

Prohibition on Contract Awards to Companies That Were Formerly Based in the United States

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On January 29, 2013, a final rule was issued prohibiting the award of contracts to inverted domestic corporations. The final rule requires an offeror to represent that it is not an inverted domestic corporation and creates potential liability if the contractor's legal status changes after the contract is awarded.

An inverted domestic corporation is a company that used to be incorporated (or be a partnership) in the United States, but now is incorporated in a foreign country. The definition also includes a subsidiary whose parent is incorporated in a foreign country, is substantially owned by former shareholders of the subsidiary, and does not have substantial business activities in the foreign country. Concerned that U.S.-based companies were reorganizing as inverted domestic corporations in order to avoid paying U.S. taxes, Congress for several years has prohibited the use of appropriated funds to award contracts to such corporations. The January 29th final rule adopted the FAR Council's May 10, 2012 interim rule implementing Congress' prohibition on using Fiscal Year 2012 funds to contract with inverted domestic corporations. The Continuing Appropriations Resolution, Pub. L. 112-175, which appropriated Fiscal Year 2013 funds through March 27, 2013, extended the prohibition. Given past practices, it is likely that Congress will further extend the prohibition to cover all Fiscal Year 2013 funds.

The final rule has two important components. First, solicitations now require a representation that the offeror is not an inverted domestic corporation or a subsidiary of an inverted domestic corporation. Second, all contracts are to include a clause stating that if the offeror either reorganizes as or becomes a subsidiary of an inverted domestic corporation, "the Government may be prohibited from paying for Contractor activities performed after the date it becomes an inverted domestic corporation or a subsidiary" and permitting the Government to seek any other available breach of contract remedies.

If you have questions, please contact the Pillsbury attorney with whom you regularly work, or the authors.

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