Zadroga 9/11 Health and Compensation Act of 2010, Public Law 111-347 (the Act), adding section 5000C to the Internal Revenue Code (Code). 26 U.S.C. 5000C, Imposition of tax on certain foreign procurement, and its implementing regulations at 26 CFR 1.5000C-1 through 1.5000C-7, imposed, unless exempted, a 2 percent excise tax of the amount of a specified Federal procurement payment on any foreign person receiving such payment.

The rule would apply to Federal government contracts that are awarded to foreign persons for goods or services, if the goods are manufactured or produced or the services are provided in any country that is not a party to an international procurement agreement with the United States (see FAR 25.003 for the definitions of "World Trade Organization Government Procurement Agreement (WTO GPA) country" and "Free Trade Agreement country"). FPDS data for FY 2018 was obtained for contracts valued over \$150,000 awarded to foreign vendors. There were 8,395 total awards, 8,178 were to large vendors; 217 were to small vendors. Of these, 1,536 were unique large foreign

entities while 59 were unique small foreign entities for a total of 1,595 unique foreign entities. Accordingly, the proposed rule is not expected to have a significant economic impact on a substantial number of small entities based in the United States.

The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no available alternatives to the proposed rule to accomplish the desired objective of the statute.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. 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 2016-013), in correspondence.

VIII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) does apply. However, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved for the IRS, Department of the Treasury regulations under the Office of Management and Budget (OMB) Control Number 1545-2263, Tax on Certain Foreign Procurement (see 80 FR 22449, April 22, 2015 and 82 FR 41310 at 41312, August 30, 2017).

List of Subjects in 48 CFR Parts 1, 12, 25, 29, and 52

Government procurement.

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Therefore, DoD, GSA, and NASA are proposing to amend 48 CFR parts 1, 12, 25, 29, and 52 as set forth below:

1. The authority citation for 48 CFR parts 1, 12, 25, 29, 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 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

2. In section 1.106 amend the table by adding entries for "52.229-WW" and "52.229-XX" in numerical order to read as follows:

FAR segment	OMB control No.
* * * *	* * *
52.229-WW	1545-2263
52.229-XX	1545-2263
* * * *	* * *

PART 12—ACQUISITION OF COMMERCIAL ITEMS

3. Amend section 12.301, by redesignating paragraph (d) (12) as (d) (13) and adding a new paragraph (d) (12) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * *

(d) * * *

(12) Insert the provision at 52.229-WW, Tax on Certain Foreign Procurements—Notice and Representation, in solicitations as prescribed in 29.402-3(a). The representation in this provision is not in the System for Award Management.

* * * * *

PART 25—FOREIGN ACQUISITION

4. Add section 25.1003 to read as follows:

25.1003 Tax on certain foreign procurements.

See 29.204 for the imposition of the tax on certain foreign procurements pursuant to the James Zadroga 9/11 Health and Compensation Act of 2010 (Pub. L. 111-347), 26 U.S.C. 5000C, Imposition of tax on certain foreign procurement, and its implementing regulations at 26 CFR 1.5000C-1 through 1.5000C-7.

PART 29—TAXES

5. Add sections 29.204 and 29.402-3 to read as follows:

29.204 Federal excise tax on specific foreign contract payments.

(a) 26 U.S.C. 5000C, Imposition of tax on certain foreign procurement, and its implementing regulations at 26 CFR 1.5000C-1 through 1.5000C-7 require acquiring agencies to collect this excise tax via withholding on applicable contract payments (see 29.402-3, 31.205-41(b)(8)). Agencies merely withhold the tax (section 5000C tax) for the Internal Revenue Service (IRS). All substantive issues regarding the underlying section 5000C tax,

e.g., the imposition of, and exemption from the tax, are matters under the jurisdiction of the IRS. The contracting officer will refer all questions relating to the interpretation of the IRS regulations to <https://www.irs.gov/help/tax-law-questions>.

(b) In accordance with the clause 52.229-XX, Tax on Certain Foreign Procurements, contractors that are subject to the section 5000C tax will complete IRS Form W-14, Certificate of Foreign Contracting Party Receiving Federal Procurement Payments, and submit this form with each voucher or invoice. In the absence of a completed IRS Form W-14 accompanying a payment request, the default withholding percentage is 2 percent for the section 5000C withholding for that payment request. Information about IRS Form W-14 is available via the Internet at www.irs.gov/w14.

(c) (1) Exemptions from the withholding in the IRS regulations at 26 CFR 1.5000C-1(d) (1) through (d) (4) are captured under the provision prescription at 29.402-3(a) (i.e., the contracting officer will not include the provision when one of the 29.402-3(a) exceptions applies).

(2) The exemptions at 26 CFR 1.5000C-1(d) (5) through (d) (7) must be claimed by the offeror when it submits an IRS Form W-14 with the offer. If not submitted with the offer, exemptions will not be applied to the contract.

(3) Any exemption claimed and self-certified on the IRS Form W-14 is subject to audit by the IRS. Any disputes regarding the imposition and collection of the section 5000C tax are adjudicated by the IRS as the section 5000C tax is a tax matter, not a contract issue.

(d) The exemptions in 29.201 through 29.302 do not apply to this section 5000C tax.

(e) Additional information about this excise tax on specific foreign contract payments is available via the Internet at <https://www.irs.gov/government-entities/excise-tax-on-specified-federal-foreign-procurement-payments>.

29.402-3 Tax on certain foreign procurements.

(a) Insert the provision at 52.229-WW, Tax on Certain Foreign Procurements—Notice and Representation, in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items, unless one of the following exceptions applies:

(1) Acquisitions using simplified acquisition procedures that do not exceed the simplified acquisition threshold (as defined in 2.101).

(2) Emergency acquisitions using the emergency acquisition flexibilities defined in part 18.

(3) Acquisitions using the unusual and compelling urgency authority per 6.302-2.

(4) Contracts with a single individual for personal services that will not exceed the simplified acquisition threshold on an annual calendar year basis for all years of the contract.

(5) Acquisitions if the requiring activity identifies that the requirement is for certain foreign humanitarian assistance contracts which are payments made by the U.S. Government agencies pursuant to a contract with a foreign contracting party to obtain goods or services described in or authorized under 7 U.S.C. 1691, et seq., 22 U.S.C. 2151, et seq., 22 U.S.C. 2601 et seq., 22 U.S.C. 5801 et seq., 22 U.S.C. 5401 et seq., 10 U.S.C. 402, 10 U.S.C. 404, 10 U.S.C. 407, 10 U.S.C. 2557, and 10 U.S.C. 2561.

(b) Insert the clause at 52.229-XX, Tax on Certain Foreign Procurements, in—

(1) Solicitations that contain the provision at 52.229-WW, Tax on Certain Foreign Procurements—Notice and Representation; and

(2) Resultant contracts in which the contractor has indicated that it was a foreign person in solicitation provision 52.229-WW, Tax on Certain Foreign Procurements—Notice and Representation.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. Amend section 52.212-5 by—

a. Revising the date of the clause;

b. Redesignating paragraphs (b) (53) through (60) as paragraphs (b) (54) through (61) and adding a new paragraph (b) (53) 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 ([DATE])

* * * * *

(b) * * *

____ (53) 52.229-XX, Tax on Certain Foreign Procurements
([DATE]).

* * * * *

7. Add sections 52.229-WW and 52.229-XX to read as follows:

52.229-WW Tax on Certain Foreign Procurements—Notice and Representation.

As prescribed in 29.402-3(a), insert the following provision:

TAX ON CERTAIN FOREIGN PROCUREMENTS—NOTICE AND REPRESENTATION ([DATE])

(a) Definitions. As used in this provision—

Foreign person means any person other than a United States person.

Specified Federal procurement payment means any payment made pursuant to a contract with a foreign contracting party that is for goods, manufactured or produced, or services provided in a foreign country that is not a party to an international procurement agreement with the United States. For purposes of the prior sentence, a foreign country does not include an outlying area.

United States person as defined in 26 U.S.C. 7701(a)(30) means—

- (1) A citizen or resident of the United States,
- (2) A domestic partnership,
- (3) A domestic corporation,
- (4) Any estate (other than a foreign estate, within the meaning of paragraph (31)), and

(5) Any trust if—

- (i) A court within the United States is able to exercise primary supervision over the administration of the trust, and

- (ii) One or more United States persons have the authority to control all substantial decisions of the trust.

(b) Unless exempted, there is a 2 percent tax of the amount of a specified Federal procurement payment on any foreign person receiving such payment. See 26 U.S.C. 5000C, Imposition

of tax on certain foreign procurement, and its implementing regulations at 26 CFR 1.5000C-1 through 1.5000C-7.

(c) Exemptions from withholding under this provision are described at 26 CFR 1.5000C-1(d)(5) through (d)(7). The Offeror would claim an exemption from the withholding by using the Department of the Treasury Internal Revenue Service Form W-14, Certificate of Foreign Contracting Party Receiving Federal Procurement Payments, available via the Internet at www.irs.gov/w14. Any exemption claimed and self-certified on the IRS Form W-14 is subject to audit by the IRS. Any disputes regarding the imposition and collection of the section 5000C tax are adjudicated by the IRS as the section 5000C tax is a tax matter, not a contract issue. The IRS Form W-14 is provided to the acquiring agency rather than to the IRS.

(d) For purposes of withholding under 26 U.S.C. 5000C, Imposition of tax on certain foreign procurement, the Offeror represents that—

(1) It is is not a foreign person; and

(2) If the Offeror indicates "is" in paragraph (d)(1) of this provision, then the Offeror represents that—I am claiming on the IRS Form W-14 a full exemption, or partial or no exemption [*Offeror shall select one*] from the excise tax.

(e) If the Offeror represents it is a foreign person in paragraph (d)(1) of this provision, then—

(1) The clause at FAR 52.229-XX, Tax on Certain Foreign Procurements, will be included in any resulting contract; and

(2) The Offeror shall submit with its offer the IRS Form W-14. If the IRS Form W-14 is not submitted with the offer, exemptions will not be applied to any resulting contract and the Government will withhold a full 2 percent of each payment.

(f) If the Offeror selects "is" in paragraph (d)(1) and "partial or no exemption" in paragraph (d)(2) of this provision, the Offeror will be subject to withholding in accordance with the clause at FAR 52.229-XX, Tax on Certain Foreign Procurements, in any resulting contract.

(g) A taxpayer may, for a fee, seek advice from the Internal Revenue Service (IRS) as to the proper tax treatment of a transaction. This is called a private letter ruling. Also, the IRS may publish a revenue ruling, which is an official interpretation by the IRS of the Internal Revenue Code, related statutes, tax treaties, and regulations. A revenue ruling is the conclusion of the IRS on how the law is applied to a specific set of facts. For questions relating to the interpretation of the IRS regulations go to <https://www.irs.gov/help/tax-law-questions>.

(End of provision)

52.229-XX Tax on Certain Foreign Procurements.

As prescribed in 29.402-3(b), insert the following clause:

TAX ON CERTAIN FOREIGN PROCUREMENTS ([DATE])

(a) Definitions.

Foreign person means any person other than a United States person.

United States person, as defined in 26 U.S.C. 7701(a)(30), means—

- (1) A citizen or resident of the United States,
- (2) A domestic partnership,
- (3) A domestic corporation,
- (4) Any estate (other than a foreign estate, within the meaning of paragraph (31)), and

(5) Any trust if—

(i) A court within the United States is able to exercise primary supervision over the administration of the trust; and

(ii) One or more United States persons have the authority to control all substantial decisions of the trust.

(b) This clause applies to foreign persons. It implements 26 U.S.C. 5000C, Imposition of tax on certain foreign procurement, and its implementing regulations at 26 CFR 1.5000C-1 through 1.5000C-7.

(c)(1) If the Contractor is a foreign person and has only a partial or no exemption to the withholding, the Contractor shall include the Department of the Treasury Internal Revenue

Service Form W-14, Certificate of Foreign Contracting Party Receiving Federal Procurement Payments, with each voucher or invoice submitted under this contract throughout the period in which this status is applicable. The excise tax withholding is applied at the payment level, not at the contract level. The Contractor should revise each IRS Form W-14 submission to reflect the exemption (if any) that applies to that particular invoice, such as a different exemption applying. In the absence of a completed IRS Form W-14 accompanying a payment request, the default withholding percentage is 2 percent for the section 5000C withholding for that payment request. Information about IRS Form W-14 and its separate instructions is available via the Internet at www.irs.gov/w14.

(2) If the Contractor is a foreign person and has indicated in its offer in the provision 52.229-WW, Tax on Certain Foreign Procurements—Notice and Representation, that it is fully exempt from the withholding, and certified the full exemption on the IRS Form W-14, and if that full exemption no longer applies due to a change in circumstances during the performance of the contract that causes the Contractor to become subject to the withholding for the 2 percent excise tax then the Contractor shall—

(i) Notify the Contracting Officer within 30 days of a change in circumstances that causes the Contractor to be

subject to the excise tax withholding under 26 U.S.C. 5000C, Imposition of tax on certain foreign procurement; and

(ii) Comply with paragraph (c)(1) of this clause.

(d) The Government will withhold a full 2 percent of each payment unless the Contractor claims an exemption. If the Contractor enters a ratio in Line 12 of the IRS Form W-14, the result of Line 11 divided by Line 10, the Government will withhold from each payment an amount equal to 2 percent multiplied by the contract ratio. If the Contractor marks box 9 of the IRS Form W-14 (rather than completes Lines 10 through 12), the Contractor must identify and enter the specific exempt and nonexempt amounts in Line 15 of the IRS Form W-14; the Government will then withhold 2 percent only from the nonexempt amount. See the IRS Form W-14 and its instructions.

(e) Exemptions from the withholding under this clause are described at 26 CFR 1.5000C-1(d)(5) through (d)(7). Any exemption claimed and self-certified on the IRS Form W-14 is subject to audit by the IRS. Any disputes regarding the imposition and collection of the section 5000C tax are adjudicated by the IRS as the section 5000C tax is a tax matter, not a contract issue.

(f) Taxes imposed under 26 U.S.C. 5000C may not be—

- (1) Included in the contract price; nor
- (2) Reimbursed.

(g) A taxpayer may, for a fee, seek advice from the Internal Revenue Service (IRS) as to the proper tax treatment of a transaction. This is called a private letter ruling. Also, the IRS may publish a revenue ruling, which is an official interpretation by the IRS of the Internal Revenue Code, related statutes, tax treaties, and regulations. A revenue ruling is the conclusion of the IRS on how the law is applied to a specific set of facts. For questions relating to the interpretation of the IRS regulations go to <https://www.irs.gov/help/tax-law-questions>.

(End of clause)

[FR Doc. 2019-20227 Filed: 9/19/2019 8:45 am; Publication Date: 9/20/2019]