



Homeland Security

JUN - 7 2012

MEMORANDUM FOR: Department of Homeland Security
Heads of Contracting Activities

FROM: Daniel L. Clever 
Deputy Chief Procurement Officer

SUBJECT: Federal Acquisition Regulation Class Deviation
(Number 12-02) – Prohibition on Contracting With Inverted
Domestic Corporations

Purpose: I am issuing this class deviation in accordance with Federal Acquisition Regulation (FAR) 1.404 to implement a deviation to FAR 9.108 that will ensure the Department of Homeland Security (DHS) is covered by the prohibition on contracting with inverted domestic corporations regardless of whether or not future Appropriations Acts include language on the prohibition.

Effective Date: Immediately.

Background: Section 835 of the Department of Homeland Security Act (HSA)¹ of 2002, Pub. L. 107-296 prohibits DHS from contracting with expatriate corporations. This is a permanent prohibition without a sunset provision. The Homeland Security Acquisition Regulation (HSAR) subsections 3009.104-70 to 3009.104-75 and the clause at 3052.209-70, finalized on May 1, 2006², implemented the HSA provision solely for the DHS. The clause is required in all DHS solicitations and contracts.

This prohibition applied only to DHS until fiscal year (FY) 2008 when Section 745 of the Consolidated Appropriations Act, Pub. L. 110-161, made the prohibition applicable to all federal contracts. However, this annual government-wide prohibition was only renewed thrice; no government-wide prohibition was included in the Appropriations Act of FY 2011 but was included in FY 2012. For DHS, when the government-wide prohibition is not in place, the agency-specific prohibition returns in full force and effect.

The FAR implemented the government-wide prohibition on contracting with inverted domestic corporations at FAR section 9.108 on July 1, 2009. On July 2, 2009, DHS issued HSAR Class

¹ This HSA section also refers to corporate expatriates as inverted domestic corporations (IDCs).

² These HSAR subsections were renumbered to 3009.108-7001 to 3009.108-7005 in 2009 to be consistent with the FAR.

Deviation 09-02 that rendered HSAR Inverted Domestic Corporation coverage temporarily without effect by the implementation of the government-wide prohibition in the FAR. The class deviation provided the necessary content to implement the FAR coverage in DHS contracts while also retaining consistency with the HSA. HSAR Class Deviation 09-02 was later rescinded when the government-wide prohibition was not included in the FY 2011 Appropriations Act.

Congress has not been consistent about including the government-wide prohibition in the annual Appropriations Acts. As noted above, it was not in the FY 2011 Appropriations Act but was included in the FY 2012 Appropriations Act. The FAR was revised on May 10, 2012 to implement the FY 2012 Appropriations Act government-wide prohibition but excluded those contracts entered into before December 23, 2011. Whenever the prohibition has not been included in the Appropriations Act, DHS has had to revert to the HSAR coverage prohibiting contracts with corporate expatriates. Whenever the government-wide prohibition has been reinstated, DHS has had to issue a new HSAR deviation to require adherence to the FAR requirements.

Deviation: This FAR class deviation relieves DHS from reinstating and withdrawing its agency prohibition based on the status of the government-wide prohibition. Inasmuch as DHS is subject to a permanent statutory prohibition, this class deviation will ensure DHS does not contract with inverted domestic corporations regardless of whether or not future Appropriations Acts include language on the prohibition. This FAR deviation will eliminate confusion among our acquisition workforce regarding the basis of the prohibition and will better ensure the appropriate clauses are included in DHS solicitations and contracts. The government-wide and the DHS prohibitions are identical; therefore, the DHS HSAR coverage does not diminish the FAR prohibition.

DHS will deviate from the FAR by following its HSAR coverage at 3009.108-70 (3009.108-7001 through 3009.108-7005) in lieu of the FAR coverage at 9.108 and by inserting the HSAR clause at 3052.209-70 in all solicitations and contracts in lieu of the FAR provision and clause at 52.209-2 and 52.209-10.

Expiration Date: This class deviation will remain in effect until otherwise rescinded.

Additional Information: Questions or comments about this class deviation may be directed to Linda Stivaletti-Petty, OCPO/APL, at (202) 447-5639, or by email at Linda.Stivaletti-Petty@hq.dhs.gov.