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# PRATT'S GOVERNMENT CONTRACTING LAW REPORT



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Victoria Prussen Spears

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# FAR Council Proposes New Rules on Inverted Corporations; Congress Voices Support

*By Jennifer Plitsch and Michael Wagner\**

*The authors of this article discuss two new Federal Acquisition Regulatory Council rules—one interim, one proposed—which would reinforce the existing ban on contracting with so-called “inverted domestic corporations,” while also imposing new, more onerous reporting obligations on government contractors.*

The Federal Acquisition Regulatory (“FAR”) Council recently announced two new rulemaking actions aimed at further tightening restrictions on the award of federal contracts to companies that have relocated overseas in inversion transactions. The two rules—one interim, one proposed—would reinforce the existing ban on contracting with so-called “inverted domestic corporations” (“IDCs”), while also imposing new, more onerous reporting obligations on government contractors. The FAR Council’s announcement represents only the latest development in a recent surge of inversion-related measures. As discussed further below, the shifting rules and requirements envisioned by these myriad proposals carries the potential to trip up even sophisticated contractors.

## INTERIM RULE

Congress has advanced a number of legislative proposals this year aimed at tightening restrictions on contracting with IDCs. With its announcements, the FAR Council has added a regulatory gloss on this flurry of activity. First, the Council issued an interim rule,<sup>1</sup> which became effective December 15, 2014, that revises the language of FAR 9.108, the provision governing IDCs. Unlike some of the legislative proposals advanced this year, the interim rule does not go so far as to expand the definition of an IDC. Still, even the rule’s supposedly “technical” changes are revealing. First, rather than specifying a list of appropriations bills that have imposed the ban, the new rule simply says that the ban will continue to apply going forward as long as “successor provisions” are not removed from subsequent appropriations acts. Second, the new rule includes—for the first time—language that affirmatively directs contracting officers to “consult with legal counsel” if a company becomes an IDC during

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<sup>1</sup> <http://www.gpo.gov/fdsys/pkg/FR-2014-12-15/pdf/2014-29153.pdf>.

the course of performance on a contract. The intent of the revisions, as explained in the Federal Register notice, is clear: to emphasize “the ongoing nature of the prohibition for as long as Congress extends the prohibition in its current form through subsequent appropriations action.”

### **PROPOSED RULE**

Furthermore, the FAR Council also simultaneously announced a new proposed rule<sup>2</sup> that would impose additional disclosure and reporting obligations on contractors. Currently, FAR 52.209-2(c) provides that a contractor's submission of an offer operates as a representation that it is not an IDC. The proposed rule would recast this representation to require offerors to affirmatively complete two yes-or-no check-off boxes addressing their IDC status. Although this change does not alter the substance of the representation, the new format highlights the question in a manner that reflects the government's closer scrutiny of the inversion issue.

Moreover, the proposed rule also would amend FAR 52.209-10 to require a contractor to give “written notification of its change in status as an inverted domestic corporation to the contracting officer within five business days from the date of the inversion event.” This entirely new obligation, and it raises further questions in its own right. For example, the proposed rule offers no guidance on the form and content of the notification that would be required, and it is silent as to whether the contractor would be permitted to continue performance of the contract following a change in IDC status.<sup>3</sup> In short, although the stated purpose of the proposed rule is to facilitate “clear, current, accurate, and complete disclosure,” its application in practice may ultimately create additional uncertainty for contractors.

### **SUPPORT IN CONGRESS**

Contractors should note that the FAR Council's proposed actions have already received vocal support from interested members of Congress. On December 19, 2014, a coalition of U.S. senators sent a letter to the Internal Revenue Service (“IRS”)<sup>4</sup> that, among other things, pointedly urged the agency to “work closely with other federal agencies to ensure that existing restrictions on awarding federal contracts to inverted corporations are properly enforced.”

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<sup>2</sup> <http://www.gpo.gov/fdsys/pkg/FR-2014-12-15/html/2014-29151.htm>.

<sup>3</sup> The interim rule is similarly unclear about this latter point. The notice accompanying the interim rule states only that contracting officers should “consult with legal counsel if a contractor becomes an inverted domestic corporation (or a subsidiary of one) during contract performance to ensure appropriate application of the prohibition.”

<sup>4</sup> <http://www.levin.senate.gov/newsroom/press/release/senators-urge-irs-to-strengthen-rules-to-stop-tax-motivated-corporate-inversions/?section=alltypes>.

The letter specifically referenced the FAR Council's announcement of an interim rule, but also called for "the FAR rules regarding contracting with inverted corporations to be coordinated with [the IRS's] new tax regulations." If the IRS heeds this call for action, contractors can expect the spotlight on IDCs to grow even hotter.

### **CONCLUSION**

In the meantime, however, the FAR Council's recent proposals warrant attention in their own right. Not only do these announcements signal an escalation in the government's efforts to enforce the existing IDC ban, but they also would impose additional tracking and reporting obligations relating to complex legal questions. Given the emphasis on developing and enforcing anti-inversion rules, contractors would be well-advised to closely monitor this issue, as well as to consider the need for proactive engagement and planning.