VIA FEDERAL RULEMAKING PORTAL AND FIRST CLASS MAIL

General Services Administration
Regulatory Secretariat (VPR)
1800 F. Street, NW.
Room 4035
Washington, D.C. 20405
Attn: Ms. Hada Flowers


Dear Ms. Flowers:

On behalf of the Section of Public Contract Law of the American Bar Association (“the Section”), I am submitting comments on the above-referenced matter (hereafter “Interim Rule”). The Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section’s governing Council and substantive committees have members representing these three segments, to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.¹

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association’s Board of Governors. The views expressed herein have not been approved by the House of Delegates or the

¹ The Honorable Thomas C. Wheeler, a member of the Section’s Council, did not participate in the Section’s consideration of or voting on these comments.
I. BACKGROUND


II. The Interim Rule Should Have Been Issued As A Proposed Rule To Afford The Public The Opportunity For Meaningful Comment

The Office of Federal Procurement Policy (“OFPP”) Act, 41 U.S.C. § 418b(a)(2) provides, in pertinent part, that “no procurement policy, regulation, procedure, or form ... may take effect until 60 days after [it] is published for comment in the Federal Register.” Subsection (d) authorizes agencies to waive this advance-notice requirement “if urgent and compelling circumstances make compliance with such requirements impracticable.” Id. § 418b(d).

2 This letter is available in pdf format at http://www.abanet.org/contract/regscomm/home.html under the topic “Emerging Areas.”
The Section believes that, with rare exception, the better practice is for agencies to provide the public with an opportunity to assess and comment on proposed regulations before implementing them. In the July 1, 2009 Interim Rule, however, the Councils invoked this waiver by stating that “urgent and compelling reasons exist to promulgate this interim rule without prior public comment.” 74 Fed. Reg. at 31563. The Interim Rule explained that the “urgent and compelling reason” is implementation of a statutory scheme that “is currently in effect.” 74 Fed. Reg. at 31563. To support this rationale, the Interim Rule cites FAR 1.501-3(b), which provides that “urgent and compelling circumstances” may exist “when a statute must be implemented in a relatively short period of time.” This provision also states that “the coverage shall be issued on a temporary basis.”

Although the FY 2009 Act is “currently in effect,” the prohibition that the Councils seek to implement has been in effect for quite some time. Thus, this statutory prohibition is not new; it is essentially the same prohibition that Congress has fashioned in one form or another for years. Although the effect of these prohibitions was limited to specific departments or agencies, Congress first enacted a government-wide restriction on doing business with inverted domestic corporations in December 2007. Because that restriction has been in existence for over two years without regulatory action, the Section questions whether it was necessary to bypass the public-comment requirements, particularly where there has been no change between the FY 2008 and 2009 restriction. Because the Councils did not promulgate a rule relating to identical appropriations provisions in FY 2008 and 2009, nor similar provisions in previous appropriations, the Section is concerned that there may not be truly exigent reasons for truncating the normal rulemaking processes.

Although agencies are entitled to depart from past practice, when they do so they must offer a meaningful explanation for that change in course. If they do not, a reviewing court will overturn the agency action as arbitrary and capricious. See Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973). The Supreme Court has emphasized that “[w]hatever the ground for the departure from prior norms, . . . it must be clearly set forth so that the reviewing court may understand the basis of the agency’s action and so may judge the consistency of that action with the agency’s mandate.” Id. Here, the Interim Rule does not explain the basis for the Councils’ immediate issuance of rules on inverted domestic corporations when in the past they have not issued any regulations when faced with identical or substantially similar statutory mandates.

Although few cases interpret the scope of the “urgent and compelling” circumstances exception in the OFPP Act (41 U.S.C. § 418b), the Administrative
Procedure Act ("APA") contains a similar requirement. The APA requires agencies to give notice by publication thirty days before the effective date of a rule subject to a "good cause" exception. Courts have noted that this exception should be construed narrowly and is essentially an emergency procedure. See Utility Solid Waste Activities Group v. EPA, 236 F.3d 749, 754-55 (D.C. Cir. 2001). In the APA context, to determine whether good cause exists, the agency should "balance the necessity for immediate implementation against principles of fundamental fairness which require that all affected persons be afforded a reasonable amount of time to prepare for the effective date of its ruling." Omnipoint Corp. v. FCC, 78 F.3d 620, 630 (D.C. Cir. 1996) (citing United States v. Gavrilovic, 551 F.2d 1099, 1105 (8th Cir. 1977)).

Arguably, § 418b contains a more stringent test by requiring a showing of "urgent and compelling" circumstances rather than just "good cause." The Section respectfully contends that the Interim Rule meets neither standard and that the identified circumstances do not outweigh the public's right to comment on the rule and prepare for its application before it takes effect.

III. The Interim Rule Does Not Comport With The Statute

In addition to the procedural issues discussed above, the Section has identified several substantive concerns with the Interim Rule. First, the Councils permanently amended the FAR in response to a temporary restriction that has varied somewhat from year to year. Second, the rule applies the FY 2006-2007 restriction to agencies not covered by the statutory restriction. Third, the Interim Rule links the definition of inverted domestic corporations to an unrelated rule in the Internal Revenue Code ("Tax Code"). Finally, the Section recommends that the Councils revise the procedure for determining inverted-corporation status.

A. The Interim Rule Adopts A Permanent Response To A Temporary Restriction

The Interim Rule reflects a permanent FAR change in response to a temporary restriction that has historically changed every year. Since FY 2006, Congress' approach has been to pass restrictions on doing business with inverted domestic corporations as part of the annual appropriations acts. There is currently

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3 See Munitions Carriers Conf., Inc. v. United States, 932 F. Supp. 334 (D.D.C. 1996), rev'd on other grounds, 147 F.3d 1027 (D.C. Cir. 1998), which holds that § 418b gives private litigants a right of action against the Government. Id. at 338. The court cited a series of APA cases and applied 5 U.S.C. § 706(2)(D) (court may set aside agency actions found to be "without observance of procedure required by law") to help interpret the scope of § 418b. Id. at 339-40.
no permanent government-wide restriction against doing business with inverted
domestic corporations. The Councils recognized that the Interim Rule applies only
to FY 2006-2009 appropriations. FAR 9.108-5, a permanent FAR clause, now
applies only to contracts funded with FY 2006-2009 appropriations.

Given that the FAR provision will be outdated within two months (FY 2009
ends September 30, 2009), the Councils will soon need to issue yet another new
rule. The FAR will need to be amended every year to reflect the changing status of
the inverted-corporations restriction. These changes are likely to involve more than
just updating the year. Variation in the restriction from FY 2006-2009 shows that
Congress has taken somewhat different approaches in some years. For example,
although the restriction applied government-wide in FY 2008 and 2009, it applied
only to certain agencies in FY 2006 and 2007. In fact, Congress has applied the
ban government-wide only in years where it enacted a consolidated or omnibus
Appropriations Act.

It also appears that Congress may soon change the scope of the restriction
again. The current provision in the FY 2010 Senate Financial Services
Appropriations bill contains an exception to the restriction if it would violate any
international treaties. S. 1432, 111th Cong. § 740 (2009). This would require a
substantive change to the FAR provision.

B. The Interim Rule Should Not Apply To FY 2006 And 2007
Funds

As discussed above, the FY 2006 Appropriations Acts applied only to
certain agencies. In FY 2007, Congress passed several continuing appropriations
resolutions that carried the FY 2006 restrictions forward. Thus, for FY 2006 and
2007, the inverted-corporations restriction did not apply government-wide. The
Interim Rule, however, explicitly applies the restriction to all agencies using
FY 2006-09 funds. See 74 Fed. Reg. at 31564. To the extent that the Interim Rule
applies to agencies not covered in the FY 2006 restriction, there is no statutory
basis for the rule; therefore, the Section believes that there is no statutory authority
to promulgate a government-wide rule for these years.

C. The Interim Rule Should Not Refer To Tax Code Definitions

The relevant appropriations acts from FY 2006-09 all define inverted
Although the Councils recognized that the Tax Code and DHS statute are not
identical, they chose to incorporate the Tax Code definition into the contracting
restriction on the basis that Congress did not “intend to set up two different
statutory schemes for handling inverted domestic corporations.” 74 Fed. Reg. at
31562. Accordingly, the Interim Rule states that a corporation that is treated as an inverted corporation for purposes of the Tax Code is also an inverted domestic corporation for purposes of the DHS statute and the FAR. 74 Fed. Reg. at 31564.

Yet, neither the DHS statute, the relevant appropriations acts, nor the relevant legislative histories contain any reference to the Tax Code. See 6 U.S.C. § 395(b); Pub. L. No. 109-115 § 724, Pub. L. No. 110-161 § 745, Pub. L. No. 111-8 § 743. Moreover, Congress passed an inverted domestic corporation ban four years in a row without reference to the Tax Code, which indicates that Congress did not intend to incorporate the Tax Code definition.

Tying the FAR definition to the Tax Code exacerbates the problem by creating a second level of required analysis. Thus, changes to both the annual appropriations restrictions and the Tax Code will create an ongoing need to amend the FAR. Accordingly, the Section recommends that the Councils consider an approach that does not require cyclical updating to the FAR definition and instead simply incorporates the Homeland Security Act definition directly.

Moreover, tying the Interim Rule to the Tax Code creates a significant risk that policymakers and interested parties might not realize that future amendments to the Tax Code affect the government-wide contracting ban. Congress, when amending the Tax Code, would have no reason to think that such an amendment would also apply to the contracting ban. If the inverted corporation definition for Tax Code purposes changes through Treasury regulations, the procurement statute would utilize a definition promulgated by an unrelated agency. Either way, parties interested in the contracting ban would have no notice that such an important restriction is about to change. The Section believes that this is an unintended consequence of linking the two statutes.

Furthermore, the Interim Rule could place the Councils in the position of interpreting substantive provisions of statutes of two other agencies – DHS and IRS. A 1979 United States Attorney General Opinion analyzed the scope of the OFPP Administrator’s powers to interpret other agencies’ statutes. 4 43 U.S. Op. Atty. Gen. 150 (1979). The opinion concludes that Congress did not intend that the powers of the OFPP Administrator extend to construction of the substantive provisions of the labor statutes at issue, including the question of whether a class of procurement contracts is subject to the labor statutes. The opinion analyzed the history of the OFPP Act, concluding that Congress recognized a distinction

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4 Although this opinion referred to the authority of the OFPP Administrator, rather than the Councils (which did not exist at the time), it is relevant to the Interim Rule because it interprets the scope of the OFPP Act.
between the procurement aspects of socio-economic statutes and the substantive enforcement of the statutes. The Attorney General Opinion involved different agencies and statutes, but the basic premise applies equally to the inverted domestic corporations issue: OFPP sets Government-wide procurement policy, and the agencies interpret their own substantive regulations.

Finally, the Tax Code applies only to inversions that occurred after March 4, 2003. Congress specifically chose not to apply the Tax Code inversions definition to transactions before that date for tax purposes. In addition, there is no indication that Congress intended for the Tax Code definition to apply to transactions before such date for other purposes. Moreover, there appears to be no basis for incorporating all aspects of the Tax Code definition, except for the effective date. Thus, although the Section believes (as discussed above) that the Tax Code definition should not be incorporated by regulation into the contracting restriction, any application of the Tax Code definition, whether for tax purposes or otherwise, should be subject to its statutory effective date.

D. The Procedure For Determining Inverted-Corporation Status Should Be Revised

In the Supplementary Information to the Interim Rule, the Councils cite a “list of high profile inversions occurring before February 2002” but state that they do not know whether these corporations would fall under the contracting ban. The Interim Rule contemplates that each contractor will have to represent that it is not an inverted domestic corporation for every contract it enters into with the federal government. Each Contracting Officer (CO) must then “rigorously examine circumstances known to him or her that would lead a reasonable business person to question the contractor self-certification, and after consultation with legal counsel, take appropriate action where questionable self-certification cannot be verified.” FAR 9.108-3(b). Indeed, the background section to the Interim Rule threatens COs with criminal penalties even though there is no basis for this in the appropriations restrictions. 74 Fed. Reg. at 31563. The threat of criminal penalties for government employees may unnecessarily strain relationships between COs and contractors and make status determinations extremely burdensome. This procedure is also inefficient because it places the burden of determination on many COs. COs are not in the best position to make the determination, and different COs may reach multiple conclusions regarding a single contractor. By allowing time for public notice and comment, the Councils will benefit from public input regarding a more efficient system for determining inverted domestic corporation status.
IV. CONCLUSION

For the reasons discussed above, the Section recommends that the Councils withdraw the current Interim Rule and issue a Notice of Proposed Rulemaking that allows interested parties additional time to comment and prepare for application of a final rule. In drafting the new Notice, the Section recommends that the Councils utilize a definition of inverted domestic corporations that closely tracks the statutory requirement by incorporating the Homeland Security Act definition.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

Karen L. Manos
Chair, Section Public Contract Law

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