Dated: January 23, 2013.

Laura Auletta,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2013–01740 Filed 1–28–13; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 9 and 52

[FAC 2005–65; FAR Case 2012–013; Item I; Docket 2012–0013, Sequence 1]

RIN 9000–AM22

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: Final rule.

SUMMARY: DoD, GSA, and NASA are adopting as final, without change, an interim rule amending the Federal Acquisition Regulation (FAR) to implement a section of the Consolidated Appropriations Act, 2012, that 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 such entity.

DATES: *Effective Date:* January 29, 2013.

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 2005–65, FAR Case 2012–013.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 77 FR 27547 on May 10, 2012, to implement section 738 of Division C of the Consolidated Appropriations Act, 2012 (Pub. L. 112–74), which was signed on December 23, 2011. The same Governmentwide restrictions are already incorporated in the FAR for funds appropriated in Fiscal Years 2008 through 2010, under FAR case 2008–009, published as an interim rule on July 1, 2009 (74 FR 31561), and as a final rule on May 31, 2011 (76 FR 31410).

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. See the definition of inverted domestic corporation at FAR 9.108–1.

Six respondents submitted comments on the interim rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule. A discussion of the comments is provided as follows:

A. Summary of Significant Changes

There are no changes to the interim rule as a result of the public comments.

B. Analysis of Public Comments

1. Support for the Prohibition

Comment: Almost all respondents strongly supported the intent of the rule, to prohibit the Government from doing business with inverted domestic corporations. Some provided specific comments that the rule should be enforced and continued. Some of the specific reasons provided for support were as follows:

a. Impact on U.S. jobs.

Comment: Several respondents stated that when millions of people in the United States are unemployed or under-employed, corporations that have ''turned their back'' on the United States and probably eliminated at least some of the jobs for American personnel should not receive Government contracts.

Response: The Councils note that the views of these respondents are in accord with the intent of the law and this FAR rule.

b. Companies should not be rewarded for tax avoidance.

Comment: Many respondents stated that companies should not be rewarded for tax avoidance, which enables them to compete unfairly with U.S. companies.

Response: The Councils note that the views of these respondents are in accord with the intent of the law and this FAR rule.

c. One respondent discussed additional costly measures that are required when dealing with inverted domestic corporations: *e.g.,* proxy agreements, authorization from national authorities, additional security measures.

Response: The Councils note that the views of this respondent are in accord with the intent of the law and this FAR rule.

2. Rule Should Be Even More Stringent

Comment: One respondent stated that the FAR rule on inverted domestic corporations is a good beginning, but does not go far enough to have any effect on the issue. The respondent requests that the Government should also stop distributors of the products of inverted domestic corporations from selling such products to the Government, because the manufacturers pay no income tax, and products they make off shore impede manufacturing growth of the United States economy and job creation.

Response: Prior to this FAR case 2012–013, the FAR already implemented restrictions that were contained in the FY 2008 through FY 2010 appropriations act restrictions: a provision at FAR 52.209–2, Prohibition on Contracting with Inverted Domestic Corporations—Representation; and a clause at 52.209–10, Prohibition on Contracting with Inverted Domestic Corporations.

Comparable to the prior appropriations act restrictions, Section 738 of the Consolidated Appropriations Act, 2012 (Pub. L. 112–74), Division C, Title VII, prohibits the use of FY 2012 funds for contracts with any foreign entity which is treated as an inverted domestic corporation under section 835(b) of the Homeland Security Act of 2002. The statute only prohibits Government contracts directly awarded to an inverted domestic corporation. It does not cover contracts to distributors of the products of inverted domestic corporations.

The purpose of the interim rule under this FAR Case 2012–013 was to extend the existing prohibition to solicitations and contracts using FY 2012 funds. It did not propose any changes in interpretation or application of the statutory prohibition. Therefore, application to distributors of the products of inverted domestic corporations is outside the scope of this rule.

3. Relationship to Buy American Statute

Comment: One respondent stated that the Buy American Act of 1933 (now codified at 41 U.S.C. chapter 83) created

a precedent to prefer American-made products relative to non-domestically produced ones. Therefore, it is proper for this act to favor domestic firms over foreign firms.

Response: The Councils note that the prohibition in this rule is not against all foreign firms, but only those foreign firms that are inverted domestic corporations.

Comment: One respondent stated that all corporations based outside the United States should be forbidden to receive business from any branch of the U.S. Government.

Response: The Buy American statute promotes purchase of domestic products, but provides certain exceptions that provide necessary balance (such as unreasonable cost or nonavailability of domestic products). In addition, the United States is party to the World Trade Organization Government Procurement Agreement and numerous free trade agreements, which provide the mutual benefit allowing the United States to export more goods and services, in exchange for opening our markets to the goods and services of countries that do not discriminate against the United States in their trade practices.

Comment: One respondent stated a belief that inverted domestic corporations are ''representing themselves as American companies'' and that the U.S. military does not even know that they are receiving ''tools made off shore in the guises of Buy American Act.''

Response: The Government considers inverted domestic corporations to be foreign companies, because they are incorporated outside the United States and do not pay U.S. corporate income taxes. Furthermore, for purposes of the Buy American statute, the key factor is not whether the corporate entity is foreign or domestic, but whether the offered product is a domestic end product: *i.e.,* the product is manufactured in the United States and the majority of the components are also of domestic origin. If the Buy American statute applies to an acquisition, the offeror must certify whether the offered product is a domestic end product. In any solicitation that is predominantly for the acquisition of manufactured end products, the offeror must also indicate whether the place of manufacture of the offered products is in the United States or outside the United States (FAR 52.225–18, Place of Manufacture).

4. Possible Lack of Other Sources

Comment: One respondent, although generally supporting the rule, was concerned about negative impact on DoD and NASA due to lack of possible leeway if there is no domestic firm producing a particular part that can only be obtained from an inverted domestic corporation.

Response: FAR 9.108–4 allows for a waiver of the prohibition, if an agency head determines in writing that the waiver is required in the interest of national security, documents the determination, and reports it to Congress.

5. Impact on Small Business

Comment: Several respondents considered that the rule could have an impact on small business, to the extent that a small business might now receive an award that formerly would have been made to an inverted domestic corporation, which would create a positive impact. One respondent expressed the certainty that a myriad of products and services can be re-directed to U.S.-based small businesses.

Another respondent did not disagree with the statement in the interim rule that small businesses would not be impacted by the rule.

Response: With regard to re-direction of awards to small U.S. businesses, the Federal Government already has an active program to set aside awards for small businesses (see FAR subpart 19.5). Generally, acquisitions with a value less than the simplified acquisition threshold are set aside for small businesses, and contracting officers are also required to set aside for small businesses acquisitions that exceed the simplified acquisition threshold, when there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns, and award will be made at fair market prices.

This final rule does not directly impact small business, because the rule only extends the existing prohibition on contracting with inverted domestic corporations to acquisitions using FY 2012 funds, and the prohibition relates to foreign entities that are also generally large multinational corporations. The fact that these particular entities are now prohibited from contracting with the Government will not have a significant impact on a substantial number of small entities, because it only removes an insignificant number of competitors and Government awards may still go to either large or small businesses, either domestic or foreign, depending on other applicable statutes and regulations. In some instances, depending on the product to be provided and the extent of competition in that market, there may be a minimal positive impact for some small businesses.

6. Prescription for Use of FAR 52.209–2

Comment: One respondent stated that the interim rule leaves unchanged the text of FAR 9.108–5(a), which states the prescription for use of the provision at FAR 52.209–2. According to the respondent, the prescription conflicts with FAR 4.1202(e), which says not to separately include FAR 52.209–2 in any solicitation that includes the clause at FAR 52.204–7, Central Contractor Registration (CCR).

Response: This comment is outside the scope of this case, which did not address FAR 9.108–5(a). The issue raised is a global issue that affects the prescriptions for all provisions listed at FAR 4.1202(a) through (bb). If the solicitation includes FAR 52.204–7, or the offeror is registered in CCR and has completed the Online Representations and Certifications Application (ORCA) electronically and chooses to rely on the electronic representations and certifications, then paragraph (d) of FAR 52.204–8, Annual Representations and Certifications, applies. FAR 52.204–8, paragraph (d) allows reliance on representation in ORCA, rather than separate inclusion of the representation in the solicitation.

The current convention has been to independently prescribe the clauses in the applicable FAR parts and then override the prescription at FAR 4.1202, if the acquisition contains the clause at FAR 52.204–7 or the offeror meets the other conditions and chooses to make paragraph (d) applicable. If the Councils decide to change this convention, then it should be addressed in a proposed rule that provides a uniform prescription format for all affected provisions, not be done piecemeal for just one provision.

III. 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. The Office of Information and Regulatory Affairs (OIRA) has deemed that this is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of

E.O. 12866, Regulatory Planning and Review, dated September 30, 1993, and that this rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not 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 United States and then reincorporated in a tax haven; the major players in these transactions are reportedly the very large multinational corporations. No domestic entities will be directly 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.'' Also see the response to the comment at II.B.5. of this preamble. Therefore, a Final Regulatory Flexibility Analysis has not been performed.

V. 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).

List of Subjects in 48 CFR Parts 9 and 52

Government Procurement.

Dated: January 23, 2013.

Laura Auletta,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

Interim Rule Adopted as Final Without Change

■ Accordingly, the interim rule amending 48 CFR parts 9 and 52, which was published in the **Federal Register** at 77 FR 27547 on May 10, 2012, is adopted as final without change.

[FR Doc. 2013–01745 Filed 1–28–13; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 16

[FAC 2005–65; FAR Case 2012–007; Item II; Docket 2012–0007, Sequence 1]

RIN 9000–AM26

Federal Acquisition Regulation; Extension of Sunset Date for Protests of Task and Delivery Orders

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are adopting as final, without change, an interim rule amending the Federal Acquisition Regulation (FAR) to implement sections of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 and the National Defense Authorization Act for Fiscal Year 2012. These statutes extend the sunset date for protests against the award of task or delivery orders from May 27, 2011 to September 30, 2016.

DATES: *Effective Date:* January 29, 2013.

FOR FURTHER INFORMATION CONTACT: Ms. Deborah Lague, Procurement Analyst, at 202–694–8149 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAC 2005–65, FAR Case 2012–007.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA originally published an interim rule in the **Federal Register** at 76 FR 39238 on July 5, 2011, entitled ''Extension of Sunset Date for Protests of Task and Delivery Orders'' (FAC 2005–53, FAR Case 2011–015). The rule implemented section 825 of the Ike Skelton National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2011 (Pub. L. 111–383, enacted January 7, 2011). The rule extended the sunset date for protests of task and delivery orders valued in excess of $10 million for Title 10 agencies, namely DoD, NASA and the Coast Guard. The rule did not extend the sunset date for Title 41 agencies as there was no comparable change to Title 41 at that time.

Subsequent to the publication of the interim rule under FAR Case 2011–015, section 813 of the NDAA for FY 2012 (Pub. L. 112–81, enacted December 31, 2011) made comparable changes to Title 41 to extend the sunset date for protests against the award of task and delivery orders from May 27, 2011 to September 30, 2016. In order to accomplish the statutory changes for both Title 10 and Title 41, FAR Case 2011–015 was not issued as a final rule and was instead incorporated into an interim rule under FAR Case 2012–007.

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 77 FR 44062 on July 26, 2012, entitled ''Extension of Sunset Date for Protests of Task and Delivery Orders'' (FAC 2005–60, FAR Case 2012–007). The rule implemented section 825 of the Ike Skelton National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2011 (Pub. L. 111–383, enacted January 7, 2011) and section 813 of the NDAA for FY 2012 (Pub. L. 112–81, enacted December 31, 2011). The rule extended the sunset date for protests of task and delivery orders valued in excess of $10 million from May 27, 2011, to September 30, 2016.

II. Discussion and Analysis

No public comments were received; therefore the Defense Acquisition Regulations Council and the Civilian Agency Acquisition Council are finalizing the interim rule without change.

III. 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