PART 3009—CONTRACTOR QUALIFICATIONS

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Parent topic: SUBCHAPTER B—ACQUISITION PLANNING

Subpart 3009.1—Responsible Prospective Contractors

3009.108-70 Prohibition on contracts with corporate expatriates.

3009.108-7001 General.

Except as provided in (HSAR) 48 CFR 3009.108-7004, DHS may not enter into any contract with a foreign incorporated entity which is treated as an inverted domestic corporation under subsection (b) of section 835 of the Homeland Security Act, 6 U.S.C. 395(b), or any subsidiary of such an entity.

3009.108-7002 Definitions.

As used in this subpart—

Expanded Affiliated Group means an affiliated group as defined in section 1504(a) of the Internal Revenue Code of 1986 (without regard to section 1504(b) of such Code), except that section 1504 of such Code shall be applied by substituting ‘more than 50 percent’ for ‘at least 80 percent’ each place it appears.

Foreign Incorporated Entity means any entity which is, or but for section 835(b) of the Homeland Security Act, 6 U.S.C. 395(b), would be, treated as a foreign corporation for purposes of the Internal Revenue Code of 1986.

Inverted Domestic Corporation. A foreign incorporated entity shall be treated as an inverted domestic corporation if, pursuant to a plan (or a series of related transactions)—

(1) The entity completes the direct or indirect acquisition of substantially all of the properties held directly or indirectly by a domestic corporation or substantially all of the properties constituting a trade or business of a domestic partnership;

(2) After the acquisition at least 80 percent of the stock (by vote or value) of the entity is held—

(i) In the case of an acquisition with respect to a domestic corporation, by former shareholders of the domestic corporation by reason of holding stock in the domestic corporation; or

(ii) In the case of an acquisition with respect to a domestic partnership, by former partners of the domestic partnership by reason of holding a capital or profits interest in the domestic partnership; and

(3) The expanded affiliated group which after the acquisition includes the entity does not have substantial business activities in the foreign country in which or under the law of which the entity is created or organized when compared to the total business activities of such expanded affiliated group.

Person, domestic, and foreign have the meanings given such terms by paragraphs (1), (4), and (5) of section 7701(a) of the Internal Revenue Code of 1986, respectively.

3009.108-7003 Special rules.

The following special rules shall apply when determining whether a foreign incorporated entity should be treated as an inverted domestic corporation.

(a) *Certain stock disregarded.* For the purpose of treating a foreign incorporated entity as an inverted domestic corporation these shall not be taken into account in determining ownership:

(1) Stock held by members of the expanded affiliated group which includes the foreign incorporated entity; or

(2) Stock of such entity which is sold in a public offering related to the acquisition described in subsection (b)(1) of section 835 of the Homeland Security Act, 6 U.S.C. 395(b)(1).

(b) *Plan deemed in certain cases.* If a foreign incorporated entity acquires directly or indirectly substantially all of the properties of a domestic corporation or partnership during the 4-year period beginning on the date which is 2 years before the ownership requirements of section 835(b)(2) of the Act are met, such actions shall be treated as pursuant to a plan.

(c) *Certain transfers disregarded.* The transfer of properties or liabilities (including by contribution or distribution) shall be disregarded if such transfers are part of a plan a principal purpose of which is to avoid the purposes of this section.

(d) *Special rule for related partnerships.* For purposes of applying subsection (b) to the acquisition of a domestic partnership, except as provided in regulations, all domestic partnerships which are under common control (within the meaning of section 482 of the Internal Revenue Code of 1986) shall be treated as a partnership.

(e) *Treatment of certain rights.*

(1) Certain rights shall be treated as stocks to the extent necessary to reflect the present value of all equitable interests incident to the transaction, as follows:

(i) Warrants;

(ii) Options;

(iii) Contracts to acquire stock;

(iv) Convertible debt instruments;

(v) Others similar interests.

(2) Rights labeled as stocks shall not be treated as stocks whenever it is deemed appropriate to do so to reflect the present value of the transaction or to disregard transactions whose recognition would defeat the purpose of section 835 of the Act.

3009.108-7004 Waivers.

(a) The Secretary shall waive the provisions of (HSAR) 48 CFR 3009.108-7001 with respect to any specific contract if the Secretary determines that the waiver is required in the interest of national security.

(b) Contractors shall submit waiver requests to the CPO. A copy of the waiver request or the approved waiver shall be attached with the bid or proposal.

3009.108-7005 Provision.

Insert the provision (HSAR) 48 CFR 3052.209-70, Prohibition on Contracts with Corporate Expatriates, in all solicitations.

3009.171 Prohibition on Federal Protective Service guard services contracts with business concerns owned, controlled, or operated by an individual convicted of a felony.

3009.171-1 General.

Except as provided in (HSAR) 48 CFR 3009.171-6 and 3009.171-7, Department of Homeland Security (DHS) contracting officers shall not enter into a contract for guard services under the Federal Protective Service (FPS) guard services program with any business concern owned, controlled, or operated by an individual convicted of a serious felony.

3009.171-2 Definitions.

As used in this subpart—

Business concern means a commercial enterprise and the people who constitute it.

Felony means an offense which, if committed by a natural person, is punishable by death or imprisonment for a term exceeding one year.

Convicted of a felony means any conviction of a felony in violation of state or federal criminal statutes, including the Uniform Code of Military Justice, whether entered on a verdict or plea, including a plea of *nolo contendere*, for which a sentence has been imposed.

Individual means any person, corporation, partnership, or other entity with a legally independent status.

3009.171-3 Determination of eligibility for award of FPS guard service contracts.

(a) Contracting officers shall make a determination of eligibility for award of FPS guard service contracts upon identification of the apparent successful offeror as a result of a solicitation for offers.

(b) Contractors shall be required to immediately notify the contracting officer in writing upon any felony conviction of personnel who own, control or operate a business concern as defined in (HSAR) 48 CFR 3009.171-4 at any time during the duration of an Indefinite Delivery/Indefinite Quantity Contract, Blanket Purchase Agreements, or other contractual instrument that may result in the issuance of task orders or calls, or exercise of an option or options to extend the term of a contract. Upon notification of a felony conviction, the contracting officer shall review and make a new determination of eligibility prior to the issuance of any task order, call or exercise of an option.

3009.171-4 Determination of ownership, control, or operation.

(a) Whether an individual owns, controls, or operates a business concern is determined on the specific facts of the case, with reference to the factors identified in paragraphs (b) and (c) of this subsection. Prior to contract award, such individual must provide any additional documentation to the contracting officer upon the contracting officer's request for the agency's use in determining ownership, control, or operation. The refusal to provide or to timely provide such documentation may serve as grounds for the contracting officer to refuse making contract award to the business concern.

(b) Any financial, voting, operational, or employment interest in the business concern of a spouse, child, or other family member of, or person sharing a household with, the individual will be imputed to the individual in determining whether and the extent to which the individual owns, controls, or operates the business concern.

(c) An individual owns, controls, or operates a business concern by fulfilling or holding the following types of roles or interests with respect to the business concern:

(1) Director or officer, including incumbents of boards and offices that perform duties ordinarily performed by a chairman or member of a board of directors, a secretary, treasurer, president, a vice president, or other chief official of a business concern, including Chief Financial Officer, Chief Operating Officer, or Chief contracting official.

(2) Officials of comparable function and status to those described in paragraph (c)(1) of this subsection as exist in partnerships of all kind and other business organizations, including sole proprietorships.

(3) A general partner in a general or limited partnership.

(4) An individual with a limited partnership interest of 25% or more.

(5) An individual that has the:

(i) Power to vote, directly or indirectly, 25% or more interest in any class of voting stock of the business concern;

(ii) Ability to direct in any manner the election of a majority of the business concern's directors or trustees; or

(iii) Ability to exercise a controlling influence over the business concern's management, policies, or decision making.

(d) Generally, the existence of one or more of the roles or interests set forth in paragraph (c) of this subsection, including roles or interests attributed to the individual, will be sufficient to determine that the individual owns, controls or operates the business concern. However, specific facts of the case may warrant a different determination by the contracting officer, where, for example, an indicator in paragraph (c) of this subsection, in light of all of the facts and circumstances, suggests that the individual lacks sufficient authority or autonomy to exert authority customarily associated with ownership or control or the assertion of operational prerogatives (e.g. the individual is one of twenty on a board of directors, plays no other role, and holds no other interest). Conversely, ownership, control, or the ability to operate the business concern, if it exists in fact, can be reflected by other roles or interests.

3009.171-5 Serious felonies prohibiting award.

(a) Only serious felony convictions will prohibit a business concern from being awarded a contract for FPS guard services. Serious felonies that will prohibit contract award are any felonies that involve dishonesty, fraud, deceit, misrepresentation, or deliberate violence; that reflect adversely on the individual's honesty, trustworthiness, or fitness to own, control, or operate a business concern; that cast doubt on the integrity or business ethics of the business concern; or are of a nature that is inconsistent with the mission of FPS, including, without limitation, those felonies listed in paragraphs (b)

(1) through (12) of this subsection.

(b) The following is a list of offenses determined by DHS to be serious felonies for purposes of the Federal Protective Service Guard Reform Act of 2008. Except as provided in (HSAR) 48 CFR 3009.171-7(f), award of a contract for FPS guard services will not be made to any business that is owned, controlled, or operated by an individual who has been convicted of a felony involving:

(1) Fraud of any type, including those arising out of a procurement contract, cooperative agreement, grant or other assistance relationship with the federal, state or local government, as well as, without limitation, embezzlement, fraudulent conversion, false claims or statements, kickbacks, misappropriations of property, unfair or deceptive trade practices, or restraint of trade;

(2) Bribery, graft, or a conflict of interest;

(3) Threatened or actual harm to a government official or family member;

(4) Threatened or actual harm to government property;

(5) A crime of violence;

(6) A threat to national security;

(7) Commercial bribery, counterfeiting, or forgery;

(8) Obstruction of justice, perjury or subornation of perjury, or bribery of a witness;

(9) An attempt to evade or defeat Federal tax;

(10) Willful failure to collect or pay over Federal tax;

(11) Trafficking in illegal drugs, alcohol, firearms, explosives, or other weapons;

(12) Immigration violations (e.g., 8 U.S.C. 1324, 1324c, 1326); and

(13) Any other felony that involves dishonesty, fraud, deceit, misrepresentation, or deliberate violence; that reflects adversely on the individual's honesty, trustworthiness, or fitness to own, control, or operate a business concern; that casts doubt on the integrity or business ethics of the business concern; or is of a nature that is inconsistent with the mission of FPS.

3009.171-6 Guidelines for contracting officers.

(a) In accordance with FAR Subpart 9.4 (48 CFR subpart 9.4), a contracting officer may not award a contract for FPS guard services to any business concern that is suspended, debarred or proposed for debarment unless the agency head determines that there is a compelling reason for such action.

(b) The contracting officer shall not award a contract for FPS guard services to any business concern that is otherwise nonresponsible on the same contract.

(c) The contracting officer shall not award an FPS guard services contract to any business concern that is owned, controlled or operated by an individual convicted of a serious felony as defined in (HSAR) 48 CFR 3009.171-5 except as provided in under (HSAR) 48 CFR 3009.171-7.

(d) In considering an award request under (HSAR) 48 CFR 3009.171-7, the contracting officer may not review the fact of the conviction itself, but may consider any information provided by the individual or business concern, and any information known to the contracting officer. Factors that the contracting officer may consider include, but are not limited to:

(1) The age of the conviction.

(2) The nature and circumstances surrounding the conviction.

(3) Protective measures taken by the individual or business concern to reduce or eliminate the risk of further misconduct.

(4) Whether the individual has made full restitution for the felony.

(5) Whether the individual has accepted responsibility for past misconduct resulting in the felony conviction.

3009.171-7 Contract award approval procedures for contractors with felony convictions.

(a) The HCA has sole discretion to approve a request to permit award of a contract for FPS guard services to a business concern owned, controlled, or operated by an individual convicted of a felony, for any reason permitted by this regulation. This authority is not delegable.

(b) A business concern owned, operated or controlled by an individual convicted of any felony (including a serious felony) may submit an award request to the contracting officer. The basis for such request shall be that the subject felony is not a serious felony as defined by this regulation; that such individual does not or no longer owns, controls or operates the business concern; or that the commission of a serious felony no longer poses the contract risk the Act and this regulation were designed to guard against. The business concern shall bear the burden of proof for award requests.

(c) A copy of the award approval request with supporting documentation or a previously approved award request shall be attached with the bid or proposal.

(d) An award approval request shall contain the basis for the request, including, at a minimum, the following information:

(1) Name and date of birth of individual convicted of a felony;

(2) A full description of which roles or interests indicate that the individual owns, controls, or operates, or may own control or operate the business concern;

(3) Date sentenced;

(4) Statute/Charge;

(5) Docket/Case Number;

(6) Court/Jurisdiction;

(7) The nature and circumstances surrounding the conviction;

(8) Protective measures taken by the individual or business concern to reduce or eliminate the risk of further misconduct;

(9) Whether the individual has made full restitution for the felony; and

(10) Whether the individual has accepted responsibility for past misconduct resulting in the felony conviction.

(e) If the contracting officer is unable to affirmatively determine that the subject felony is not a serious felony as defined in (HSAR) 48 CFR 3009.171-5; that such individual no longer owns, controls or operates the business concern; or that the commission of a serious felony no longer calls into question the individual or business concern's integrity or business ethics and would be consistent with the mission of FPS, then the contracting officer shall deny the award approval request and not forward such request to the HCA.

(f) For a felony that meets any of the following conditions, the contracting officer shall refer the award request, with a copy of the contracting officer's determination, to the HCA with a recommendation for approval:

(1) The subject felony is not a serious felony as defined by this regulation;

(2) The convicted individual does not or no longer owns, controls or operates the business concern; or

(3) The commission of a serious felony no longer calls into question the individual or business concern's integrity or business ethics and that an award would be consistent with the mission of the

FPS.

(g) The HCA shall make a final written decision on the award approval request following referral and after any necessary additional inquiry.

3009.171-8 Ineligible contractors.

Any business concern determined to be ineligible for award under (HSAR) 48 CFR 3009.171-5 to 3009.171-7 shall be ineligible to receive a contract for guard services under the FPS guard program until such time as:

(a) The concern demonstrates that it has addressed and resolved the issues that resulted in the determination of ineligibility, and

(b) The HCA approves an award request under (HSAR) 48 CFR 3009.171-7.

3009.171-9 Clause.

Insert the clause (HSAR) 48 CFR 3052.209-76, Prohibition on Federal Protective Service guard services contracts with business concerns owned, controlled, or operated by an individual convicted of a felony, in all solicitations and contracts for FPS guard services.

Subpart 3009.4 [Reserved]

Subpart 3009.5—Organizational and Consultant Conflicts of Interest

3009.507 Solicitation provision and contract clause. [Reserved]

3009.507-1 Solicitation clause.

The contracting officer shall insert a clause substantially the same as (HSAR) 3052.209-72, Organizational Conflict of Interest, in solicitations and contracts where a potential organizational conflict of interest exists and mitigation may be possible. The contracting officer shall ensure the conditions enumerated in (FAR) 48 CFR subpart 9.5 warrant inclusion. The contracting officer shall include the information required by (FAR) 48 CFR 9.507-1 and (HSAR) 3052.209-72(a).

3009.507-2 Contract clause.

The contracting officer shall insert a clause substantially the same as the clause at (HSAR) 48 CFR 3052.209-73, Limitation of Future Contracting, in solicitations and contracts when a potential organizational conflict of interest exists and mitigation is not feasible.

3009.570 Limitations on contractors acting as lead system integrators.

3009.570-1 Definitions.

“Direct Financial Interest,” as used in this section, is defined in the clause at HSAR 48 CFR 3052.209-75, Prohibited Financial Interests for Lead System Integrators.

“Lead system integrator,” as used in this section, is defined in the clause at (HSAR) 48 CFR 3052.209-75, Prohibited Financial Interests for Lead System Integrators.

3009.570-2 Policy.

(a) Except as provided in paragraph (b) of this subsection, under 6 U.S.C. 396, no entity performing lead system integrator functions in the acquisition of a major system (See (HSAR) 48 CFR 3002.101) by DHS may have any direct financial interest in the development or construction of any individual system or element of any system of systems under the program in which the entity is performing lead system integrator functions.

(b) The prohibition in paragraph (a) of this subsection does not apply if—

(1) The Secretary of Homeland Security certifies to the Committees on Appropriations of the Senate and the House of Representatives, the Committee on Homeland Security of the House of Representatives, the Committee on Transportation and Infrastructure of the House of Representatives, the Committee on Homeland Security and Governmental Affairs of the Senate, and the Committee on Commerce, Science and Transportation of the Senate that—

(i) The entity was selected by DHS as a contractor to develop or construct the system or element concerned through the use of competitive procedures, and

(ii) DHS took appropriate steps to prevent any organizational conflict of interest in the selection process; or

(2) The entity was selected by a subcontractor to serve as a lower-tier subcontractor, through a process over which the entity exercised no control.

(c) CONSTRUCTION—Nothing in this section 3009.570 shall be construed to preclude an entity described in paragraph (a) of this subsection from performing work necessary to integrate two or more individual systems or elements of a system of systems with each other.

3009.570-3 Procedures.

In making a responsibility determination before awarding a contract for the acquisition of a major system, the contracting officer shall—

(a) Determine whether the prospective contractor meets the definition of “lead system integrator”;

(b) Consider all information regarding the prospective contractor's direct financial interests in view of the prohibition at (HSAR) 48 CFR 3009.570-2(a); and

(c) Apply the following procedures:

(1) After assessing the offeror's direct financial interests in the development or construction of any individual system or element of any system of systems, if the offeror—

(i) Has no direct financial interest in such systems, the contracting officer shall document the contract file to that effect and may then further consider the offeror for award of the contract;

(ii) Has a direct financial interest in such systems, but the exception in (HSAR) 3009.570-2(b)(2) applies, the contracting officer shall document the contract file to that effect and may then further consider the offeror for award of the contract;

(iii) Has a direct financial interest in such systems and the exception in (HSAR) 3009.570-2(b)(2) does not apply, but the conditions in (HSAR) 3009.570-2(b)(1)(i) and (ii) do apply, the contracting officer—

(A) Shall document the contract file to that effect;

(B) May, in coordination with program officials, request an exception for the offeror from the Secretary of Homeland Security, in accordance with Homeland Security Acquisition Manual section 3009.570; and

(C) Shall not award to the offeror unless the Secretary of Homeland Security grants the exception and provides the required certification to Congress; or

(iv) Has a direct financial interest in such systems and the exceptions in (HSAR) 3009.570-2(b)(1) and (2) do not apply, the contracting officer shall not award to the offeror.

3009.570-4 Solicitation provision and contract clause.

(a) Use the provision at (HSAR) 48 CFR 3052.209-74, Limitations on Contractors Acting as Lead System Integrators, in solicitations for the acquisition of a major system when the acquisition strategy envisions the use of a lead system integrator.

(b) Use the clause at (HSAR) 48 CFR 3052.209-75, Prohibited Financial Interests for Lead System Integrators—

(1) In solicitations that include the provision at (HSAR) 48 CFR 3052.209-74; and

(2) In contracts when the contractor will fill the role of a lead system integrator for the acquisition of a major system.