



**BILLING CODE: 6820-EP**

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

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

**[FAC 2020-06; FAR Case 2016-013; Item III; 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:** Final rule.

**SUMMARY:** DoD, GSA, and NASA are issuing a final rule amending 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:** *Effective:* [Insert date 30 days after date of publication in the **FEDERAL REGISTER**].

**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 FAC 2020-06, FAR Case 2016-013.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD, GSA, and NASA published a proposed rule on September 20, 2019, at 84 FR 49498, 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 final 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. No public comments were submitted in response to the proposed rule. 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). Title 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 on the amount of a specified Federal procurement payment on any foreign person receiving such payment. Title 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 and the amendments made by it 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**

There are no changes from the proposed rule made in the final 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 (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 remaining exemptions in that paragraph (d), at 26 CFR 1.5000C-1(d)(5) through (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.

This FAR final rule covers withholding, not the imposition of the tax, which was implemented in the IRS regulation.

**III. 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 in Title 26 of the United States Code 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).

#### **IV. 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, this rule 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.

**V. Executive Order 13771**

This rule is not an E.O. 13771 regulatory action, because this rule is not significant under E.O. 12866.

**VI. Regulatory Flexibility Act**

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

This rule is required 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.

There were no significant issues raised by the public in response to the initial regulatory flexibility analysis.

The rule will 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"). Federal Procurement Data System data for FY 2018 was obtained for contracts valued over \$250,000 awarded to foreign vendors. There were 7,518 total awards, 7,349 were to large vendors; 169 were to small vendors. Of these, 1,358 were unique large foreign entities while 10 were unique small foreign

entities for a total of 1,368 unique foreign entities. Accordingly, the rule is not expected to have a significant economic impact on a substantial number of small entities based in the United States.

The rule contains an information collection requirement that requires the approval of the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. chapter 35). However, the paperwork burden was previously approved for the IRS regulations under OMB Control Number 1545-2263, Tax on Certain Foreign Procurement.

There are no available alternatives to the rule to accomplish the desired objective of the statute.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

#### **VII. 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 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.

William F. Clark,  
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 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 "52.229-11" and "52.229-12" in numerical order to read as follows:

1.106 OMB approval under the Paperwork Reduction Act.

\* \* \* \* \*

| <b>FAR segment</b> | <b>OMB control No.</b> |
|--------------------|------------------------|
| * * * *            | * * *                  |
| 52.229-11          | 1545-2263              |
| 52.229-12          | 1545-2263              |
| * * * *            | * * *                  |

**PART 12—ACQUISITION OF COMMERCIAL ITEMS**

3. Amend section 12.301 by redesignating paragraph (d) (12) as paragraph (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 52.229-11, Tax on Certain Foreign Procurements—Notice and Representation, in solicitations as prescribed in 29.402-3(a). The representation in the provision at 52.229-11 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, and its implementing regulations at 26 CFR 1.5000C-1 through 1.5000C-7.

**PART 29—TAXES**

5. Add section 29.204 to read as follows:

**29.204 Federal excise tax on specific foreign contract payments.**

(a) Title 26 U.S.C. 5000C 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 52.229-12, 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](http://www.irs.gov/w14).

(c)(1) Exemptions from the withholding in the IRS regulations at 26 CFR 1.5000C-1(d)(1) through (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 (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>.

6. Add section 29.402-3 to read as follows:

**29.402-3 Tax on certain foreign procurements.**

(a) Insert the provision at 52.229-11, 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 52.229-12, Tax on Certain Foreign Procurements, in-

(1) Solicitations that contain the provision at 52.229-11, 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 52.229-11, Tax on Certain Foreign Procurements—Notice and Representation.

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

7. Amend section 52.212-5 by redesignating paragraphs (b) (55) through (62) as paragraphs (b) (56) through (63) and adding a new paragraph (b) (55) to read as follows:

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

\* \* \* \* \*

(b) \* \* \*

\_\_\_(55) 52.229-12, Tax on Certain Foreign Procurements ([INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]).

\* \* \* \* \*

8. Add sections 52.229-11 and 52.229-12 to read as follows:

**52.229-11 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 (**[INSERT ABBREVIATED MONTH AND YEAR 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**)

(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 26 U.S.C. 701(a)(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 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 (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](http://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 26 U.S.C. 5000C tax are adjudicated by the IRS as the 26 U.S.C. 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, 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 52.229-12, 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 52.229-12, 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)

**52.229-12 Tax on Certain Foreign Procurements.**

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

TAX ON CERTAIN FOREIGN PROCUREMENTS ([**INSERT ABBREVIATED MONTH AND YEAR  
30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER***])

(a) *Definitions.* As used in this clause—

*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 26 U.S.C. 7701(a)(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 only to foreign persons. It implements 26 U.S.C. 5000C 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 52.229-11, 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; 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 (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 26 U.S.C. 5000C tax are adjudicated by the IRS as the 26 U.S.C. 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. 2020-07110 Filed: 5/5/2020 8:45 am; Publication Date: 5/6/2020]