

CHANGE REQUEST COVER SHEET

Change Request Number: 10-11

Date Received: 10/26/2009

Title: Inverted Domestic Corporation

Name: Tim Eckert

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Policy OR Guidance: Guidance

Section/Text Location Affected: T3.2.2.7

Summary of Change: Prohibition of contracts with Inverted Domestic Corporations

Reason for Change: Consistency with appropriations law as advised by legal counsel

Development, Review, and/or Concurrence: Acquisition Policy Division, Legal, Contracting Organizations at FAA HQ, Centers, and Regions (ARC)

Target Audience: FAA Contracting Workforce and Program Offices

Potential Links within FAST for the Change: None

Briefing Planned: Yes

ASAG Responsibilities: Review and Comment

Potential Links within FAST for the Change: None

Links for New/Modified Forms (or) Documents (LINK 1) [null](#)

Links for New/Modified Forms (or) Documents (LINK 2) [null](#)

Links for New/Modified Forms (or) Documents (LINK 3) [null](#)

SECTIONS ADDED:

Procurement Guidance:

T3.2.2.7 - Contractor Qualifications

Contractor Qualifications

Section 5 : Prohibition Against Contracting with Inverted Domestic Corporations [\[New Content\]](#)

SECTIONS EDITED:

Procurement Guidance:

T3.2.2.7 - Contractor Qualifications

Section D : Appendix 1 - Definitions [\[Old Content\]](#) [\[New Content\]](#) [\[RedLine Content\]](#)

SECTIONS ADDED:

Procurement Guidance:

T3.2.2.7 - Contractor Qualifications

Contractor Qualifications

Section 5 : Prohibition Against Contracting with Inverted Domestic Corporations

(a) To be eligible for a contract award when using Fiscal Year 2006 through Fiscal Year 2010 appropriations, an offeror must represent it is not an inverted domestic corporation or subsidiary as defined under 6 U.S.C. 395 (b) and (c) and 26 U.S.C. 7874. Any offeror that cannot so represent is ineligible for contract award using such appropriated funds.

(b) Contracting Officers must rigorously examine known circumstances that would lead a reasonable business person to question an offeror's self-certification and, after consultation with legal counsel, take appropriate action when that questionable self-certification cannot be verified.

(c) *Waiver.* The FAA Administrator may waive the requirements of this Section if the FAA Administrator determines in writing that a waiver is required in the interest of national security, documents the determination, and reports it to Congress.

SECTIONS EDITED:

Section D : Appendix 1 - Definitions

Old Content: Procurement Guidance:

T3.2.2.7 - Contractor Qualifications

Section D : Appendix 1 - Definitions

"Adequate evidence" means information sufficient to support the reasonable belief that a particular act or omission has occurred.

"Affiliates." Business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly:

- (a) Either one controls or has the power to control the other, or

(b) A third party controls or has the power to control both. Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended, or proposed for debarment.

"Agency," as used in this subpart, means any executive department, military department or defense agency, or other agency or independent establishment of the executive branch.

"Civil judgment" means a judgment or finding of a civil offense by any court of competent jurisdiction.

"Contractor," as used in this subpart, means any individual or other legal entity that:

(a) Directly or indirectly (*e.g.*, through an affiliate), submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a Government contract, including a contract for carriage under Government or commercial bills of lading, or a subcontract under a Government contract; or

(b) Conducts business, or reasonably may be expected to conduct business, with the Government as an agent or representative of another contractor.

"Conviction" means a judgment or conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, and includes a conviction entered upon a plea of *nolo contendere*.

"Debarment," as used in this subpart, means action taken by a debarring official to exclude a contractor from Government contracting and Government-approved subcontracting for a reasonable, specified period; a contractor so excluded is "debarred."

"Debarring official" means:

(a) An agency head; or

(b) A designee authorized by the agency head to impose debarment.

"Excluded Parties List" means a list compiled, maintained and distributed by the General Services Administration (GSA) containing the names and other information about parties debarred, suspended, or voluntarily excluded under the Nonprocurement Common Rule or the Federal Acquisition Regulation, parties who have been proposed for debarment under the Federal Acquisition Regulation, and parties determined to be ineligible.

"Indictment" means indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense must be given the same effect as an indictment.

"Ineligible," as used in this subpart, means excluded from Government contracting (and subcontracting, if appropriate) pursuant to statutory, Executive order, or regulatory authority other than this regulation and its implementing and supplementing regulations; for example, pursuant to the Davis-Bacon Act and its related statutes and implementing regulations, the Service Contract Act, the Equal Employment Opportunity Acts and Executive orders, the Walsh-Healey Public Contracts Act, the Buy American Act, or the Environmental Protection Acts and Executive orders.

"Legal proceedings" means any civil judicial proceeding to which the Government is a party or any criminal proceeding. The term includes appeals from such proceedings.

"Nonprocurement Common Rule" means the procedures used by Federal Executive Agencies to suspend, debar, or exclude individuals or entities from participation in nonprocurement transactions under Executive Order 12549. Examples of nonprocurement transactions are grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements.

"Preponderance of the evidence" means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

"Suspending official" means:

- (a) An agency head; or
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"Suspension," as used in this subpart, means action taken by a suspending official under 9.407 to disqualify a contractor temporarily from Government contracting and Government-approved subcontracting; a contractor so disqualified is "suspended."

"Unfair trade practices," as used in this subpart, means the commission of any or the following acts by a contractor:

- (a) A violation of Section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) as determined by the International Trade Commission.
- (b) A violation, as determined by the Secretary of Commerce, of any agreement of the group known as the "Coordination Committee" for purposes of the Export Administration Act of 1979 (50 U.S.C. App. 2401, *et seq.*) or any similar bilateral or multilateral export control agreement.
- (c) A knowingly false statement regarding a material element of a certification concerning the foreign content of an item of supply, as determined by the Secretary of the Department or the head of the agency to which such certificate was furnished.

New Content: Procurement Guidance:
T3.2.2.7 - Contractor Qualifications
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"Inverted Domestic Corporation" means a foreign incorporated entity which is treated as an inverted domestic corporation under 6 U.S.C. 395(b) and (c), 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. A foreign corporation is treated as an inverted domestic corporation for tax purposes in accordance with 26 U.S.C 7874, rather than as a foreign corporation, if:

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

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

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. A foreign entity that escapes the tax consequences of 26 U.S.C 7874 only because the inversion transactions were filed prior to the March 4, 2003 date is nevertheless treated as an inverted domestic corporation for purposes of this section.

"Legal proceedings" means any civil judicial proceeding to which the Government is a party or any criminal proceeding. The term includes appeals from such proceedings.

"Nonprocurement Common Rule" means the procedures used by Federal Executive Agencies to suspend, debar, or exclude individuals or entities from participation in nonprocurement transactions under Executive Order 12549. Examples of nonprocurement transactions are grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements.

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