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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

48 CFR Parts 1, 4, 9, 12, and 52

[FAC 2005-91; FAR Case 2015-011; Item I; Docket No. 2015-0011, Sequence No. 1]

RIN 9000-AN05

**Federal Acquisition Regulation; Prohibition on Contracting with Corporations with Delinquent Taxes or a Felony Conviction**

**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, without changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement sections of the Consolidated and Further Continuing Appropriations Act, 2015, to prohibit the Federal Government from entering into a contract with any corporation having a delinquent Federal tax liability or a felony conviction under any Federal law, unless the agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.

**DATES:** Effective: [INSERT DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

**FOR FURTHER INFORMATION CONTACT:** Ms. Cecelia L. Davis, Procurement Analyst, at 202-219-0202 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite FAC 2005-91, FAR Case 2015-011.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD, GSA, and NASA published an interim rule in the Federal Register at 80 FR 75903 on December 4, 2015, to implement sections 744 and 745 of Division E of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and section 523 of Division B of the same act. Three respondents submitted comments on the interim rule.

**II. Discussion and Analysis**

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 are provided as follows:

**A. Summary of public comments**

There were no changes made in the final rule as a result of the three public comments.

**B. Analysis of public comments**

**1. Need for the rule.**

Comment: Two respondents expressed support for the interim rule. According to the respondents, this rule will facilitate more rigorous scrutiny of companies with a recent Federal conviction or unpaid Federal taxes and will help ensure that Federal contractors conduct themselves with the highest degree of integrity and honesty.

Response: Noted.

Comment: The other respondent said the rule is unnecessary, given the existing statutory and regulatory framework. This respondent noted that tax and criminal statutes already include penalties for tax delinquency and felony conviction, such as the Internal Revenue Code (title 26) and the Criminal Code (title 18). Furthermore, the respondent noted that the FAR already includes Federal tax delinquency and criminal malfeasance as causes for debarment. The respondent stated that agencies already reliably utilize suspension and debarment processes.

Response: This rule is necessary to implement the requirements of sections 744 and 745 of Division E, title VIII of the Consolidated and Further Continuing Resolution Appropriations Act, 2015, as well as section 523 of Division B, title V of the same act (affects Commerce, Justice, NASA, and some related agencies). These appropriations act restrictions, although having some overlap with existing laws, have specific provisions that are not identical to

existing laws and regulations, and must be implemented in order to avoid misuse of appropriated funds.

## **2. Meaning of "corporation".**

Comment: One respondent requested clarification as to what entities are and are not corporations for the purposes of this rule. The respondent stated that the term "corporation" could encompass C corporations, S corporations, and limited liability corporations (LLCs), among others. The respondent is concerned that if the rule applies to LLCs and S corporations, through which tax liability falls at the individual rather than the corporate level, that failure of one shareholder to pay taxes could adversely affect all shareholders. Likewise, the respondent is concerned how the rule would be applied if a shareholder or member of the entity is convicted of a felony.

The respondent is also concerned about how this rule applies to a joint venture and teaming. First, can a corporation avoid disclosure of a felony conviction if it becomes a member of a joint venture? Second, if the joint venture is a corporate entity, are the underlying entities that make up the joint venture required to disclose tax delinquencies and felonies?

Response: No change is made. The term "corporation" is used throughout the FAR without definition. If a term is used in the FAR without definition, then it has

the standard dictionary definition. A corporation is a legal entity that is separate and distinct from the entities that own, manage, or control it. It is organized and incorporated under the jurisdictional authority of a governmental body, such as a State or the District of Columbia. The law does not specify any particular type of corporation. The most common type of corporation in the U.S. is the subchapter C corporation - authorized under State law, and subject to tax under subchapter C of the Internal Revenue Code (IRC). Most publicly traded corporations are C corporations. The IRC and other governing statutes authorize specialized corporations including the subchapter S corporation (e.g., per the IRC and State laws), professional corporation (PC) (e.g., per State laws), and limited liability company (LLC) (e.g., per State laws).

Section 744 applies to "any corporation that has any unpaid Federal tax liability..." Section 745 applies to "any corporation that was convicted of a felony criminal violation under any Federal law..." Any corporation, including pass-through entities such as the S corporation and the LLC, may have an unpaid Federal tax liability - there are Federal tax liabilities other than corporate income tax liability. While the S corporation and LLC may not incur Federal income tax liabilities as pass-through

entities, they may incur Federal employment tax liabilities under subtitle C of 26 U.S.C. for payroll tax withholdings, social security and Medicare taxes; as well as various Federal excise tax liabilities, e.g., under subtitle D of 26 U.S.C. on communications and air transportation facilities and services, coal, medical devices, group health plans, and failure to maintain minimum essential health insurance coverage; and under subtitle E of 26 U.S.C. on alcohol and tobacco, machine guns, some other firearms, and structured settlement factoring transactions.

The corporation is an artificial construct, a legally created entity that generally has the same rights and responsibilities as a natural person. Thus, the corporation is not automatically immune from being convicted of a felony criminal violation under any Federal law merely because it is an artificial entity. A corporation can commit crimes as it can be held criminally liable for the illegal act of its directors, officers, employees, agents, or shareholders under the legal doctrine of respondeat superior. A corporation cannot be jailed if convicted. Otherwise, it faces the same consequences as a natural person following conviction. Depending on the facts and circumstances, any corporation may be convicted of a felony criminal violation under any Federal law, separate and apart from any felony criminal conviction of any of its directors,

officers, employees, agents, or shareholders. While the liabilities of the corporate entity are separate from the liabilities of its shareholders generally because they are separate legal entities, the shareholders may become liable for corporate liabilities under the legal doctrine of piercing the corporate veil. Under certain facts and circumstances, a court may pierce the corporate veil and ignore the legal separateness of the corporation and its shareholders, and hold the shareholders and other principals personally liable for what would otherwise be corporate liabilities.

Joint ventures and other teaming arrangements are temporary business arrangements where two or more parties agree to work together to achieve a specific task or objective, e.g., usually a new project, business activity, or a contract. A joint venture or other teaming arrangement is not necessarily a corporation - it all depends upon the legal structure and arrangement chosen for the temporary relationship formed by the members of the teaming arrangement. FAR 9.601 defines two types of teaming arrangements: two or more companies form a partnership or joint venture entity to act as a potential prime contractor - the joint venture teaming arrangement; or a potential prime contractor agrees with one or more companies to have them act as its subcontractors under a specified Government

contract or acquisition program - the prime-subcontractor teaming arrangement. In either type of teaming arrangement, the parties to the arrangement may be existing or newly created entities, or a combination thereof. With respect to the prime-subcontractor teaming arrangement, the prime contractor is subject to the rule if it is a corporation. With respect to the joint venture teaming arrangement, the joint venture can take many legal forms, including as a C corporation, LLC, or partnership. If the prime contractor(s) in the joint venture teaming arrangement is a corporation, it is subject to the rule. Conversely, if the prime contractor(s) in the joint venture teaming arrangement is(are) not a corporation, it is not subject to the rule, i.e., the legal form of the joint venture teaming arrangement will determine whether the joint venture prime contractor(s) is(are) subject to the rule. See FAR 4.102 for the signatories for the various prime contractor entity types. If the signatory for the prime contractor is a corporation, it is subject to the rule.

If the offeror or contractor is uncertain as to its legal status as a corporation, the offeror or contractor needs to consult with its legal counsel to determine whether it is a corporation subject to sections 744 and 745.

### **3. Finality of felony criminal conviction.**



Comment: One respondent noted that the rule requires contractors to report assessed, unpaid Federal tax liability only when all judicial and administrative remedies have been exhausted or have lapsed. The respondent noted, however, that the rule requires a contractor to disclose conviction of a felony criminal violation under any Federal law within the preceding 24 months, but does not provide any consideration as to whether the contractor has appealed the decision and such an appeal is pending. The respondent recommends that the rule should require disclosure of convictions only after all judicial remedies have been exhausted.

Response: No change is made. The disclosure requirements of this rule are based on the statutory requirements of section 744 and 745. Section 745 applies to "any corporation that was convicted of a felony criminal violation under any Federal law within the preceding 24 months." Unlike section 744 which requires the exhaustion of all judicial and administrative remedies for any unpaid Federal tax liability, the plain text of section 745 does not require the exhaustion of all judicial and administrative remedies for a felony criminal violation conviction before it is applicable.

#### **4. Response time for debarring official.**

Comment: One respondent is concerned that the lack of requirement for a reasonable response time for a debarring official to make a decision under this rule will likely delay the procurement process. The respondent recommends that the debarment official should be required to make a determination within five business days of receiving the inquiry from a contracting officer. According to the respondent, after the five days expires, the determination should automatically default to no suspension or debarment.

Response: No change is made. Sections 744 and 745 do not require the suspending or debarring official to issue a determination to suspend or debar a corporation in accordance with the normal suspension and debarment process (see FAR subpart 9.4). If statutory text similar to the text of these sections is in an appropriations act, the funds appropriated by such an act are prohibited from being used to award to a corporation that has delinquent Federal taxes or has been convicted of a Federal felony unless the suspending or debarring official makes a positive determination that suspension or debarment is not necessary to protect the interests of the Government.

#### **5. Out of scope.**

Comment: Two respondents recommended that because this rule has a zero tolerance for tax delinquencies, the FAR Council should remove the \$3,500 threshold for reporting

of tax delinquencies at FAR 9.104-5(a)(2) and paragraph (a)(1)(i)(D) of the provision at 52.209-5, Certification Regarding Responsibility Matters. The respondents also recommended expanding the certification provision at FAR 52.209-12 to include reporting of State and local tax delinquencies.

Response: These recommendations are outside the scope of this rule, which is to implement sections 744 and 745 of division E and section 523 of division B of the Consolidated and Further Continuing Resolution Appropriations Act, 2015. The certification at FAR 52.209-5(a)(1)(i)(D) with regard to delinquent Federal taxes was inserted in the FAR under FAR Case 2006-011 at the request of the Senate Permanent Subcommittee on Investigations. The certification in FAR 52.209-5 covers delinquent Federal taxes in excess of \$3,500 within the past three years, is required in all solicitations when the contract value is expected to exceed the simplified acquisition threshold, and is used along with other factors in the determination of contractor responsibility. The representations in this final rule are based on an annual appropriations act funding restriction, and are required to be included in all solicitations when awards are made with such restricted appropriated funds. There is no de minimis amount of delinquent Federal taxes which does not need to be reported.

These requirements are only in effect with respect to the affected appropriated funds when the funding restrictions are included in the specific annual appropriations act. The law does not restrict the award with appropriated funds to entities with regard to State and local tax delinquencies. Thus, there are no representations required as to the status of State and local tax delinquencies. 41 U.S.C. 1304, as implemented at FAR 1.107, prohibits the inclusion of non-statutory certifications unless justified in writing to the Administrator for Federal Procurement Policy.

**III. Applicability to Acquisitions Not Greater than the Simplified Acquisition Threshold and Commercial Items (Including Commercially Available Off-the-Shelf (COTS) Items).**

The FAR Council and the Administrator for Federal Procurement Policy have determined that it would not be in the best interest of the Federal Government to exempt acquisitions with estimated value not greater than the simplified acquisition threshold and contracts for the acquisition of commercial items (including COTS items) from the application of these appropriations act restrictions.

**IV. 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 not a significant regulatory action and, therefore, was not 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.

#### **V. Regulatory Flexibility Act**

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

This rule implements sections 744 and 745 of Division E of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) (and similar provisions in subsequent appropriations acts) to prohibit using any of the funds made available under that or any other act to enter a contract with any corporation with any delinquent Federal tax liability or a felony conviction, unless the agency has considered suspension or debarment of the corporation and has made a determination that this further action is not necessary to protect the interests of the Government.

The rule also implements section 523 of Division B of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) (and similar provisions in subsequent appropriations acts). This section prohibits award of any contract in an amount greater than \$5,000,000, unless the offeror affirmatively certifies that it has filed all Federal tax returns required during the three years preceding the certification; has not been convicted of a criminal offense under the Internal Revenue Code of 1986; and has not, more than 90 days prior to certification, been

notified of any unpaid Federal tax assessment for which the liability remains unsatisfied, unless the assessment is the subject of an installment agreement or offer in compromise that has been approved by the Internal Revenue Service and is not in default, or the assessment is the subject of a non-frivolous administrative or judicial proceeding.

DoD, GSA, and NASA published an interim rule in the Federal Register at 80 FR 75903 on December 4, 2015, to implement sections 744 and 745 of Division E of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) and section 523 of Division B of the same act. Three respondents submitted comments on the interim rule. No comments were received from the public relative to the initial regulatory flexibility analysis.

Based on current data with regard to active registrants in the System for Award Management (SAM), the rule will apply to approximately 65,000 small business concerns, which are required to complete the annual representations and certifications at least once per year in order to keep their registration in SAM current.

The information collection requirement imposed by this rule is minimal - a brief representation, and in some cases also a certification, each estimated to require an average of 6 minutes to complete.

DoD, GSA, and NASA were unable to identify any significant alternatives that would reduce the impact on small businesses and still meet the objectives of the statute. However, other than the potential for not receiving award if the small entity is delinquent in payment of Federal taxes or has been convicted of a felony, there is no significant economic impact on small entities because the information collection burden imposed by the rule is minimal.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

## **VI. Paperwork Reduction Act**

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies. The rule contains information collection

requirements. OMB has cleared this information collection requirement under OMB Control Number 9000-0193, titled: Prohibition on Contracting with Corporations with Delinquent Taxes or a Felony Conviction.

**List of Subjects in 48 CFR Parts 1, 4, 9, 12, and 52**

Government procurement.

Dated: September 19, 2016.

William F. Clark,  
Director,  
Office of Government-wide  
Acquisition Policy,  
Office of Acquisition Policy,  
Office of Government-wide Policy.

**Interim Rule Adopted as Final Without Change**

Accordingly, the interim rule amending 48 CFR parts 1, 4, 9, 12, and 52, which published in the Federal Register at 80 FR 75903 on December 4, 2015, is adopted as a final rule without change.

**BILLING CODE 6820-EP**

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