

DEPARTMENT OF DEFENSE

<AGENCY TYPE="O">GENERAL SERVICES ADMINISTRATION

<AGENCY TYPE="O">NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4, 9, and 52

[FAC 200534; FAR Case 2008009; Item II; Docket 20090020, Sequence 1]

RIN 9000AL28

Federal Acquisition Regulation; FAR Case 2008009, 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 with request for comments.

SUMMARY:

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement Section 743 of Division D of the Omnibus Appropriations Act, 2009 (Public Law 1118). Section 743 of Division D of this Act 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 one.

The Department of Homeland Security (DHS) has had its own rule prohibiting contracting with inverted domestic corporations since December 2003 (see 48 CFR Subpart 3009.1). The DHS rule implements section 835 of the Homeland Security Act of 2002 (P.L. 107296, 6 U.S.C. 395).

DATES:

Effective Date: July 1, 2009.

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 FAR case 2008009, by any of the following methods:

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

Submit comments via the Federal eRulemaking portal by inputting FAR Case 2008009 under the heading Comment or Submission. Select the link Send a Comment or Submission that corresponds with FAR Case 2008009. Follow the instructions provided to complete the Public Comment and Submission Form. Please include your name, company name (if any), and FAR Case 2008009 on your attached document.

• Fax: 2025014067.

• Mail: General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW, Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 200534, FAR case 2008009, 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:

Ms. Meredith Murphy, Procurement Analyst, at (202) 2086925 for clarification of content. Please cite FAC 200534, FAR case 2008009. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 5014755.

SUPPLEMENTARY INFORMATION:

A. Background

This rule implements section 743 of Division D of the Omnibus Appropriations Act, 2009 (Public Law 1118). Although this is effective for Fiscal Year 2009 funds, the Councils have included the clause requirement when using Fiscal Year 2006, 2007, and 2008 funds, when similar prohibitions were included in appropriations acts.

Section 743 of Division D of this Act prohibits the use of Federal appropriated funds for Fiscal Year 2009 to contract with any inverted domestic corporation, as defined at section 835(b) of the Homeland Security Act of 2002 (Pub. L. 107296, 6 U.S.C. 395(b)) or any subsidiary of such an entity.

What is an inverted domestic corporation. 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. The reason a corporation would do this is to avoid United States taxes on business income generated in foreign countries. Bermuda, Barbados, and the Cayman Islands are well known tax havens; the statute is not restricted to these countries however. A term in wide use for these corporations is corporate expatriate. Congress has enacted both contract statutes and tax statutes to try to discourage corporations from expatriating themselves.

Tax statute. Congress enacted 26 U.S.C. 7874 to remove the tax benefits from the most egregious of these transactions, where at least 80 percent (80%) of the stock is now held by former shareholders or partners and where the foreign entity plus companies connected to it by 50 percent (50%) or more ownership do not have substantial business activities in the foreign country. The tax consequence is that the parent foreign corporation must then file a United States income tax return as a domestic corporation, not a foreign corporation.

Contracting and appropriations statutes. The contracting statutes are similar to the tax statute, but not identical. Congress, in 6 U.S.C. 395, restricted the Department of Homeland Security (DHS) from awarding contracts to inverted domestic corporations, either parent or subsidiary. Congress further restricted all executive branch agencies in Public Law 1118, from using Fiscal Year 2009 monies for any Federal Government contract with any...inverted domestic corporation.... This statute borrowed the definition of inverted domestic corporation from the DHS statute, which in turn is related to the tax statute. The FAR is implementing Public Law 1118 by further reliance on the tax statute and Internal Revenue Service regulations, as the Councils do not believe that Congress intended to set up two different statutory schemes for handling inverted domestic corporations. A foreign corporation that has to file a tax return as a domestic corporation is automatically going to be an inverted domestic corporation for contracting purposes as well. The Councils note that there is an important difference between the tax statute and the other statutory definitions: the tax statute only applies to incorporations completed after

March 4, 2003. An incorporation that took place on or before March 4, 2003, will not escape the contracting and fiscal ban.

Statutory definition of inverted domestic corporation. Section 835(b) defines an inverted domestic corporation to mean a foreign incorporated entity that, pursuant to a plan (or a series of related transactions) (1) directly or indirectly acquires substantially all of the properties held directly or indirectly by a domestic corporation or substantially all of the properties constituting a trade or business of a domestic partnership; (2) acquires at least eighty percent (80%) of the stock (by vote or value) of the entity held (a) in the case of an acquisition with respect to a domestic corporation, by former shareholders of the domestic corporation by reason of holding stock in the domestic corporation; or (b) in the case of an acquisition with respect to a domestic partnership, by former partners of the domestic partnership by reason of holding a capital or profits interest in the domestic partnership; and (3) after the acquisition, the expanded affiliated group that includes the entity does not have substantial business activities in the foreign country in which or under the law of which the entity is created or organized when compared to the total business activities of such expanded affiliated group.

Which contractors are inverted domestic corporations. The Councils do not have this information. The Councils and Government contracting officers by law do not have access to tax return information. We cannot determine whether a contractor's status and history mean it falls under the statutory requirements. Each contractor will have to analyze its own history and current status. This should be very easy to determine for sole proprietorships, partnerships, and domestic corporations without a foreign parent, as none of these could be inverted domestic corporations. It will also be easy for a foreign corporation which filed last year's income tax return as a domestic corporation and its subsidiaries, which automatically fall under the contracting ban. The harder case will be for foreign corporations that were domestic corporations or partnerships before 2004, and their subsidiaries. A list of high profile inversions occurring before February 2002 can be found in an article (Mihir A. Desai and James R. Hines, Jr., Expectations and Expatriations: Tracing the Causes and Consequences of Corporate Inversions, 55 National Tax Journal 409, 41820 (2002)): Triton Energy, Tyco, Fruit of the Loom, Transocean, Everest Reinsurance, Foster Wheeler, Cooper Industries, Global Marine, Ingersoll Rand, Nabors Industries, and Noble Drilling. The Councils do not know whether these corporations would fall under the contracting ban (because of the 80 percent (80%) rule and the substantial-business test).

Funds covered. Section 743 of Public Law 1118 contains the words None of the funds appropriated or otherwise made available by this or any other Act may be used for any Federal Government contract.... The Government Accountability Office (GAO) has stated that The words "or any other Act" in a provision addressing funds appropriated in or made available by "this or any other act" are not words of futurity. They merely refer to any other appropriations act for the same fiscal year. Volume One of the GAO Red Book at page 236. This means Section 743 does not apply to future fiscal years, unless Congress extends it in future legislation. However, it does apply to all Fiscal Year 2009 monies, whether the agency appropriations are directly covered by Public Law 1118 or by a different 2009 appropriations act.

FAR coverage. The Councils are considering the prohibition as a prohibited business practice and have chosen to place coverage in the FAR Subpart entitled Responsible Prospective Contractors, 9.1. In addition to the definition of inverted domestic corporation and the prohibition on contracting with one, newly added FAR section 9.108 includes the limited Secretarial waiver authority granted by the statute and a representation requirement to be included in solicitations for goods and services.

The new solicitation provision at 52.2092, Prohibition on Contracting with Inverted Domestic Corporations Representation, provides the relevant definition and the condition that, by submission of its offer, the offeror represents that it is not an inverted domestic corporation or a subsidiary of an inverted domestic corporation. If the offeror cannot affirmatively make the representation, then it is not allowed to submit an offer absent a Secretarial waiver that contracting with the inverted domestic corporation or its subsidiary is in the interest of national security.

Contracting officers should rigorously examine circumstances known to them that would lead a reasonable business person to question the contractor self-certification, as the appropriation restriction applies to accountable Government officers, and if willfully and knowingly violated, may result in criminal penalties.

The Act does not require flow down of the representation provision. Section 743 addresses only contracts entered into by Executive agencies. However, the Councils are taking public comments on this issue.

Applicability to commercial item contracts. Section 8003 of Public Law 103355 (41 U.S.C. 430) is intended to limit the applicability of procurement laws to commercial items. Section 430 only permits exemption from a covered law, which is any provision of law that...sets forth policies, procedures, requirements, or restrictions for the procurement of property or services by the Federal Government. Also, exemption under section 430 is not permitted if the provision of law contains criminal or civil penalties. In any event, the law may be applied if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts from the covered law.

Therefore, given that Section 743 of Division D of the Omnibus Appropriations Act, 2009 (Public Law 1118) prohibits the use of funds for any Federal Government contract with an inverted domestic corporation or to any subsidiary of one, the FAR Council has determined that the rule applies to contracts for commercial items.

Applicability to Commercially Available Off-The-Shelf (COTS) item contracts. Section 4203 of Public Law 104106, the Clinger-Cohen Act of 1996 (41 U.S.C. 431), governs the applicability of laws to the procurement of commercially available off-the-shelf (COTS) items, and is intended to limit the applicability of laws to them. Clinger-Cohen provides that if a provision of law contains criminal or civil penalties, or if the Administrator for Federal Procurement

Policy makes a written determination that it is not in the best interest of the Federal Government to exempt COTS item contracts, the provision of law will apply. The same applies for subcontracts for COTS items.

Therefore, given the requirements of Section 743 of Division D of the Omnibus Appropriations Act of 2009 (Public Law 1118) which prohibits the use of funds for any Federal Government contract with an inverted domestic corporation or to any subsidiary of one, and the intent of the law, the Administrator of the Office of the Federal Procurement Policy, has determined that it is in the best interest of the Federal Government to apply this law to Commercially Available Off-The-Shelf (COTS) item contracts and subcontracts, as defined at FAR 2.101.

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

#### B. Regulatory Flexibility Act

The interim rule is not expected 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 U.S. and then reincorporated in a tax haven; the major players in these transactions are reportedly the very large multinational corporations.

Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 4, 9, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 601, et seq. (FAC 200534, FAR case 2008009), in all correspondence.

#### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. Chapter 35, et seq.

#### D. 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 743 of Division D of Public Law 1118, which is currently in effect. However, pursuant to Public Law 98577 and FAR 1.501, the Councils 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 4, 9, and 52  
Government procurement.

Dated: June 25, 2009.

Al Matera,

Director, Office of Acquisition Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 4, 9, and 52 as set forth below:

1. The authority citation for 48 CFR parts 4, 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 4ADMINISTRATIVE MATTERS

2. Amend section 4.1202 by redesignating paragraphs (f) through (cc) as (g) through (dd) respectively, and adding a new paragraph (f) to read as follows:

4.1202

Solicitation provision and contract clause.

(f) 52.2092, Prohibition on Contracting with Inverted Domestic CorporationsRepresentation.

#### PART 9CONTRACTOR QUALIFICATIONS

3. Amend section 9.1041 by revising paragraph (g) to read as follows:

9.1041

General standards.

(g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations (see also inverted domestic corporation prohibition at FAR 9.108).

4. Add sections 9.108 through 9.1085 to read as follows:

9.108

Prohibition on contracting with inverted domestic corporations.

9.1081

Definition.

Inverted domestic corporation, as used in this section, means a foreign incorporated entity which is treated as an inverted domestic corporation under 6 U.S.C. 395(b), i.e., a corporation 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, that meets the criteria specified in 6 U.S.C. 395(b), applied in accordance with the rules and definitions of 6 U.S.C.

395 (c) .

9.1082

Relationship with the Internal Revenue Code and Treasury regulations.

(a) Inverted domestic corporations are covered not only in the Department of Homeland Security statute at 6 U.S.C. 395, but also are similarly covered in the Internal Revenue Code at 26 U.S.C. 7874. A foreign corporation is treated as an inverted domestic corporation for U.S. Federal income tax purposes, rather than as a foreign corporation, if

(1) At least 80 percent (80%) of the stock is now held by former shareholders of the domestic corporation or partners of the domestic partnership; and

(2) The foreign entity plus companies connected to it by 50 percent (50%) or more ownership do not have substantial business activities in the foreign country.

(b) A foreign corporation that is treated as an inverted domestic corporation for U.S. Federal income tax purposes, is also treated as one for purposes of this section.

(c) A foreign entity that escapes the tax consequence of 26 U.S.C. 7874 only because the inversion transactions were completed on or before the March 4, 2003, date in section 7874, is nevertheless treated as an inverted domestic corporation for purposes of 6 U.S.C. 395 (which does not have a limiting date) and therefore also for purposes of this section.

9.1083

Prohibition.

(a) Section 743 of Division D of the FY 2009 Omnibus Appropriations Act (Public Law 1118) prohibits the use of 2009 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. The same restriction was also contained in the Fiscal Year 2006 through 2008 appropriations acts. In order to be eligible for contract award when using Fiscal Year 2006 through Fiscal Year 2009 funds, an offeror must represent that it is not an inverted domestic corporation or subsidiary. Any offeror that cannot so represent is ineligible for award of a contract using such appropriated funds.

(b) Contracting officers should rigorously examine circumstances known to them that would lead a reasonable business person to question the contractor selfcertification and, after consultation with legal counsel, take appropriate

action where that questionable self-certification cannot be verified.

9.1084  
Waiver.

Any agency head may waive the requirement of subsection 9.1083 for a specific contract if the agency head determines in writing that the waiver is required in the interest of national security, documents the determination, and reports it to the Congress.

9.1085  
Solicitation provision.

When using funds appropriated in Fiscal Year 2006 through Fiscal Year 2009, the contracting officer shall include the provision at 52.2092, Prohibition on Contracting with Inverted Domestic CorporationsRepresentation, in each solicitation issued after July 1, 2009 for the acquisition of products or services (see FAR 52.2123 for solicitations issued under Part 12), unless waived in accordance with FAR 9.1084.

#### PART 52 SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Add section 52.2092 to read as follows:

52.2092  
Prohibition on Contracting with Inverted Domestic CorporationsRepresentation.

As prescribed in 9.1085, insert the following provision:

<EXTRACT>

PROHIBITION ON CONTRACTING WITH INVERTED DOMESTIC CORPORATIONSREPRESENTATION  
(JUL 2009)

(a) Definition. Inverted domestic corporation means a foreign incorporated entity which is treated as an inverted domestic corporation under 6 U.S.C. 395(b), i.e., a corporation 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, that meets the criteria specified in 6 U.S.C. 395(b), applied in accordance with the rules and definitions of 6 U.S.C. 395(c).

(b) Relation to Internal Revenue Code. A foreign entity that is treated as an inverted domestic corporation for purposes of the Internal Revenue Code at 26 U.S.C. 7874 (or would be except that the inversion transactions were completed on or before March 4, 2003), is also an inverted domestic corporation for purposes of 6 U.S.C. 395 and for this solicitation provision (see FAR 9.108).

(c) Representation. By submission of its offer, the offeror represents that it is not an inverted domestic corporation and is not a subsidiary of one.

(End of provision)

</EXTRACT>

6. Amend section 52.2123 by

a. Revising the date of the provision;

b. In paragraph (a), adding, in alphabetical order, the definition Inverted domestic corporation;

c. Removing from paragraph (b)(2) (c) through (m) and adding (c) through (n) in its place;

d. Adding paragraph (n).

The revised and added text reads as follows:

52.2123  
Offeror Representations and CertificationsCommercial Items.

<EXTRACT>

OFFEROR REPRESENTATIONS AND CERTIFICATIONS COMMERCIAL ITEMS (JUL 2009)

(a) \* \* \*

Inverted domestic corporation means a foreign incorporated entity which is treated as an inverted domestic corporation under 6 U.S.C. 395(b), i.e., a corporation 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, that meets the criteria specified in 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) Relation to Internal Revenue Code. A foreign entity that is treated as an inverted domestic corporation for purposes of the Internal Revenue Code at 26 U.S.C. 7874 (or would be except that the inversion transactions were completed on or before March 4, 2003), is also an inverted domestic corporation for purposes of 6 U.S.C. 395 and for this solicitation provision (see FAR 9.108).

(2) Representation. By submission of its offer, the offeror represents that it is not an inverted domestic corporation and is not a subsidiary of one.

</EXTRACT>

[FR Doc. 09????? Filed ???09; 8:45 am]  
BILLING CODE 6820EPS

[FR Doc. 2009-15434 Filed 06/30/2009 at 8:45 am; Publication Date: 07/01/2009]