

(iv) Best management practices for energy-efficient management of servers and Federal data centers.

\* \* \* \* \*

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 36. Revise section 52.204–4 to read as follows:

### 52.204–4 Printed or Copied Double-Sided on Postconsumer Fiber Content Paper.

As prescribed in 4.303, insert the following clause:

#### Printed or Copied Double-Sided on Postconsumer Fiber Content Paper (May 2011)

(a) *Definitions.* As used in this clause—*Postconsumer fiber* means—(1) Paper, paperboard, and fibrous materials from retail stores, office buildings, homes, and so forth, after they have passed through their end-use as a consumer item, including: used corrugated boxes; old newspapers; old magazines; mixed waste paper; tabulating cards; and used cordage; or

(2) All paper, paperboard, and fibrous materials that enter and are collected from municipal solid waste; but not

(3) Fiber derived from printers' over-runs, converters' scrap, and over-issue publications.

(b) The Contractor is required to submit paper documents, such as offers, letters, or reports that are printed or copied double-sided on paper containing at least 30 percent postconsumer fiber, whenever practicable, when not using electronic commerce methods to submit information or data to the Government.

(End of clause)

■ 37. Amend section 52.204–8 by revising the date of the provision; removing paragraph (c)(2)(vi); and redesignating paragraphs (c)(2)(vii) and (viii) as paragraphs (c)(2)(vi) and (vii), respectively.

The revised text reads as follows:

### 52.204–8 Annual Representations and Certifications.

\* \* \* \* \*

#### Annual Representations and Certifications (May 2011)

\* \* \* \* \*

■ 38. Amend section 52.213–4 by revising the date of the clause and paragraph (b)(1)(vii) to read as follows:

### 52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

\* \* \* \* \*

#### Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (May 2011)

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(vii) 52.223–5, Pollution Prevention and Right-to-Know Information (May 2011) (E.O. 13423) (Applies to services performed on Federal facilities).

\* \* \* \* \*

■ 39. Amend section 52.223–5 by—

■ a. Revising the date of the clause;

■ b. Removing from paragraph (a) the definition “Priority chemical”;

■ c. Revising paragraphs (b) and (c)(6);

■ d. Revising the date of Alternate I and paragraph (c)(7); and

■ e. Revising the date of Alternate II and paragraph (c)(7).

The revised text reads as follows:

### 52.223–5 Pollution Prevention and Right-to-Know Information.

\* \* \* \* \*

#### Pollution Prevention and Right-to-Know Information (May 2011)

\* \* \* \* \*

(b) Federal facilities are required to comply with the provisions of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) (42 U.S.C. 11001–11050), and the Pollution Prevention Act of 1990 (PPA) (42 U.S.C. 13101–13109).

(c) \* \* \*

(6) The toxic chemical and hazardous substance release and use reduction goals of section 2(e) of Executive Order 13423 and of Executive Order 13514.

\* \* \* \* \*

*Alternate I (May 2011).* \* \* \*

(c)(7) The environmental management system as described in section 3(b) of E.O. 13423 and 2(j) of E.O. 13514.

*Alternate II (May 2011).* \* \* \*

(c)(7) The facility compliance audits as described in section 3(c) of E.O. 13423.

■ 40. Amend section 52.223–10 by revising the introductory paragraph, the date of the clause, and the first sentence of paragraph (b) to read as follows:

### 52.223–10 Waste Reduction Program.

As prescribed in 23.705(a), insert the following clause:

#### Waste Reduction Program (May 2011)

\* \* \* \* \*

(b) Consistent with the requirements of section 3(e) of Executive Order 13423, the Contractor shall establish a program to promote cost-effective waste reduction in all operations and facilities covered by this contract. \* \* \*

### 52.223–13 and 52.223–14 [Removed and Reserved]

■ 41. Remove and reserve sections 52.223–13 and 52.223–14.

■ 42. Amend section 52.223–16 by revising the introductory paragraph, and the introductory paragraph of Alternate I to read as follows:

### 52.223–16 IEEE 1680 Standard for the Environmental Assessment of Personal Computer Products.

As prescribed in 23.705(b)(1), insert the following clause:

\* \* \* \* \*

*Alternate I (Dec 2007).* As prescribed in 23.705(b)(2), substitute the following paragraph (b) for paragraph (b) of the basic clause:

\* \* \* \* \*

■ 43. Add section 52.223–19 to read as follows:

### 52.223–19 Compliance with Environmental Management Systems.

As prescribed in 23.903, insert the following clause:

#### Compliance With Environmental Management Systems (May 2011)

The Contractor's work under this contract shall conform with all operational controls identified in the applicable agency or facility Environmental Management Systems and provide monitoring and measurement information necessary for the Government to address environmental performance relative to the goals of the Environmental Management Systems.

(End of clause)

[FR Doc. 2011–12851 Filed 5–27–11; 8:45 am]

BILLING CODE 6820–EP–P

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

### 48 CFR Parts 4, 42, and 52

[FAC 2005–52; FAR Case 2008–020; Item II; Docket 2009–0031, Sequence 1]

RIN 9000–AL43

### Federal Acquisition Regulation; Contract Closeout

**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 issuing a final rule amending the Federal Acquisition Regulation (FAR) procedures for closing out contract files. This case revises procedures for clearing final patent reports and quick-closeout procedure, and sets forth a description of an adequate final indirect cost rate proposal and supporting data.

**DATES:** *Effective Date:* June 30, 2011.

**FOR FURTHER INFORMATION CONTACT:** Ms. Clare McFadden, Procurement Analyst,

at (202) 501–0044, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–52, FAR Case 2008–020.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 74 FR 42044 on August 20, 2009. Sixteen respondents provided comments. The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in development of the final rule.

##### II. Discussion and Analysis of the Public Comments

Comments received were grouped under 13 general topics. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

###### A. “Adequacy” Definition

The final rule implements the changes published in the proposed rule, without further amendments in response to comments in this category.

*Comment:* One respondent recommends a new definition for “adequacy” at FAR 42.705–1. The respondent states that guidelines for determining adequacy should be established in order to provide a baseline against which the contracting officer can resolve differences of opinion on adequacy between the auditor and the contractor.

*Response:* A new definition is not necessary, as specific information has been provided in the clause to ensure uniformity, consistency, and fairness for all contractors. This assures that contractors are fully informed in advance of the Government’s parameters for the content of an adequate final indirect cost rate proposal.

###### B. Adequacy Determination

The final rule implements the changes published in the proposed rule, without further amendments in response to comments in this category.

*Comment:* One respondent recommends the term “adequate” be replaced with “complete” or “detailed” at FAR 42.705–1(b). The respondent states that the phrase “the contractor shall submit \* \* \* an adequate indirect cost rate proposal” is inappropriate, as the Defense Contract Audit Agency (DCAA) has historically interpreted the term “adequate” to mean identical to DCAA’s incurred cost model.

*Response:* Use of the term “adequate” for describing the Government’s requirements for submission of costs is more appropriate than utilizing the terms “complete” or “detailed”. The FAR already required the submission of an adequate final indirect cost rate proposal (FAR 42.705–1(b)). This final rule establishes the content of an adequate submission.

###### C. Adequacy Determination and Roles

The final rule includes amendments to FAR 42.705–1(b) and 42.705–2(b) in response to comments in this category.

*Comment:* One respondent recommends that the granting of an extension to the contractor for submitting its indirect cost rate proposal by the contracting officer be made in writing at FAR 42.705–1(b)(1)(i).

*Response:* The language at FAR 42.705–1(b)(1)(ii) is revised accordingly.

*Comments:* Five respondents question whether it is appropriate for DCAA to have sole responsibility to determine the adequacy of indirect cost rate proposals. One respondent believes a determination from the auditor exceeds the auditor’s authority under law.

Three respondents state that any final determination regarding adequacy should be the responsibility of the contracting officer. One respondent states that the contracting officer/ auditor relationship that is provided for in the audit process should be followed.

*Response:* The term “determination” in this case was not intended to shift the authority to make determinations from the contracting officer to the auditor; rather, the intent was for the auditor to offer advice to the contracting officer regarding adequacy of the proposal. The language in 42.705–1(b)(1)(iii), 42.705–1(b)(2), and 42.705–2(b) has been revised to remove the term “determination” and to clarify that the auditor reviews the proposal for adequacy and provides the findings of inadequacy to the contracting officer and contractor.

*Comment:* One respondent states that the proposed rule creates a review process within which there is little latitude for a contracting officer to resolve administrative disagreements between auditors and contractors.

*Response:* The rule does not diminish the latitude or the authority that contracting officers have to resolve any and all matters arising under the contract with respect to an indirect cost rate proposal. The current FAR already allows flexibility for the content based on the situation, e.g., complexity and size of the contractor.

*Comment:* One respondent states that the proposed changes at FAR 42.705–

1(b)(1)(iv) and FAR 52.216–7(d) contradict FAR 42.705–1(b)(1)(i), which requires the parties to work together to make the proposal, audit, and negotiation process as efficient as possible. The proposed default choice requiring data in FAR 52.216–7(d)(2)(iii) will result in contractors trying to provide unrelated data to avoid an auditor’s automatic “checklist” determination of inadequate proposals. Such rigid requirements will lead to an increase in disagreements about the adequacy of final indirect cost rate proposals.

*Response:* The process of reviewing the proposal for adequacy, performing the audit, and conducting negotiations has not changed. Also, no new requirement is imposed on contractors by this rule. The list of data (schedules) now included in FAR 52.216–7(d) requires the same information previously cited in FAR 42.705–1(b).

###### D. Adequacy of Indirect Cost Rate Proposal

The final rule includes amendments to FAR 52.216–7(d)(2)(iv) in response to comments in this category.

*Comment:* One respondent agrees with the proposed language at FAR 42.705–1 as positive changes.

*Comment:* One respondent states that the proposed rule was not clear as to whether the list of required data in FAR 52.216–7(d)(2)(iv) that “may” be submitted with the proposal will be considered in making a determination of the adequacy of the contractor’s proposal. The respondent recommends clarification.

*Response:* The language at FAR 52.216–7(d)(2)(iv) has been revised by replacing “will” with “may”; however, clarification of FAR 42.705–1(b)(1)(ii) is not necessary. The supplemental information listed in FAR 52.216–7(d)(2)(iv) is not required for a determination on the adequacy for the contractor’s proposal for audit.

*Comment:* One respondent states that the proposed statement at FAR 42.705–1(b)(1)(iii) “The proposal must be supported with adequate supporting data, which may be required subsequent to proposal submission” is repetitious of FAR 52.216–7(d)(iv) and unnecessary. The respondent further states that the statement adds a level of subjectivity as contractors guess at what information “may be required” subsequent to submission.

*Response:* The contractor’s requirements are located in the clause at FAR 52.216–7(d)(2)(iv). The FAR 42.705–1(b)(1)(iv) text is directed to the contracting officer, explaining the supplemental information that is

required by contract clause, FAR clause 52.216–7, Allowable Cost and Payment. The language directed to the contracting officer and the contract clause serve different purposes; therefore, both are necessary.

*Comment:* One respondent recommends rescinding the proposed rule and revising the approach to determining adequacy. The respondent states that the approach taken to set forth a description of an adequate final indirect cost rate proposal and supporting data fails to improve the process and unnecessarily creates additional and very significant process and administrative problems.

*Response:* The rule will provide uniformity and consistency. Further, the information is not new and should be readily available from the contractor's books, records, and systems.

#### E. Data Requirements

The final rule includes amendments to FAR 52.216–7(d)(2)(iv) in response to the comments in this category. Many respondents submitted comments regarding data requirements.

*Comments:* Three respondents submitted comments objecting to the volume of data required for determination of an adequate indirect cost rate proposal.

*Response:* The revisions to FAR 42.705–1 and FAR 52.216–7 are necessary to clarify the submission of an adequate indirect cost rate proposal. While the information required may be considered lengthy, it is not new, and it is essential information necessary for an adequate claim for cost.

*Comments:* Four respondents believe the proposed rule is overly prescriptive. One respondent specifically suggests the rule is a regulation to legitimize DCAA's longstanding insistence that an adequate final indirect cost rate proposal be inclusive of several mandatory schedules and supplemental information as represented by DCAA within its Model Incurred Cost Proposal rate as stipulated in DCAA Pamphlet No. 7641.90. This respondent further takes the position that use of the DCAA model schedule information eliminates any opportunity for further variation in proposal content.

*Response:* The information required from the contractor for an adequate indirect cost rate proposal is not new. No specific format is prescribed for the submission. This information is readily available in the contractor's books, records, and systems. DCAA has been the primary provider of information necessary for contracting officers to adequately perform their functions as stewards of public trust. Furthermore,

the revised language “shall include the following data, unless otherwise specified by the cognizant Federal agency official” allows flexibility, depending on the circumstances of the contract (e.g., size, complexity).

*Comments:* Four respondents submitted four comments objecting to the inclusion of one or more schedule items and stated that some of the information proposed to be required for an adequate submission is not necessary for an adequate contractor rate submission.

*Response:* The information required in the schedules is the minimum standard for an adequate indirect cost rate proposal. For example, the information in FAR 52.216–7(d)(2)(iii) item G, reconciliation of books of account and claimed direct costs, is necessary for an adequate submission and different from the information requested for item H, which is a schedule of direct costs by contract/subcontract and indirect expenses applied. The rule language does not require the reconciliation to be presented in a single schedule. An updated schedule (as specified in FAR 52.216–7(d)(2)(v)) is necessary to ensure timely adjustments to amounts claimed and billed by a contractor for the period covered by the final indirect cost rate determination.

*Comment:* One respondent states that “a requirement for the adequacy of an indirect cost rate submission that final direct costs must be submitted for audit is out of the scope of this clause” at FAR 52.216–7(g).

*Response:* This rule does not amend paragraph (g) of the clause at FAR 52.216–7, which has no bearing on the adequacy of an indirect cost rate submission as required by FAR 52.216–7(d)(2)(iii). The Government has the right to audit any invoice or voucher and statements of cost prior to final payment pursuant to FAR 52.216–7.

*Comments:* Two respondents submitted comments in regard to formatting. One respondent states that DCAA's insistence that data be converted into other formats (such as spreadsheets using DCAA's ICE Model) is in direct contradiction of FAR 52.215–2(d)(2) that access to records “may not be construed to require the contractor or subcontractor to create or maintain any record that the contractor or subcontractor does not maintain in the ordinary course of business or pursuant to a provision of law.” The other respondent suggests that the proposed revision at FAR 42.705–1(b)(1) eliminates the suggestion in the current rule that contractors can use the DCAA model incurred cost rate proposal and

supporting data for guidance on what constitutes an adequate final indirect cost rate proposal. According to the respondent, this proposed revision also refers the definition of adequacy to the revised clause at FAR 52.216–7(d)(2), which makes mandatory specific schedules and data requirements taken almost verbatim from the DCAA ICE Model.

*Response:* The information required from the contractor for an adequate indirect cost rate proposal is not new. No specific format is prescribed for the submission. This information should be readily available in the contractor's books, records, and systems.

*Comment:* One respondent states that the list of requirements proposed at FAR 52.216–7(d)(2) is contradictory to the definition of supporting documentation for final indirect cost rate proposals in the current FAR. According to FAR 31.201–2(d), supporting documentation means records necessary to demonstrate the costs claimed in the proposal have been incurred, are allocable to the contract, and comply with applicable cost principles. This makes clear the meaning of the current FAR 52.216–7(d), “The contractor shall support its proposal with adequate supporting documentation.”

*Response:* The cost principles are not intended to set forth the submission requirements of an adequate indirect cost rate proposal.

*Comment:* One respondent states he does not believe that the proposed rule is in line with the FAR objective of achieving a timely settlement of final indirect rates. The rule delineates extensive requirements and supplemental data related to the description of an adequate final indirect cost rate proposal that are unnecessarily burdensome and largely irrelevant to indirect cost rate proposals. Levying requirements for the creation of new books and records as supporting documentation for costs is contradictory to existing provisions of FAR 52.215–2. The respondent is concerned that many of the proposed data requirements under the proposed rule have no connection to the indirect cost rates and may result in the unnecessary disclosure of proprietary information, e.g., schedules O and L.

*Response:* The revisions to FAR 42.705–1 and FAR 52.216–7 are necessary to clarify the submission of an adequate indirect cost rate proposal. The information required is necessary for an adequate claim for cost. The supplemental information, if applicable, is what auditors expect to review in support of an adequate claim for cost. The proposed language “shall include

the following data, unless otherwise specified by the cognizant Federal agency official” allows flexibility depending on the circumstances of the contract (e.g. size, complexity). The information being requested should be readily available from the contractor’s accounting system. The information is not new and the format of the information has not been designated for the contractor. The Government treats all audit information from contractors as confidential and protects it against all unauthorized disclosure.

*Comment:* One respondent states that the list of data required by FAR 52.216–7 (regardless of type of business, sector, or accounting system) is inconsistent and contradictory to FAR 42.705–1(b)(1)(i), which states that the “required content of the proposal and supporting data will vary depending on such factors as business type, size, and accounting system capabilities.” The final rule should afford contractors the flexibility to provide only that information necessary to support an indirect cost rate proposal.

*Response:* The information required from the contractor for an adequate indirect cost rate proposal is not new. No specific format is prescribed for the submission. This information is readily available in the contractor’s books, records, and systems. DCAA has been the primary provider for information necessary for contracting officers to adequately perform their functions as stewards of the public trust.

*Comment:* One respondent takes exception to the statement in FAR 52.216–7(d)(2)(iv) that “The following supplemental information which will be required during the audit process \* \* \*” and suggests it should be restated “the following supplemental information may be required \* \* \*.”

*Response:* The language has been revised to read “the following supplemental information is not required to determine if a proposal is adequate, but may be required during the audit process.”

#### F. Indirect Cost Rate Proposal

The final rule implements the changes published in the proposed rule, without further amendments in response to the comments in this category.

*Comment:* One respondent states that the indirect cost rate proposal mandates at FAR 52.216–7 will result in an increase in proposal rejections, administrative costs and burden, and will significantly delay contract closeout.

*Response:* The information will provide uniformity, consistency,

timeliness, and reduce the number of proposals being returned as inadequate.

*Comment:* One respondent agrees with the language to require a completion invoice to be submitted within 120 days after all rates have been settled for all years during a contract’s period of performance and require inclusion of settled subcontract amounts and rates at FAR 52.216–7(d)(5) may assist in more timely completion of indirect cost audits and facilitate closeout. The respondent further agrees with the list set forth for an adequate indirect cost rate proposal.

*Response:* No response required.

*Comment:* One respondent states that timely closeout of subcontracts issued under a Government prime contract should be addressed and that contracting officers should be empowered and encouraged to unilaterally close out the prime contract, even if subcontracts have not been settled.

*Response:* The prime contractor is responsible for resolution of subcontract costs and rates prior to submission of final vouchers. FAR 52.216–7(d)(6)(i) allows the contracting officer to unilaterally close out a prime contract, when the contractor fails to submit a final voucher within 120 days.

#### G. Final Patent Report

The final rule implements the changes published in the proposed rule, without further amendments in response to the comments in this category.

*Comment:* One respondent states that if clearance by the contracting officer is not received within 60 days of receipt of the final patent report, the contract can be closed (FAR 4.804–5(a)(2)).

Two respondents recommend timelines be established (FAR 4.804–5). One respondent states that patent reports are seldom, if ever, cleared within 60 days and recommends timelines be established for both the contractor and legal community with finite time constraints to respond. The other respondent suggests establishing a time period for responding to the contracting officer’s notification.

*Response:* The final rule provides for 60 days for the clearance of patent reports and allows for flexibility on a case-by-case basis. Any further clarification, if needed, should be provided in agency guidance.

*Comment:* One respondent suggests revising FAR 4.804–5(a)(2)(i) to read “Final Patent Reports, where no contractor invention is disclosed should be cleared within 60 days of receipt.”

*Response:* The inclusion of the language “where no contractor invention is disclosed” is not necessary because

the patent report may be cleared whether an invention is disclosed or not.

*Comment:* Two respondents concur with the proposed procedures for clearing final patent reports.

*Response:* Comment noted.

#### H. Payment Withhold

The final rule implements the changes published in the proposed rule, without further amendments in response to the comments in this category.

*Comment:* One respondent states that the rule, in regard to payment withholds, should allow the contracting officer to use their discretion regarding whether to withhold payment so that the provision is applied only when necessary.

*Response:* The institution of a uniform policy is more appropriate because the contracting officer will know what is required, as a minimum, for fee withholds for all contract types. This uniform policy will help to facilitate contract closeout by encouraging timely submission of final indirect cost rate proposals and final vouchers.

*Comment:* One respondent states that the retainage of a maximum of \$100,000 is a good start, but for large contractors it is not much of a disincentive for the untimely submission of New Technology/Patent Reports and recommends the retainage be changed to 15 percent of the fee. This respondent also states that changes in the proposed rule may facilitate closeout; however, withholding of \$100,000 in fee is insufficient to influence the actions of larger contractors.

Another respondent does not believe that the withhold changes in FAR 52.216–8, 52.216–9, and 52.216–10 are necessary; the changes should be rescinded; and, the current clauses remain in their current form.

*Response:* The intent of this FAR case is not to change the amount of the withholdings. The intent is to make the fee withholds mandatory, not optional, and to define an adequate indirect cost rate proposal.

*Comments:* Two respondents object to the allegedly arbitrary fee withholds that will negatively impact cash flow, harm the industrial base, and increase the amount of cancelled funds. Also, the other respondent states that the prescribed withholding of fee will result in contracting officers experiencing significant ongoing contract administration issues with expiring funds with no clear benefit.

*Response:* The intent of this FAR case is not to change the amount of the fee withholdings. The intent is to make the

fee withholds mandatory, not optional, and to define an adequate indirect cost rate proposal. The proposed rule does not change the current procedures in regard to expiring funds.

*Comment:* One respondent objects to making the proposed fee withholds mandatory because there are existing FAR provisions that already provide for fee withholds so no change is necessary. The combined effect of adding an exhaustive, ill fitting list of requirements for an adequate indirect cost rate proposal with mandatory fee withholds for inadequacy means that inevitable differences in interpreting the new rule will punish contractors unfairly and unilaterally. It is contrary to FAR 42.705–1(b) and could result in increases in the amount of cancelled funds.

*Response:* It is in the Government's best interest to set a uniform policy to establish mandatory fee withholds and define an adequate indirect cost rate proposal.

#### I. Quick-Closeout

The final rule includes amendments to FAR 42.708(a), in response to comments in this category.

Five respondents provided comments in this category.

*Comment:* One respondent welcomes the change at FAR 42.708(a) through (d) but requests clarification of direct costs to be allocated to a cost contract as direct costs are normally assigned/charged rather than allocated to contracts.

*Response:* The language is revised in FAR 42.708(a)(2) to read “unsettled direct costs and indirect costs to be allocated to the contract.”

*Comment:* One respondent states that setting the limitation at FAR 42.708(a)(2)(i) to 20 percent is inconsistent with the historical intent of the provision to settle only an “insignificant” portion of the costs in advance of determination of final costs and rates. The respondent recommends a percentage of 10 or less.

*Response:* This rule changes the criteria for use of quick-closeout procedures from unsettled indirect rates on the contract as a percentage of total unsettled indirect costs, to both unsettled direct and indirect contract costs as a percentage of total claimed contract costs. The Councils believe this change expands the number of contracting actions, which will meet the criteria for quick-closeout. The limitation has been lowered from the proposed 20 percent to 10 percent of the total unsettled direct and indirect costs to be allocated to any one contract. The coverage is also revised in FAR

42.708(a)(2) to state that “Cost amounts will be considered relatively insignificant when the total unsettled direct costs and indirect costs to be allocated to any one contract, task order, or delivery order, do not exceed the lesser of (i) \$1,000,000; or (ii) 10 percent of the total contract, task order, or delivery order amount.” The Councils believe the percentage and monetary threshold should be lower because the lower percentage and dollar threshold will provide increased oversight and reduced risk to the government. The \$1,000,000 threshold aligns with current inventories of physically-complete contracts that are amenable to use of quick-closeout procedures.

*Comments:* Three respondents comment that the proposed revisions limiting the use of quick-closeout procedures are counter-productive and will decrease their use. One respondent recommends adopting the Defense Contract Management Agency (DCMA) Class Deviation in FAR 42.703–1(b), 42.703–1(c)(2), and 42.708(a)(2) entitled “use of quick-closeout procedures for cost-reimbursement, fixed-price incentive, fixed-price redeterminable, and time-and-material contracts.” Another respondent recommends deletion of the phrase “other concerns of the cognizant auditor” at FAR 42.708(a)(2)(i) in the risk assessment verbiage. The respondent also recommends that unsettled direct costs be defined.

*Response:* Previously, the FAR limited the use of quick-closeout procedures to instances where only indirect cost rates remain unsettled. This final rule allows the contracting officer to close contracts with unaudited direct costs and unsettled indirect cost rates. The intent of the rule is to increase the use of quick-closeout procedures for instances involving relatively insignificant amounts of unaudited costs under certain circumstances. DCMA's deviation does not allow the contracting officer to close out contracts without audit of all direct costs. The contracting officer's risk assessment plan includes coordination with the cognizant auditor. There is no need for a definition of “unsettled direct costs” because unsettled direct costs are identified on a case-by-case basis.

#### J. Timelines for the Government

The final rule implements the changes published in the proposed rule, without further amendments in response to the comments in this category.

*Comment:* One respondent states that the “provision at FAR 42.705–1(b)(ii) does not state a time limitation for the auditor to make a written determination

of adequacy.” Also, according to the respondent, time limitations should be established for completing audits.

Another respondent states that the Government needs to emphasize its role, including timely finalization of indirect rates, which includes DCAA completing audits of indirect costs proposals and administrative contracting officer's settling rates, signing off on reports, doing plant clearances, *etc.* Another respondent states that the rule does not define time requirements which all parties, not just contractors, must meet.

*Response:* Timelines should not be instituted for auditors to make a written determination of adequacy or for completion of audits, and for administrative contracting officers to settle rates, sign off on reports, do plant clearances, *etc.*, in order to ensure quality and allow flexibility, based on the size and complexity of each contract.

*Comment:* One respondent does not believe that the proposed rule will achieve any predictable reduction of time or resources associated with contract closeout.

*Response:* This rule clarifies the contract closeout process.

#### K. Regulatory Flexibility Act

*Comments:* One respondent questions the statement within the Regulatory Flexibility Act section of the preamble to the proposed rule that the rule is intended to “clarify and streamline” closeout procedures. The respondent further suggests that adoption of the DCAA Model Incurred Cost Proposal rate is not justified. Another respondent does not agree that the rule will not have a significant impact on a substantial number of small entities. The respondent believes that the numbers of schedules and the imposition of a six-month time constraint will have significant impact on small businesses. The third respondent also strongly disagrees with the conclusion that the proposed rule will not have a significant economic impact on a substantial number of small entities. Requiring preparation and submittal of DCAA's Model Indirect Cost Proposal rate and withholding fees, the proposed rule will have a significant economic impact on a substantial number of small entities. The respondent encourages the Councils to prepare and make available for public comment an initial regulatory flexibility analysis.

*Response:* Contractors are already required to support their indirect cost rate proposals with adequate supporting data. (See FAR 42.705–1(b).) No new requirement is imposed on contractors

by this rule. The changes to FAR parts 4 and 42 clarify and streamline closeout procedures. The model for an adequate indirect cost rate proposal is contained in the DCAA Model Incurred Cost Proposal rate. The data required in this model is not new to contractors nor is there evidence of any effect on small businesses when this information is required. In fact, because the information required is not new and the format of the information has not been designated for the contractor, this should be helpful to small businesses. The information being requested should be readily available from the contractor's accounting system. The inclusion of this information list should improve consistency, efficiency, and timeliness in contractor submissions. The clauses at FAR 52.216–8, 52.216–9, and 52.216–10 are being changed to make the reserve mandatory. However, the reserve amount set aside in the proposed rule has not changed. No small businesses commented on the changes to the clauses at FAR 52.216–8, 52.216–9, and 52.216–10 as published in the proposed rule. Therefore, the Councils conclude that this change will not have a significant impact on small businesses.

#### L. Paperwork Reduction Act

*Comments:* Several respondents disagree with the preamble to the proposed rule, which stated that the proposed changes to the FAR would not impose additional information collection requirements to the paperwork burden previously approved by the Office of Management and Budget (OMB). According to one respondent, mandating preparation and submittal of DCAA's model indirect cost rate proposal for every contract that requires an indirect cost rate proposal will significantly increase the paperwork burdens.

*Response:* No new requirement is imposed on contractors by this proposed rule. The schedules now contained in FAR 52.216–7(d) require the same information previously cited in FAR 42.705–1(b). FAR 42.705–1(b) requires contractors to submit an adequate final indirect cost rate proposal to the contracting officer and auditor within the 6-month period following the expiration of each of its fiscal years. This requirement is contained in OMB Clearance 9000–0013. The clause at FAR 52.216–7, Allowable Cost and Payment, is covered by OMB Clearance 9000–0069. The clause at FAR 52.216–10, Incentive Fee, is covered by OMB Clearance 9000–0067.

#### M. General

There are no revisions to the FAR based on this comment category.

*Comment:* One respondent inquires as to why the FAR case and new clause are limited to DoD, GSA, and NASA and that other civilian agencies would benefit from the new streamlined procedures as well.

*Response:* By law, 41 U.S.C. 1302 (formerly 41 U.S.C. 421(b)), DoD, GSA, and NASA are the signatories of the FAR. GSA signs on behalf of all the other civilian agencies that are subject to the FAR except NASA. The final rule is applicable Government-wide to those executive agencies under the Federal Acquisition Regulations System.

*Comment:* One respondent recommends that “contracting officers should be encouraged to unilaterally de-obligate cancelling funds as an administrative action without fear of violating anti-deficiency or other contracting protocols.”

Another respondent recommends that a timeframe should be targeted for the replacement of cancelled funds.

*Response:* These comments on funding are outside the scope of this case.

*Comments:* Two respondents question the application of this rule to the FAR guiding principles in FAR 1.102.

*Response:* This guidance helps to clarify the requirements of an adequate submission of an indirect cost rate proposal. The guidance for the proper submission of an adequate indirect cost rate proposal is provided to contractors in the clause at FAR 52.216–7. The inclusion of this list of information should help to provide consistency, efficiency, and more timely submission.

#### N. Summary of Changes

The Councils made the following changes to the FAR as a result of the public comments:

1. Revised FAR 42.705–1(b)(1) to be consistent with language at FAR 52.216–7(d)(2).

2. Revised FAR 42.705–1(b) and 42.705–2(b)(2) to clarify the role of the auditor.

- The term “determination” was removed from proposed 42.705–1(b)(1)(ii);
- FAR 42.705–1(b)(1)(iii), 42.705–1(b)(2), and 42.705–2(b) clarify that the auditor—

- Reviews the proposal for adequacy and provides the findings of inadequacy to the contractor and contracting officer; and

- Prepares an advisory audit report, after the proposal has been determined to be adequate for audit.

3. Revised FAR 42.708(a)(2) to lower the percentage limitation in the existing quick-closeout criteria. FAR 42.708 (a)(2)(i) dollar limitation reverts to \$1,000,000, instead of \$4,000,000 in the proposed rule. Renumbered FAR 42.708(a)(3) as FAR 42.708(a)(4) and added a new paragraph FAR 42.708(a)(3). Provided examples of other pertinent information at new paragraph FAR 42.708(a)(3)(iii).

4. Revised FAR 52.216–7(d)(2)(iii) to further illustrate the data.

5. Revised FAR 52.216–7(d)(2)(iv) to clarify that the supplemental information listed, although it may not be required for a determination on the adequacy of the contractor's proposal, may be required during the audit process.

6. Revised FAR 52.216–7(d)(2)(iii) and (d)(2)(iv) to clarify items provided for adequate final indirect cost rate proposal at FAR 52.216–7(d)(2)(i).

#### 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. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. 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 the rule does not impose any additional requirements on small businesses. The changes to FAR parts 4 and 42 clarify and streamline closeout procedures. The changes to the clauses at FAR 52.216–8, 52.216–9, and 52.216–10 allow for a reserve to be set-aside to protect the Government's interest. Contracting Officers already may set aside a reserve under current FAR procedures.

## V. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does apply; however these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under the following:

- OMB Control Number 9000–0013, titled: Cost or Pricing Data Requirements Information Other Than Cost or Pricing Data;
- OMB Control Number 9000–0067, titled: Incentive Contract; and
- OMB Control Number 9000–0069, titled: Indirect Cost Rates.

### List of Subjects in 48 CFR Parts 4, 42, and 52

Government procurement.

Dated: May 18, 2011.

Millisa Gary,

Acting Director, Office of Governmentwide Acquisition Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 4, 42, and 52 as set forth below:

- 1. The authority citation for 48 CFR parts 4, 42, 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 4.804–5 by revising paragraph (a)(2) to read as follows.

### 4.804–5 Procedures for closing out contract files.

(a) \* \* \*

(2) *Final patent report is cleared.* If a final patent report is required, the contracting officer may proceed with contract closeout in accordance with the following procedures, or as otherwise prescribed by agency procedures:

(i) Final patent reports should be cleared within 60 days of receipt.

(ii) If the final patent report is not received, the contracting officer shall notify the contractor of the contractor's obligations and the Government's rights under the applicable patent rights clause, in accordance with 27.303. If the contractor fails to respond to this notification, the contracting officer may proceed with contract closeout upon consultation with the agency legal counsel responsible for patent matters regarding the contractor's failure to respond.

\* \* \* \* \*

## PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

- 3. Amend section 42.705–1 by revising paragraphs (b)(1) and (b)(2) to read as follows:

### 42.705–1 Contracting officer determination procedure.

\* \* \* \* \*

(b) *Procedures.* (1) In accordance with the Allowable Cost and Payment clause at 52.216–7, the contractor is required to submit an adequate final indirect cost rate proposal to the contracting officer (or cognizant Federal agency official) and to the cognizant auditor.

(i) The required content of the proposal and supporting data will vary depending on such factors as business type, size, and accounting system capabilities. The contractor, contracting officer, and auditor must work together to make the proposal, audit, and negotiation process as efficient as possible.

(ii) Each contractor is required to submit the final indirect cost rate proposal within the six-month period following the expiration of each of its fiscal years. The contracting officer may grant, in writing, reasonable extensions, for exceptional circumstances only, when requested in writing by the contractor.

(iii) Upon receipt of the proposal—  
(A) The cognizant auditor will review the adequacy of the contractor's proposal for audit in support of negotiating final indirect cost rates and will provide a written description of any inadequacies to the contractor and contracting officer.

(B) If the auditor and contractor are unable to resolve the proposal's inadequacies identified by the auditor, the auditor will elevate the issue to the contracting office to resolve the inadequacies.

(iv) The proposal must be supported with adequate supporting data, some of which may be required subsequent to finding that the proposal is adequate for audit in support of negotiating final indirect cost rates (e.g., during the course of the performance of the advisory audit). See the clause at 52.216–7(d)(2) for the description of an adequate final indirect cost rate proposal and supporting data.

(2) Once a proposal has been determined to be adequate for audit in support of negotiating final indirect cost rates, the auditor will audit the proposal and prepare an advisory audit report to the contracting officer (or cognizant Federal agency official), including a listing of any relevant advance

agreements or restrictive terms of specific contracts.

\* \* \* \* \*

- 4. Amend section 42.705–2 by—

■ a. Revising the introductory text of paragraph (b)(2) and (b)(2)(i); and  
■ b. Redesignating paragraphs (b)(2)(ii) through (iv) as paragraphs (b)(2)(iii) through (v), respectively; and adding a new paragraph (b)(2)(ii) to read as follows:

### 42.705–2 Auditor determination procedure.

\* \* \* \* \*

(b) \* \* \*

(2) Once a proposal has been determined to be adequate for audit in support of negotiating final indirect cost rates, the auditor shall—

(i) Audit the proposal and prepare an advisory audit report, including a listing of any relevant advance agreements or restrictive terms of specific contracts;

(ii) Seek agreement on indirect costs with the contractor;

\* \* \* \* \*

- 5. Amend section 42.708 by revising paragraph (a) to read as follows:

### 42.708 Quick-closeout procedure.

(a) The contracting officer responsible for contract closeout shall negotiate the settlement of direct and indirect costs for a specific contract, task order, or delivery order to be closed, in advance of the determination of final direct costs and indirect rates set forth in 42.705, if—

(1) The contract, task order, or delivery order is physically complete;

(2) The amount of unsettled direct costs and indirect costs to be allocated to the contract, task order, or delivery order is relatively insignificant. Cost amounts will be considered relatively insignificant when the total unsettled direct costs and indirect costs to be allocated to any one contract, task order, or delivery order does not exceed the lesser of—

(i) \$1,000,000; or

(ii) 10 percent of the total contract, task order, or delivery order amount;

(3) The contracting officer performs a risk assessment and determines that the use of the quick-closeout procedure is appropriate. The risk assessment shall include—

(i) Consideration of the contractor's accounting, estimating, and purchasing systems;

(ii) Other concerns of the cognizant contract auditors; and

(iii) Any other pertinent information, such as, documented history of Federal Government approved indirect cost rate agreements, changes to contractor's rate



structure, volatility of rate fluctuations during affected periods, mergers or acquisitions, special contract provisions limiting contractor's recovery of otherwise allowable indirect costs under cost reimbursement or time-and-materials contracts; and

(4) Agreement can be reached on a reasonable estimate of allocable dollars.

\* \* \* \* \*

## PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

### ■ 6. Amend section 52.216–7 by—

■ a. Revising the date of the clause;

■ b. Adding paragraphs (d)(2)(iii) through (d)(2)(v); and

■ c. Adding two sentences to the end of paragraph (d)(5) to read as follows:

#### 52.216–7 Allowable Cost and Payment.

\* \* \* \* \*

#### Allowable Cost and Payment (JUN 2011)

\* \* \* \* \*

(d) \* \* \*

(2) \* \* \*

(iii) An adequate indirect cost rate proposal shall include the following data unless otherwise specified by the cognizant Federal agency official:

(A) Summary of all claimed indirect expense rates, including pool, base, and calculated indirect rate.

(B) *General and Administrative expenses (final indirect cost pool)*. Schedule of claimed expenses by element of cost as identified in accounting records (Chart of Accounts).

(C) *Overhead expenses (final indirect cost pool)*. Schedule of claimed expenses by element of cost as identified in accounting records (Chart of Accounts) for each final indirect cost pool.

(D) *Occupancy expenses (intermediate indirect cost pool)*. Schedule of claimed expenses by element of cost as identified in accounting records (Chart of Accounts) and expense reallocation to final indirect cost pools.

(E) Claimed allocation bases, by element of cost, used to distribute indirect costs.

(F) Facilities capital cost of money factors computation.

(G) Reconciliation of books of account (*i.e.*, General Ledger) and claimed direct costs by major cost element.

(H) Schedule of direct costs by contract and subcontract and indirect expense applied at claimed rates, as well as a subsidiary schedule of Government participation percentages in each of the allocation base amounts.

(I) Schedule of cumulative direct and indirect costs claimed and billed by contract and subcontract.

(J) *Subcontract information*. Listing of subcontracts awarded to companies for which the contractor is the prime or upper-tier contractor (include prime and subcontract numbers; subcontract value and award type; amount claimed during the fiscal year; and the subcontractor name, address, and point of contact information).

(K) Summary of each time-and-materials and labor-hour contract information, including labor categories, labor rates, hours, and amounts; direct materials; other direct costs; and, indirect expense applied at claimed rates.

(L) Reconciliation of total payroll per IRS form 941 to total labor costs distribution.

(M) Listing of decisions/agreements/approvals and description of accounting/organizational changes.

(N) Certificate of final indirect costs (see 52.242–4, Certification of Final Indirect Costs).

(O) Contract closing information for contracts physically completed in this fiscal year (include contract number, period of performance, contract ceiling amounts, contract fee computations, level of effort, and indicate if the contract is ready to close).

(iv) The following supplemental information is not required to determine if a proposal is adequate, but may be required during the audit process:

(A) Comparative analysis of indirect expense pools detailed by account to prior fiscal year and budgetary data.

(B) General Organizational information and Executive compensation for the five most highly compensated executives. See 31.205–6(p). Additional salary reference information is available at [http://www.whitehouse.gov/omb/procurement\\_index\\_exec\\_comp/](http://www.whitehouse.gov/omb/procurement_index_exec_comp/).

(C) Identification of prime contracts under which the contractor performs as a subcontractor.

(D) Description of accounting system (excludes contractors required to submit a CAS Disclosure Statement or contractors where the description of the accounting system has not changed from the previous year's submission).

(E) Procedures for identifying and excluding unallowable costs from the costs claimed and billed (excludes contractors where the procedures have not changed from the previous year's submission).

(F) Certified financial statements and other financial data (*e.g.*, trial balance, compilation, review, *etc.*).

(G) Management letter from outside CPAs concerning any internal control weaknesses.

(H) Actions that have been and/or will be implemented to correct the weaknesses described in the management letter from subparagraph (G) of this section.

(I) List of all internal audit reports issued since the last disclosure of internal audit reports to the Government.

(J) Annual internal audit plan of scheduled audits to be performed in the fiscal year when the final indirect cost rate submission is made.

(K) Federal and State income tax returns.

(L) Securities and Exchange Commission 10-K annual report.

(M) Minutes from board of directors meetings.

(N) Listing of delay claims and termination claims submitted which contain costs relating to the subject fiscal year.

(O) Contract briefings, which generally include a synopsis of all pertinent contract provisions, such as: Contract type, contract amount, product or service(s) to be provided, contract performance period, rate ceilings,

advance approval requirements, pre-contract cost allowability limitations, and billing limitations.

(v) The Contractor shall update the billings on all contracts to reflect the final settled rates and update the schedule of cumulative direct and indirect costs claimed and billed, as required in paragraph (d)(2)(iii)(I) of this section, within 60 days after settlement of final indirect cost rates.

\* \* \* \* \*

(5) \* \* \* The completion invoice or voucher shall include settled subcontract amounts and rates. The prime contractor is responsible for settling subcontractor amounts and rates included in the completion invoice or voucher and providing status of subcontractor audits to the contracting officer upon request.

\* \* \* \* \*

■ 7. Amend section 52.216–8 by revising the date of the clause and paragraph (b) to read as follows:

#### 52.216–8 Fixed Fee.

\* \* \* \* \*

#### Fixed Fee (JUN 2011)

\* \* \* \* \*

(b) Payment of the fixed fee shall be made as specified in the Schedule; provided that the Contracting Officer withholds a reserve not to exceed 15 percent of the total fixed fee or \$100,000, whichever is less, to protect the Government's interest. The Contracting Officer shall release 75 percent of all fee withholds under this contract after receipt of an adequate certified final indirect cost rate proposal covering the year of physical completion of this contract, provided the Contractor has satisfied all other contract terms and conditions, including the submission of the final patent and royalty reports, and is not delinquent in submitting final vouchers on prior years' settlements. The Contracting Officer may release up to 90 percent of the fee withholds under this contract based on the Contractor's past performance related to the submission and settlement of final indirect cost rate proposals.

\* \* \* \* \*

■ 8. Amend section 52.216–9 by revising the date of the clause and paragraph (c) to read as follows:

#### 52.216–9 Fixed Fee—Construction.

\* \* \* \* \*

#### Fixed Fee—Construction (JUN 2011)

\* \* \* \* \*

(c) The Contracting Officer shall withhold a reserve not to exceed 15 percent of the total fixed fee or \$100,000, whichever is less, to protect the Government's interest. The Contracting Officer shall release 75 percent of all fee withholds under this contract after receipt of an adequate certified final indirect cost rate proposal covering the year of physical completion of this contract, provided the Contractor has satisfied all other contract terms and conditions, including the submission of the final patent



and royalty reports, and is not delinquent in submitting final vouchers on prior years' settlements. The Contracting Officer may release up to 90 percent of the fee withholds under this contract based on the Contractor's past performance related to the submission and settlement of final indirect cost rate proposals.

\* \* \* \*

■ 9. Amend section 52.216–10 by revising the date of the clause and paragraph (c) to read as follows:

**52.216–10 Incentive Fee.**

\* \* \* \*

**Incentive Fee (JUN 2011)**

\* \* \* \*

(c) *Withholding of payment.* (1) Normally, the Government shall pay the fee to the Contractor as specified in the Schedule. However, when the Contracting Officer considers that performance or cost indicates that the Contractor will not achieve target, the Government shall pay on the basis of an appropriate lesser fee. When the Contractor demonstrates that performance or cost clearly indicates that the Contractor will earn a fee significantly above the target fee, the Government may, at the sole discretion of the Contracting Officer, pay on the basis of an appropriate higher fee.

(2) Payment of the incentive fee shall be made as specified in the Schedule; provided that the Contracting Officer withholds a reserve not to exceed 15 percent of the total incentive fee or \$100,000, whichever is less, to protect the Government's interest. The Contracting Officer shall release 75 percent of all fee withholds under this contract after receipt of an adequate certified final indirect cost rate proposal covering the year of physical completion of this contract, provided the Contractor has satisfied all other contract terms and conditions, including the submission of the final patent and royalty reports, and is not delinquent in submitting final vouchers on prior years' settlements. The Contracting Officer may release up to 90 percent of the fee withholds under this contract based on the Contractor's past performance related to the submission and settlement of final indirect cost rate proposals.

\* \* \* \*

[FR Doc. 2011–12852 Filed 5–27–11; 8:45 am]

**BILLING CODE 6820–EP–P**

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 4, 9, and 52

[FAC 2005–52; FAR Case 2008–009; Item III; Docket 2009–0020, Sequence 1]

RIN 9000–AL28

#### 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 have adopted as final, with changes, the interim rule amending the Federal Acquisition Regulation (FAR) to implement section 743 of Division D of the Omnibus Appropriations Act, 2009. 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. For Fiscal Year (FY) 2010, the same restrictions were continued under section 740 of Division C of the Consolidated Appropriations Act, 2010.

**DATES:** *Effective Date:* May 31, 2011.

**FOR FURTHER INFORMATION CONTACT:** Ms. Cecelia L. Davis, Procurement Analyst, at (202) 219–0202, for clarification of content. Please cite FAC 2005–52, FAR Case 2008–009. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 74 FR 31561 on July 1, 2009, to implement section 743 of the Division D of the Omnibus Appropriations Act, 2009 (Pub. L. 111–8). Section 743 of Division D of this Act prohibited the use of Federal appropriated funds for FY 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. On December 16, 2009, section 740 of Division C of the Consolidated Appropriations Act, 2010 (Pub. L. 111–117), also prohibited the use of Federal

appropriated funds for FY 2010. Eight respondents submitted comments on the interim rule.

## II. Discussion and Analysis of the Public Comments

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

### A. Applicability to Fiscal Years (FY) 2006 and 2007 Funds

*Comment:* Three respondents commented that the interim rule inaccurately applies the ban on contracting with inverted domestic corporations to funds appropriated in FY 2006 and FY 2007 on a Governmentwide basis. Section 743 of Division D of the Omnibus Appropriations Act, 2009, and section 745 of the Consolidated Appropriations Act, 2008, prohibit all Federal agencies from using appropriated funds on contracts with any foreign incorporated entity that is treated as an inverted domestic corporation or the subsidiary of such a corporation. In FY 2006 and FY 2007, the statutory prohibition was limited to agencies funded under the Treasury, Transportation and Housing Appropriation (Pub. L. 109–115, Pub. L. 109–289, Pub. L. 109–369, Pub. L. 109–383, and Pub. L. 110–5).

*Response:* The Councils agree with the respondents that the prohibition in the FY 2006 and FY 2007 appropriations bills only covers a limited number of agencies, whereas the FY 2008 and FY 2009 prohibition applies Governmentwide. The Councils therefore have revised FAR 9.108–3 to apply the prohibition to the use of FY 2008 and FY 2009 appropriated funds. The Councils recommend that each covered agency continue with its implementation of the FY 2006 and FY 2007 prohibitions because the required implementation has probably already occurred within the covered agencies.

### B. Applicability to Task Orders

*Comment:* One respondent commented that the interim rule fails to reflect a statutory exception for funds expended on task orders issued under contracts entered into before December 26, 2007. Section 743(c) of Division D of the Omnibus Appropriations Act, 2009, and section 745(c) of Division D of Public Law 110–161 (the Consolidated Appropriations Act, 2008) each provide that “This section shall not apply to any