

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2009-0001, Sequence 5]

Federal Acquisition Regulation; Federal Acquisition Circular 2005-34; Introduction

AGENCIES: Department of Defense (DoD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of rules.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in this Federal Acquisition Circular (FAC) 2005-34. A companion document, the Small Entity Compliance Guide (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at <http://www.regulations.gov>.

DATES: For effective dates and comment dates, see separate documents, which follow.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below in relation to each FAR case. Please cite FAC 2005-34 and the specific FAR case numbers. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

LIST OF RULES IN FAC 2005-34

Item	Subject	FAR case	Analyst
I	Contractor Performance Information	2006-022	Parnell.
II	Prohibition on Contracting with Inverted Domestic Corporations (Interim)	2008-009	Murphy.
III	Role of Interagency Committee on Debarment and Suspension	2008-028	Loeb.

SUPPLEMENTARY INFORMATION:

Summaries for each FAR rule follow. For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005-34 amends the FAR as specified below:

Item I—Contractor Performance Information (FAR Case 2006-022)

This final rule amends the FAR to revise the contractor performance information process. The FAR revisions include changes to FAR Parts 2, 8, 9, 13, 17, 36, 42, and 53. The purpose of this final rule is to ensure that the FAR clearly reflects the use of the Governmentwide performance information repository, Past Performance Information Retrieval System (PPIRS) at <http://www.ppirs.gov>; requires the evaluation of past performance for orders exceeding the simplified acquisition threshold placed against Federal Supply Schedule contracts, or under a task order or delivery order against a contract awarded by another Federal agency (*i.e.* Governmentwide acquisition contract or multi-agency contract); recommends past performance information for orders under single agency contracts; consolidates the collection of past performance guidance in Part 42; and, clarifies that the Agency shall identify those responsible for preparing interim and final evaluations.

Item II—Prohibition on Contracting with Inverted Domestic Corporations (FAR Case 2008-009) (Interim)

This interim rule implements Section 743 of Division D of the Omnibus Appropriations Act, 2009 (Public Law 111-8), which 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 interim rule addresses solicitations issued after the date of publication using funds appropriated in Fiscal Years 2006, 2007, and 2008, as well.

Item III—Role of Interagency Committee on Debarment and Suspension (FAR Case 2008-028)

This final rule amends Federal Acquisition Regulation Subpart 9.4 to clarify the role of the Interagency Committee on Debarment and Suspension when more than one agency has an interest in the debarment or suspension of a contractor. Among other responsibilities, the Interagency Committee on Debarment and Suspension is authorized to resolve issues regarding the agency that will have lead responsibility in initiating a suspension or debarment proceeding. The Committee will also coordinate actions among interested agencies with respect to such action. This rule implements the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Section 873(a)(1) and (2).

Dated: June 25, 2009.

Al Matera,

Director, Office of Acquisition Policy.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2005-34 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005-34 is effective July 1, 2009 except for Item III, which is effective July 31, 2009.

Dated: June 20, 2009.

Shay D. Assad,

Director of Defense Procurement and Acquisition Policy.

Dated: June 23, 2009.

Rodney P. Lantier,

Acting Senior Procurement Executive, Office of the Chief Acquisition Officer, U.S. General Services Administration.

Dated: June 24, 2009.

William P. McNally,

Assistant Administrator for Procurement, National Aeronautics and Space Administration.

[FR Doc. E9-15437 Filed 6-30-09; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 2, 8, 9, 13, 17, 36, 42, and
53**[FAC 2005–34; FAR Case 2006–022; Item
I; Docket 2008–0002; Sequence 2]

RIN 9000–AK99

**Federal Acquisition Regulation; FAR
Case 2006–022, Contractor
Performance Information****AGENCIES:** Department of Defense (DoD),
General Services Administration (GSA),
and National Aeronautics and Space
Administration (NASA).**ACTION:** Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to revise the contractor performance information process. This change primarily emphasizes the use of a standard performance information reporting system, the Past Performance Information Retrieval System (PPIRS). This change aligns with the President's March 4, 2009 Memorandum on Government Contracting specifically with regards to managing the Government's risk associated with the goods and services being procured and ensuring projects are completed effectively and efficiently.

DATES: *Effective Date:* July 1, 2009.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Jeritta Parnell, Procurement Analyst, at (202) 501–4082. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–34, FAR case 2006–022.

SUPPLEMENTARY INFORMATION:**A. Background**

Past performance information (PPI) can decrease the Government's risk in contracting by rating, at a minimum, quality of work, timeliness, cost, and business relations of contractors for projects above a specified threshold. PPI incentivizes contractors to perform well in order to be rewarded with future contracts.

The Office of Federal Procurement Policy (OFPP) and the Chief Acquisition Officer's Acquisition Council for E-GOV

(ACE) established a working group to review regulations, policies, and guidance associated with contractor performance information. The working group proposed changes to a number of FAR parts. The Councils have agreed to some, but not all the changes under this final rule.

The purpose of the final rule is to ensure that the FAR clearly reflects the use of the Governmentwide performance information repository, Past Performance Information Retrieval System (PPIRS) at <http://www.ppirs.gov>; requires the evaluation of past performance for orders exceeding the simplified acquisition threshold placed against Federal Supply Schedule contracts, or under a task order or delivery order against a contract awarded by another Federal agency (i.e. Governmentwide acquisition contract or multi-agency contract); recommends past performance information for orders under single agency contracts; consolidates the collection of past performance guidance in FAR Part 42; and, clarifies that the Agency shall identify those responsible for preparing interim and final evaluations.

The Councils published a proposed rule with request for comments in the **Federal Register** at 73 FR 17945, April 2, 2008. Forty comments from ten respondents were received.

B. Discussion of Public Comments

The comments received were grouped under five general topics. A summary of these topics and a discussion of the comments and the changes made to the proposed rule as a result of those comments are provided below:

Miscellaneous Comments

Comment: One Respondent recommended adding a definition for "completed contracts" under FAR 2.101.

Response: The definition of past performance is revised from "completed contracts" to "physically completed contracts."

Comment: One respondent disagreed with the revisions as written in the third person.

Response: In this particular instance, third person is appropriate. There was no change made to the final rule as a result of this comment.

Comment: Two respondents suggested adding language to include the FAR clause 52.219–8, Utilization of Small Business Concerns, as well as the FAR clause 52.219–9, Small Business Subcontracting Plan, which requires an assessment of the other nine elements of a subcontracting plan and utilizing small businesses.

Response: This case addresses goals as required by FAR 52.219–9. This case continues the current FAR focus on compliance with the goals. There was no change made to the final rule as a result of this comment.

Comment: One respondent recommended that past performance assessments should address small business utilization as a whole in addition to subcontracting plan requirements by referencing FAR 52.219–8 and 52.219–16.

Response: It is not beneficial to further reference FAR 52.219–8, Utilization of Small Business Concerns, as addressed in the preceding comment and response. Furthermore, it is not beneficial to include a reference to FAR 52.219–16, Liquidated Damages—Subcontracting Plan, since this clause establishes procedures for the payment of liquidated damages in the event that the contractor failed to meet the requirements established under FAR 52.219–9, and does not set forth contractual performance requirements that may be assessed. There was no change made to the final rule as a result of this comment.

Comment: One respondent suggested that the requirement for the inclusion of FAR 52.219–9, Small Business Subcontracting, be excepted for delivery or task orders against Federal Supply Schedules or Governmentwide contracts.

Response: Contractor subcontracting plans under Federal Supply Schedules and Governmentwide contracts are established on a contract level, not task order level. The Councils agree that it would be inappropriate to require an evaluation of contractor performance for individual task orders against a small business subcontracting plan that has been established on a contract level for Federal Supply Schedules and Governmentwide contracts. Contracting officers may include such an assessment on single agency task order and delivery order contracts when deemed appropriate. FAR 42.1502(c) and (d) are revised to reflect this change.

Comment: One respondent indicated support for the proposed rule as written.

Response: The Councils have noted this comment.

Past Performance Information Retrieval System (PPIRS)

Comment: One respondent recommended two changes - changing from the "Government wide Past Performance Information Retrieval System (PPIRS)" to the "Government wide past Performance Information Retrieval System-Report Card (PPIRS-RC)," and adding an additional

paragraph to reference the PPIRS-Report Card.

Response: PPIRS is the universally accepted database used by all agencies. The FAR does not preclude the usage of additional systems. There was no change made to the final rule as a result of this comment.

Comment: One respondent suggested revising the performance information system to improve access to provide more timely, accurate and detailed performance assessments for acquisition personnel.

Response: These kinds of improvements to the past performance system are outside the scope of this case. This rule, however, will improve the contractor performance information process. There was no change made to the final rule as a result of this comment.

Comment: Two respondents suggested including a reference to PPIRS in FAR 15.305(a)(2).

Response: There was no intent to change the evaluation criteria set forth in FAR 15.305. There was no change made to the final rule as a result of this comment.

Comment: One respondent recommended moving the language from FAR 42.1503(e) to FAR Part 15 since this language appears to be information regarding source selection.

Response: This language deals with retention of past performance information rather than required procedures to be utilized in a source selection, and is therefore a post award function that is appropriately retained in FAR 42.1503(e). There was no change made to the final rule as a result of this comment.

Comment: One respondent recommended clarification for information retention. The respondent suggested the following language: "Agencies shall not retain past performance information longer than three years (six years for construction and architect engineer contracts.)"

Response: These documents are part of the official contract file and must be retained. The intent of this language is to ensure that past performance data is current and relevant. The use of the past performance information that may be obtained from PPIRS for acquisition evaluations is limited to the 3-year timeframe (six years for construction and architect engineer contracts). PPIRS archives past performance data three years after the data is input into PPIRS. There was no change made to the final rule as a result of this comment.

Comment: One respondent questioned the period of retention of past

performance information for construction.

Response: This language was merely consolidated and relocated under FAR Part 42 without change. Due to the nature of construction and A&E contracts, retention of such past performance information is necessarily longer than for contracts for other products/services. There was no change made to the final rule as a result of this comment.

Comment: One respondent suggested the wording is unclear in FAR 42.1503(e).

Response: The language was revised to delete "For source selection purposes" to clarify that this is a post award function rather than a source selection function.

Comment: One respondent suggested adding another paragraph to FAR 42.1503 to address information retention.

Response: Previous FAR language regarding retaining records is outdated. Rather than being destroyed, PPIRS electronic records will be retained through archiving beyond the specified 3 and 6 year timeframes. The language was revised at the time of the proposed rule to reflect timeframes for access and use of this information. There was no change made to the final rule as a result of this comment.

Past Performance Reporting

Comment: One respondent recommended changing the term "evaluation" to "assessment" or "report card."

Response: The terms "evaluation" and "assessment", as used in FAR Part 42, are synonymous in this context. There was no change made to the final rule as a result of this comment.

Comment: One respondent would like a clarification to the language that states that agencies shall submit past performance reports electronically to PPIRS in accordance with agency procedures.

Response: The intent of the language is to require submission of past performance evaluations to PPIRS in a method prescribed under agency procedures. The language at FAR 42.1503(c) has been revised to clarify that the process for submitting such reports to PPIRS shall be in accordance with agency procedures.

Comment: One respondent recommended additional language in the last sentence of FAR 42.1502(a) as follows: "The content and format of performance evaluations shall be established in accordance with agency procedures and should be tailored to the size, content, and complexity of the requirements."

Response: The Councils interpret the intent of the comment was to obtain greater detail in the evaluations. The language is sufficient as proposed. There was no change made to the final rule as a result of this comment.

Comment: One respondent suggested expanding the case to cover responsibilities for negative past performance information received from surveys or questionnaires.

Response: The FAR already has sufficient provisions allowing contracting officers to discuss negative past performance information with offerors. There was no change made to the final rule as a result of this comment.

Comment: One respondent suggested that some form of incentive or other documented means be provided to encourage and ensure that information is timely provided into the system.

Response: This is a requirement of agencies in the normal course of duties assigned to their designated personnel as required in FAR 42.1502 and 42.1503. As such, an additional incentive would be inappropriate. There was no change made to the final rule as a result of this comment.

Comment: Three respondents suggested that the identification of an "individual" responsible for preparing evaluations is too restrictive and recommended flexibility for each agency to determine the responsible individual or individuals by title or organizational element.

Response: The Councils agree with the comment. The language at FAR 42.1503(a) is revised to read "Agency procedures shall identify those responsible for preparing interim and final evaluations."

Comment: One respondent recommended that past performance evaluations should be required for all contracts that are terminated for default.

Response: The Councils have noted this comment and will consider this issue under a separate rule. There was no change made to the final rule as a result of this comment.

Past Performance Evaluation

Comment: One respondent recommended that evaluations over the simplified acquisition threshold be submitted when "an extraordinary event or occurrence takes place." Furthermore, the respondent questioned the value of performance evaluations on each order over the simplified acquisition threshold.

Response: The information is necessary and required. There was no change made to the final rule as a result of this comment.

Comment: One respondent suggested a change to the mandatory evaluation of orders over the simplified acquisition threshold from “shall” to “may.”

Response: The Councils do not agree with changing “shall” to “may.” It is the intent of this rule to capture the universe of contracts which includes task orders against basic contracts. Likewise, nothing prevents prudent contracting officers from addressing extraordinary circumstances on contracts under the simplified acquisition threshold where a past performance evaluation may be warranted. There was no change made to the final rule as a result of this comment.

Comment: Two respondents recommended revising FAR 13.106–2(b)(3)(ii) to read “May be based on one or more of the following:” to encourage contracting officers to use more than one tool in identifying offerors’ past performance information.

Response: The Councils agree with this comment. FAR 13.106–2(b)(3)(ii) is revised to read “May be based on one or more of the following:”

Comment: One respondent suggested that PPIRS is not a mandatory source of information and that other sources are available.

Response: PPIRS is the universally accepted database used by all agencies. PPIRS is not the only source for past performance information that may be utilized in source selection evaluations. However, under this rule, agencies are now required to submit past performance information to PPIRS. Agencies will establish procedures to effect these electronic submissions. There was no change made to the final rule as a result of this comment.

Comment: One respondent suggested amending FAR 13.106–2(b)(3)(ii) to include other available sources as previously addressed.

Response: FAR 13.106–2(b)(3)(ii) is revised to read “May be based on one or more of the following:”

Comment: Two respondents recommended defining “relevant past performance information.”

Response: Relevancy is subjective and should be left to the contracting officer’s discretion on a case by case basis. There was no change made to the final rule as a result of this comment.

Comment: One respondent suggested providing objective criteria and weights for acquisition officials.

Response: This requirement is addressed in FAR 15.305(a)(2)(i). These past performance evaluations are subjective based on the current acquisition. Assigning weighted values to evaluation criteria, including past

performance, is the purview of the Source Selection Authority. There was no change made to the final rule as a result of this comment.

Thresholds

Comment: One respondent recommended that the reference to the Simplified Acquisition Threshold (SAT) should be limited to the lowest dollar value for the SAT in the definition of FAR 2.1.

Response: Due to the extraordinary nature of the performance under contracts that qualify for higher simplified acquisition thresholds, it would not be appropriate to require the preparation of evaluations at the lowest SAT for each contract. Agency designated personnel have the discretion to prepare and submit to PPIRS an evaluation of contractor performance at any threshold when they deem it appropriate. There was no change made to the final rule as a result of this comment.

Comment: One respondent suggested that the threshold specific to orders placed against an FSS, GWAC, or other multi-agency contract be raised to \$550,000 rather than all orders exceeding the SAT.

Response: It is the intent of this rule to capture the universe of contracts that includes task orders against basic contracts. There was no change made to the final rule as a result of this comment.

Comment: Two respondents recommended changing the language in FAR 42.1502(c) and 42.1502(d) as follows: “task order contract or a delivery order contract” to “indefinite-delivery contract.”

Response: The phrase “task order contract or delivery order contract” is more specific. This change was not intended to cover definite quantity contracts as proposed by the commenter. There was no change made to the final rule as a result of this comment.

Summary of Changes to the Proposed Rule

The Councils made the following changes to the proposed rule as a result of the public comments and Council deliberations. The final rule reflects the following changes:

FAR 2.101

The definition of past performance was revised to clarify the term “completed contract” as one that is physically completed in accordance with FAR 4.804–4.

FAR 8.406–7

The addition of language to advise ordering activities that past performance evaluations required in FAR 42.1502(c) are applicable to orders.

FAR 13.106–2

Language was revised to encourage contracting officers to utilize more than one tool in identifying offerors’ past performance information.

FAR 42.1502(c) and (d)

Language was added to clarify the consideration of small business goals in past performance evaluations for Governmentwide acquisition contracts, multi-agency contracts, and single-agency task order and delivery order contracts.

FAR 42.1503(a)

Language was revised to clarify that agency procedures shall identify those responsible for preparing interim and final evaluations.

FAR 42.1503(c)

Language was revised to clarify that agencies shall be responsible for establishing procedures for reporting past performance information to PPIRS.

FAR 42.1503(e)

Language was revised to delete the phrase “For source selection purposes” in order to clarify that this language deals with retention of past performance information rather than required procedures to be utilized in a source selection.

C. Regulatory Analyses

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

D. 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 the rule does not impose any additional requirements on small businesses. The collection and reporting of past performance information is an internal process to the Government. The rule merely puts into effect the current practices of prudent contracting officers. In addition, the rule provides clearer instruction to contracting officers by restating in a better format the current language.

E. 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.*

List of Subjects in 48 CFR Parts 2, 8, 9, 13, 17, 36, 42, and 53

Government procurement.

Dated: June 25, 2009.

Al Matera,

Director, Office of Acquisition Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 8, 9, 13, 17, 36, 42, and 53 as set forth below:

1. The authority citation for 48 CFR parts 2, 8, 9, 13, 17, 36, 42, and 53 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 2—DEFINITIONS OF WORDS AND TERMS

2. Amend section 2.101 in paragraph (b)(2) by adding, in alphabetical order, the definition "Past performance" to read as follows:

2.101 Definitions.

* * * * *

(b) * * *
(2) * * *

Past performance means an offeror's or contractor's performance on active and physically completed contracts (see 4.804-4).

* * * * *

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

3. Add section 8.406-7 to read as follows:

8.406-7 Contractor Performance Evaluation.

Ordering activities must prepare an evaluation of contractor performance for each order that exceeds the simplified acquisition threshold in accordance with 42.1502(c).

PART 9—CONTRACTOR QUALIFICATIONS

4. Amend section 9.105-1 by revising the second sentence of the introductory text of paragraph (c); and removing paragraph (c)(7). The revised text reads as follows:

9.105-1 Obtaining information.

* * * * *

(c) * * * In addition to the Governmentwide performance information repository, Past Performance Information Retrieval System (PPIRS) (at www.ppirs.gov), the contracting officer should use the following sources of information to support such determinations:

* * * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

5. Amend section 13.106-2 by revising paragraph (b)(3)(ii) to read as follows:

13.106-2 Evaluation of quotations or offers.

* * * * *

(b) * * *
(3) * * *

(ii) May be based on one or more of the following:

- (A) The contracting officer's knowledge of and previous experience with the supply or service being acquired;
(B) Customer surveys, and past performance questionnaire replies;
(C) The Governmentwide Past Performance Information Retrieval System (PPIRS) at www.ppirs.gov; or
(D) Any other reasonable basis.

* * * * *

PART 17—SPECIAL CONTRACTING METHODS

6. Amend section 17.207 by removing from the end of paragraph (c)(3) the word "and"; removing the period from the end of paragraph (c)(4) and adding "and" in its place; and adding paragraph (c)(5) to read as follows:

17.207 Exercise of options.

* * * * *

(c) * * *

(5) The contractor is not listed on the Excluded Parties List System (EPLS) (see FAR 9.405-1).

* * * * *

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

7. Revise section 36.201 to read as follows:

36.201 Evaluation of contractor performance.

See 42.1502(e) for the requirements for preparing past performance evaluations for construction contracts.

36.602-3 [Amended]

8. Amend section 36.602-3 by removing from paragraph (a) "36.604" and adding "36.603" in its place.
9. Amend section 36.603 by revising paragraph (d)(4); and removing from paragraph (d)(5) "36.604(c)" and adding "42.1502(f)" in its place. The revised text reads as follows:

36.603 Collecting data on and appraising firms qualifications.

* * * * *

(d) * * *

(4) Assuring that the file contains a copy of each pertinent performance evaluation (see 42.1502(f)).

* * * * *

10. Revise section 36.604 to read as follows:

36.604 Performance evaluation.

See 42.1502(f) for the requirements for preparing past performance evaluations for architect-engineer contracts.

36.701 [Amended]

11. Amend section 36.701 by removing paragraph (d).

36.702 [Amended]

12. Amend section 36.702 by removing paragraph (c).

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

13. Revise section 42.1502 to read as follows:

42.1502 Policy.

(a) Past performance evaluations shall be prepared as specified in paragraphs (b) through (g) of this section at the time the work under the contract or order is completed. In addition, interim evaluations shall be prepared as specified by the agencies to provide current information for source selection purposes, for contracts or orders with a period of performance, including options, exceeding one year. These evaluations are generally for the entity, division, or unit that performed the contract or order. The content of the evaluations should be tailored to the size, content, and complexity of the contractual requirements.

(b) Except as provided in paragraphs (e), (f) and (h) of this section, agencies shall prepare an evaluation of contractor performance for each contract that exceeds the simplified acquisition threshold.

(c) Agencies shall prepare an evaluation of contractor performance for each order that exceeds the simplified acquisition threshold placed against a Federal Supply Schedule contract, or under a task order contract or a delivery order contract awarded by another agency (i.e. Governmentwide acquisition contract or multi-agency contract). This evaluation shall not consider the requirements under paragraph (g) of this section.

(d) For single-agency task order and delivery order contracts, the contracting officer may require performance evaluations for each order in excess of the simplified acquisition threshold when such evaluations would produce more useful past performance

information for source selection officials than that contained in the overall contract evaluation (e.g., when the scope of the basic contract is very broad and the nature of individual orders could be significantly different). This evaluation need not consider the requirements under paragraph (g) of this section unless the contracting officer deems it appropriate.

(e) Past performance evaluations shall be prepared for each construction contract of \$550,000 or more, and for each construction contract terminated for default regardless of contract value. Past performance evaluations may also be prepared for construction contracts below \$550,000.

(f) Past performance evaluations shall be prepared for each architect-engineer services contract of \$30,000 or more, and for each architect-engineer services contract that is terminated for default regardless of contract value. Past performance evaluations may also be prepared for architect-engineer services contracts below \$30,000.

(g) Past performance evaluations shall include an assessment of contractor performance against, and efforts to achieve, the goals identified in the small business subcontracting plan when the contract includes the clause at 52.219-9, Small Business Subcontracting Plan.

(h) Agencies shall not evaluate performance for contracts awarded under Subpart 8.7.

■ 14. Amend section 42.1503 by revising paragraphs (a), (c), (d), and (e) to read as follows:

42.1503 Procedures.

(a) Agency procedures for the past performance evaluation system shall generally provide for input to the evaluations from the technical office, contracting office and, where appropriate, end users of the product or service. Agency procedures shall identify those responsible for preparing interim and final evaluations. Those individuals identified may obtain information for the evaluation of performance from the program office, administrative contracting office, end users of the product or service, and any other technical or business advisor, as appropriate. Interim evaluations shall be prepared as required.

* * * * *

(c) Agencies shall submit past performance reports electronically to the Past Performance Information Retrieval System (PPIRS) at www.ppirs.gov. The process for submitting such reports to PPIRS shall be in accordance with agency procedures.

(d) Any past performance information systems used for maintaining contractor performance information and/or evaluations should include appropriate management and technical controls to ensure that only authorized personnel have access to the data.

(e) Agencies shall use the past performance information in PPIRS that is within three years (six for construction and architect-engineer contracts) of the completion of performance of the evaluated contract or order.

PART 53—FORMS

53.236-1 Construction.

■ 15. Amend section 53.236-1 by removing and reserving paragraph (a).

■ 16. Amend section 53.236-2 by revising the section heading as set forth below; and removing paragraph (c). The revised text reads as follows:

53.236-2 Architect-engineer services (SF's 252 and 330).

* * * * *

53.301-1420 and 53.301-1421 [Removed]

■ 17. Remove sections 53.301-1420 and 53.301-1421.

[FR Doc. E9-15436 Filed 6-30-09; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4, 9, and 52

[FAC 2005-34; FAR Case 2008-009; Item II; Docket 2009-0020, Sequence 1]

RIN 9000-AL28

Federal Acquisition Regulation; FAR Case 2008-009, 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

111-8). 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. 107-296, 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 August 31, 2009 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAR case 2008-009, by any of the following methods:

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

Submit comments via the Federal eRulemaking portal by inputting "FAR Case 2008-009" under the heading "Comment or Submission". Select the link "Send a Comment or Submission" that corresponds with FAR Case 2008-009. Follow the instructions provided to complete the "Public Comment and Submission Form". Please include your name, company name (if any), and "FAR Case 2008-009" on your attached document.

• Fax: 202-501-4067.

• 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 2005-34, FAR case 2008-009, 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) 208-6925 for clarification of content. Please cite FAC 2005-34, FAR case 2008-009. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755.

SUPPLEMENTARY INFORMATION:

A. Background

This rule implements section 743 of Division D of the Omnibus Appropriations Act, 2009 (Public Law 111-8). 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. 107–296, 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 111–8, 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 111–8 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, 418–20 (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 111–8 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 2–36. 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 111–8 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 52.209–2, 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 103-355 (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 111-8) 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 104-106, 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 111-8) 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 2005-34, FAR case 2008-009), 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 111-8, which is currently in effect. However, pursuant to Public Law 98-577 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 4—ADMINISTRATIVE 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) 52.209-2, Prohibition on Contracting with Inverted Domestic Corporations—Representation.

* * * * *

PART 9—CONTRACTOR QUALIFICATIONS

■ 3. Amend section 9.104-1 by revising paragraph (g) to read as follows:

9.104-1 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 9.108-5 to read as follows:

9.108 Prohibition on contracting with inverted domestic corporations.

9.108-1 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).

9.108-2 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.

9.108-3 Prohibition.

(a) Section 743 of Division D of the FY 2009 Omnibus Appropriations Act (Public Law 111-8) 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 self-certification and, after consultation with legal counsel, take appropriate action where that questionable self-certification cannot be verified.

9.108-4 Waiver.

Any agency head may waive the requirement of subsection 9.108-3 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.

9.108-5 Solicitation provision.

When using funds appropriated in Fiscal Year 2006 through Fiscal Year 2009, the contracting officer shall include the provision at 52.209-2, Prohibition on Contracting with Inverted Domestic Corporations—Representation, in each solicitation issued after July 1, 2009 for the acquisition of products or services (see FAR 52.212-3 for solicitations issued under Part 12), unless waived in accordance with FAR 9.108-4.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 5. Add section 52.209-2 to read as follows:

52.209-2 Prohibition on Contracting with Inverted Domestic Corporations—Representation.

As prescribed in 9.108-5, insert the following provision:

PROHIBITION ON CONTRACTING WITH INVERTED DOMESTIC CORPORATIONS—REPRESENTATION (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, 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)

■ 6. Amend section 52.212-3 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:

52.212-3 Offeror Representations and Certifications—Commercial Items.

* * * * *

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, 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.

* * * * *

[FR Doc. E9-15434 Filed 6-30-09; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 9

[FAC 2005-34; FAR Case 2008-028; Item III; Docket 2009-0021; Sequence 1]

RIN 9000-AL33

Federal Acquisition Regulation; FAR Case 2008-028, Role of Interagency Committee on Debarment and Suspension

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement Section 873(a)(1) and (2) of the National Defense Authorization Act for Fiscal Year 2009. Section 873(a)(1) and (2) clarifies the role of the Interagency Committee on Debarment and Suspension when more than one agency has an interest in the debarment or suspension of a contractor.

DATES: *Effective Date:* July 31, 2009.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Edward Loeb, Director, at (202) 501-0650. The TTY Federal Relay Number for further information is 1-800-877-8973. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-34, FAR case 2008-028.

SUPPLEMENTARY INFORMATION:

A. Background

This case amends FAR 9.402 to implement Section 873(a)(1) and (2) of the Duncan Hunter National Defense Authorization Act of 2009 (Public Law 110-417), which was enacted on October 14, 2008. Section 873 of the Act defines the role of the Interagency Committee on Debarment and Suspension. Among other responsibilities, the Interagency Committee on Debarment and Suspension is authorized to resolve issues regarding the agency that will have lead responsibility in initiating a suspension or debarment proceeding. The Committee will also coordinate actions among interested agencies with respect to such action.

This is not a significant regulatory action and, therefore, was not 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 Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98-577, and publication for public comments is not required. However, the Councils will consider comments from small entities concerning the affected FAR Part 9 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 2005-34, FAR case 2008-028), 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.*

List of Subjects in 48 CFR Part 9

Government procurement.

Dated: June 25, 2009.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 9 as set forth below:

PART 9—CONTRACTOR QUALIFICATIONS

■ 1. The authority citation for 48 CFR part 9 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).

■ 2. Amend section 9.402 by revising paragraph (c), redesignating paragraph (d) as paragraph (e), and adding a new paragraph (d) to read as follows:

9.402 Policy.

* * * * *

(c) Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

(d) When more than one agency has an interest in the debarment or suspension of a contractor, the Interagency Committee on Debarment and Suspension, established under Executive Order 12549, and authorized by Section 873 of the National Defense

Authorization Act for Fiscal Year 2009 (Pub. L. 110-417), shall resolve the lead agency issue and coordinate such resolution among all interested agencies prior to the initiation of any suspension, debarment, or related administrative action by any agency.

* * * * *

[FR Doc. E9-15431 Filed 6-30-09; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2009-0002, Sequence 5]

Federal Acquisition Regulation; Federal Acquisition Circular 2005-32; Small Entity Compliance Guide

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

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2005-34 which amend the FAR. Interested parties may obtain further information regarding these rules by referring to FAC 2005-34 which precedes this document. These documents are also available via the Internet at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Hada Flowers, FAR Secretariat, (202) 208-7282. For clarification of content, contact the analyst whose name appears in the table below.

LIST OF RULES IN FAC 2005-34

Item	Subject	FAR case	Analyst
I	Contractor Performance Information	2006-022	Parnell.
II	Prohibition on Contracting with Inverted Domestic Corporations (Interim)	2008-009	Murphy.
III	Role of Interagency Committee on Debarment and Suspension	2008-028	Loeb.

SUPPLEMENTARY INFORMATION:

Summaries for each FAR rule follow. For the actual revisions and/or amendments to these FAR cases, refer to the specific item number and subject set forth in the documents following these item summaries.

FAC 2005-34 amends the FAR as specified below:

Item I—Contractor Performance Information (FAR Case 2006-022)

This final rule amends the FAR to revise the contractor performance information process. The FAR revisions include changes to FAR Parts 2, 8, 9, 13, 17, 36, 42, and 53. The purpose of this final rule is to ensure that the FAR clearly reflects the use of the Governmentwide performance information repository, Past Performance Information Retrieval System (PPIRS) at <http://www.ppirs.gov>; requires the evaluation of past performance for orders exceeding the simplified acquisition threshold placed against Federal Supply Schedule contracts, or under a task order or delivery order against a contract

awarded by another Federal agency (*i.e.* Governmentwide acquisition contract or multi-agency contract); recommends past performance information for orders under single agency contracts; consolidates the collection of past performance guidance in Part 42; and, clarifies that the Agency shall identify those responsible for preparing interim and final evaluations.

Item II—Prohibition on Contracting with Inverted Domestic Corporations (FAR Case 2008-009) (Interim)

This interim rule implements Section 743 of Division D of the Omnibus Appropriations Act, 2009 (Public Law 111-8), which 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 interim rule addresses solicitations issued after the date of publication using funds appropriated in Fiscal Years 2006, 2007, and 2008, as well.

Item III—Role of Interagency Committee on Debarment and Suspension (FAR Case 2008-028)

This final rule amends Federal Acquisition Regulation Subpart 9.4 to clarify the role of the Interagency Committee on Debarment and Suspension when more than one agency has an interest in the debarment or suspension of a contractor. Among other responsibilities, the Interagency Committee on Debarment and Suspension is authorized to resolve issues regarding the agency that will have lead responsibility in initiating a suspension or debarment proceeding. The Committee will also coordinate actions among interested agencies with respect to such action. This rule implements the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Section 873(a)(1) and (2).

Dated: June 25, 2009.

Al Matera,

Director, Office of Acquisition Policy.

[FR Doc. E9-15430 Filed 6-30-09; 8:45 am]

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