



**4810-25-P**  
**DEPARTMENT OF THE TREASURY**

**48 CFR Parts 1009 and 1052**

**Department of the Treasury Acquisition Regulations; Tax Check Requirements**

**AGENCY:** Department of the Treasury.

**ACTION:** Interim rule.

**SUMMARY:** Pursuant to Section 6103 of the Internal Revenue Code, taxpayer return information, with few exceptions, is confidential. Under this authority, officers and employees of the Department of the Treasury may have access to taxpayer return information as necessary for purposes of tax administration. The Department of the Treasury has determined that an Internal Revenue Service (IRS) contractor's compliance with the tax laws is a tax administration matter and that taxpayer return information is needed for determining an offeror's eligibility to receive an award, including but not limited to implementation of the statutory prohibition of making an award to corporations that have an unpaid Federal tax liability. This interim rule amends the Department of the Treasury Acquisition Regulation (DTAR) for the purposes of supplementing the Federal Acquisition Regulation (FAR). This interim rule will amend the DTAR by adding a subpart titled "Responsible Prospective Contractor" and a paragraph concerning Representation and certifications regarding responsibility matters, for the purpose of directing IRS contracting officers to the newly added DTAR subpart titled "Tax Check Requirement," which prescribes the policies and procedures for performing a tax check on the apparent successful offeror in order to determine eligibility to receive an award.

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

*Comment due date:* Interested parties should submit written comments to the Department of the Treasury on or before [INSERT DATE THAT IS 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER] to be considered in the formation of the final rule.

**ADDRESSES:** Treasury invites comments on the topics addressed in this interim rule. Comments may be submitted to Treasury by any of the following methods: by submitting electronic comments through the federal government e-rulemaking portal, [www.regulations.gov](http://www.regulations.gov) or by sending paper comments to Department of the Treasury, Office of the Procurement Executive, Attn: Thomas O’Linn, 1722 I Street NW, Mezzanine – M12C, Washington, DC 20006.

In general, Treasury will post all comments to [www.regulations.gov](http://www.regulations.gov) without change, including any business or personal information provided, such as names, addresses, e-mail addresses, or telephone numbers. All comments, including attachments and other supporting materials received are part of the public record and subject to public disclosure. You should submit only information that you wish to make publicly available.

**FOR FURTHER INFORMATION CONTACT:** Thomas O’Linn, Procurement Analyst, Office of the Procurement Executive, at (202) 622-2092.

**SUPPLEMENTARY INFORMATION:**

**Background**

The DTAR, which supplements the Federal Acquisition Regulation (FAR), is codified at 48 CFR Chapter 10.

**A. General.** It is in the interest of the United States Government to only award contracts to entities that are responsible and law abiding. This is codified in FAR 9.104 by requiring contracting officers to perform a responsibility determination prior to each contract award by using the standards at FAR 9.104-1, as well as consider information submitted by the contractor and information they research or acquire from other sources. The IRS administers the Internal Revenue Code as enacted by Congress. Since fiscal year 2012, language in the annual Consolidated Appropriations Act has prohibited the Federal Government under various conditions from using appropriated funds to enter into a contract with a prospective contractor unless the prospective contractor certifies in writing that it has not been notified of any unpaid Federal tax assessment. Most recently, Sections 744 and 745 of Division E of the Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) prohibits the Federal Government from entering into a contract with any corporation where the awarding agency is aware of an unpaid Federal tax liability.

For purposes of tax administration, the IRS has access to taxpayer return information that is not otherwise available to other Federal Agencies pursuant to 26 U.S.C. 6103(h)(1). The Department of the Treasury has determined that an IRS contractor's compliance with the tax laws is a tax administration matter. Additionally, 26 U.S.C. 6103(c) authorizes the IRS to disclose a taxpayer's return information to such person(s) as the taxpayer may designate in a consent to such disclosure. In many cases, however, the official signing a contract proposal on behalf of an offeror will not be an official to whom the IRS is authorized to disclose the offeror's tax information. Thus, in order to ensure that IRS is authorized is to discuss the offeror's own tax information with an authorized official of the offeror, a consent to disclosure is required. This consent to disclosure must be in the form of a separate written document pertaining solely to the authorized disclosure and must be signed and dated by an authorized person as required

and defined in 26 U.S.C. 6103(c) and 26 CFR 301.6103(c)-1(e)(4).

This interim rule amends the DTAR to establish policies and procedures that facilitate successful, timely, and economical execution of IRS contractual actions in compliance with the FAR and various appropriation restrictions. Specifically, this interim rule establishes an express requirement for IRS contracting officers to use taxpayer return information that is available only to IRS to perform a tax check on the apparent successful offeror for purposes of determining eligibility to enter into a contract with the IRS. The IRS has established an internal Procedure, Guidance and Information (PGI) that further supplements the DTAR requirement for IRS contracting officers to use when conducting a tax check. To ensure compliance with 26 U.S.C. 6103(h)(1) and to safeguard taxpayer return information, the PGI restricts the number of personnel within the IRS Office of Procurement who have access to tax compliance information. The PGI also limits the amount of information provided to the contracting officer regarding a delinquent Federal tax liability. Upon notification by the contracting officer that the offeror has a delinquent Federal tax liability, the offeror may provide the contracting officer with documentation that demonstrates the offeror's tax status as paid-in-full or that an approved payment agreement has been reached, at which time the contracting officer will coordinate with the appropriate office within IRS to validate the offeror's tax status (see FAR 9.104-5(a)(1), (b)(1) and (e)).

The offeror may want to take steps to confirm it does not have a delinquent Federal tax liability prior to submission of its response to the solicitation. If the offeror recently settled a delinquent Federal tax liability, the offeror may want to take steps to obtain information in order to demonstrate the offeror's responsibility to the contracting officer, if such information is requested (see FAR 9.104-5(a)(1) and (b)(1)).

**B. FAR supplement.** This interim rule will supplement paragraph (b) of FAR 9.104-5, Representation and certifications regarding responsibility matters, for the purpose of directing

IRS contracting officers to the newly added DTAR subpart 1009.70, which prescribes the policies and procedures for performing a tax check on the apparent successful offeror to determine eligibility to receive an award.

**C. Subpart.** This interim rule will add DTAR subparts 1009.1, Responsible Prospective Contractors, and 1009.70, Tax Check Requirements. This latter subpart prescribes the policies and procedures IRS contracting officers will use for performing a tax check on the apparent successful offeror to determine eligibility to receive an award. Definitions of terms “authorized representative(s) of the offeror,” “delinquent Federal tax liability” and “tax check” are included within this subpart. The definition of “authorized representative(s) of the offeror” is the person(s) identified to the IRS contracting officer by the offeror as authorized to represent the offeror in disclosure matters pertaining to the offer. The definition of “delinquent Federal tax liability” is derived from language within the FAR concerning Federal tax delinquency and unpaid Federal tax assessment (see FAR 9.104-5). The definition of “tax check” is an IRS process that accesses and uses taxpayer return information, that is available only to IRS, to support the Government’s determination of an offeror’s eligibility to receive an award, including but not limited to implementation of the statutory prohibition of making an award to corporations that have an unpaid Federal tax liability (see FAR 9.104-5(b)).

**D. Provision.** This interim rule will add a provision to be inserted in all IRS solicitations regardless of dollar value, including those for commercial items. The provision will notify offerors that the IRS will conduct a tax check because the Department of the Treasury has determined that an IRS contractor’s compliance with the tax laws is a tax administration matter, and that taxpayer return information is needed for determining an offeror’s eligibility to receive an award, including but not limited to implementation of the statutory prohibition of making an award to corporations that have a unpaid Federal tax liability (see FAR 9.104-5(b)). The provision will also contain a consent to disclosure to be signed and dated by a person authorized

to act on behalf of the offeror as defined in 26 CFR 301.6103(c)-1(e)(4). The consent to disclosure will authorize the officers and employees of the Department of the Treasury, including the IRS, to disclose the results of the tax check to the person(s) authorized by the offeror via the signed consent to disclosure.

### **Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items**

This provision will apply to all IRS solicitations regardless of the dollar value, including commercial items (including Commercially Available Off-the-Shelf items). This determination is consistent with the FAR requirements regarding the inclusion of the provisions 52.209-5, 52.209-11 and 52.212-3 as well as various appropriation restrictions.

### **Regulatory Planning and Review**

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.

### **Determination To Issue an Interim Rule**

Tax liability is a serious matter and there have been a number of congressional hearings and subsequent actions taken by Congress to ensure that appropriated funds are not spent with entities with a delinquent Federal tax liability. Most recently, Section 744 of Division E of the

Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. 113-235) (and similar provisions in prior appropriations acts since 2012) prohibits the Federal Government from entering into a contract with any corporation where the awarding agency is aware of an unpaid Federal tax liability, 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. This prohibition has been implemented in the FAR under FAR 9.104-5. Considering all these factors, it is in the interest of the United States Government to only award contracts to entities that are responsible and law abiding.

As such a determination has been made under the authority of the Secretary of Treasury that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. Even absent this rule, IRS would have a duty under the appropriations act provision not to award contracts to entities with delinquent tax liability, and to review available tax information for this purpose. However, IRS would not have clear authority to discuss any adverse information with the offeror to which it pertained. The only effect of delaying the rule to consider public comment would be to increase the likelihood that offerors will be disqualified due to adverse tax information that could have been clarified or resolved if the rule were in place. For the same reason, the effective date is set as immediately upon publication. However, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), Treasury will consider public comments received in response to this interim rule in the formation of the final rule.

### **Regulatory Flexibility Act**

The Regulatory Flexibility Act (5 U.S.C. chapter 6) generally requires agencies to conduct an initial regulatory flexibility analysis and a final regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

It is hereby certified that this interim rule will not have a significant economic impact on a substantial number of small entities. This interim rule will amend the DTAR to establish an internal process that strengthens IRS' compliance with appropriation act restrictions and the FAR prohibition of entering into a contract with contractors having a delinquent Federal tax liability (see FAR subpart 9.1) and should not have significant economic impacts on small entities other than the potential for not receiving award if the small entity has a delinquent Federal tax liability. This rule does not impose any new reporting, recordkeeping or other compliance requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules. No significant alternatives were identified during the development of this rule. Notwithstanding this certification, the Department welcomes comments on the potential impact on small entities.

#### **List of Subjects in 48 CFR Parts 1009 and 1052**

Government procurement.

Accordingly, the Department of the Treasury amends 48 CFR Chapter 10 as follows:

#### **PART 1009—CONTRACTOR QUALIFICATIONS**

1. The authority citation for part 1009 continues to read as follows:

Authority: 41 U.S.C. 418(b).

2. Add subpart 1009.1 to read as follows:

#### **Subpart 1009.1—Responsible Prospective Contractors**

##### **1009.104 Standards.**

##### **1009.104-5 Representation and certifications regarding responsibility matters.**

(b) Internal Revenue Service (IRS) contracting officers shall comply with the

requirements of subpart 1009.70 once an offeror has been identified as the apparent successful offeror.

3. Add subpart 1009.70 to read as follows:

**Subpart 1009.70—Tax Check Requirements**

Sec.

1009.7000 Scope of subpart.

1009.7001 Definition.

1009.7003 Policy.

1009.7004 Procedure.

1009.7005 Solicitation provision.

**Subpart 1009.70—Tax Check Requirements**

**1009.7000 Scope of subpart.**

This subpart prescribes the IRS policies and procedures for performing a tax check on the apparent successful offeror to determine eligibility to receive an award.

**1009.7001 Definition.**

As used in this subpart—

*Authorized representative(s) of the offeror* means the person(s) identified to the Internal Revenue Service (IRS) within the consent to disclosure by the offeror as authorized to represent the offeror in disclosure matters pertaining to the offer.

*Delinquent Federal tax liability* means any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability.

*Tax check* means an IRS process that accesses and uses taxpayer return information to support the Government's determination of an offeror's eligibility to receive an award, including but not limited to implementation of the statutory prohibition of making an award to corporations that have a delinquent Federal tax liability (see FAR 9.104-5(b)).

**1009.7003 Policy.**

(a) There are various Federal laws and regulations that in aggregate prohibit the Federal Government from entering into a contract with an entity where the awarding agency is aware of an unpaid Federal tax liability (see FAR subpart 9.1) unless the agency has considered suspension or debarment and has made a determination that this further action is not necessary to protect the interests of the Government.

(b) IRS contracting officers shall include a provision in all solicitations regardless of dollar value, which contains a consent to disclosure to be signed and dated by a person authorized to act on behalf of the offeror as defined in 26 CFR 301.6103(c)-1(e)(4). The consent to disclosure will authorize officers and employees of the Department of the Treasury, including the IRS, to disclose the results of the tax check to the authorized representative(s) of the offeror. In the absence of a signed and dated consent to disclosure in an offer, taxpayer return information of the offeror may not be disclosed, which subsequently may remove the offeror from eligibility to receive an award.

#### **1009.7004 Procedure.**

IRS contracting officers shall not proceed with award, at any dollar value, until a tax check has been performed on the apparent successful offeror. See IRS Procedures, Guidance, and Information (PGI) 9.1.

(a) The contracting officer, regardless of an offeror's response in paragraph (a)(1) of the provision 52.209-5, Certification Regarding Responsibility Matters, paragraph (b)(1) of the provision at FAR 52.209-11, or paragraphs (h) and (q)(2)(i) of the provision at FAR 52.212-3 (see FAR 9.104-5(b)), shall request a tax check through the IRS designated point of contact. The request shall include only the information required for purposes of conducting the tax check.

(b) If the result of the tax check demonstrates the offeror as having a delinquent Federal tax liability, the contracting officer shall—

(1) Confirm the offer includes a signed and dated consent to disclosure (see 1052.209-70, Notice and Consent to Disclose and Use of Taxpayer Return Information), the absence of which may remove the offeror from eligibility to receive an award under the solicitation because taxpayer return information of the offeror may not be disclosed.

(2) If the consent to disclosure is completed in the offer, notify the authorized representative(s) of the offeror that a delinquent Federal tax liability exists and therefore the offeror is ineligible for award.

(i) If upon notification the offeror provides the contracting officer with documentation, within the timeframe specified by the contracting officer, that demonstrates the offeror's tax status as being paid-in-full or that an approved payment agreement is in place, the contracting officer will coordinate with the appropriate office within IRS to validate the tax status. If the offeror is found to be tax compliant, the contracting officer will notify the offeror of such.

Assuming the offeror meets all other standards of responsibility, the offeror is eligible for award.

(3) Notify, in accordance with IRS PGI 9.1, the Department of the Treasury official responsible for suspension and debarment for purposes of requesting a determination in accordance with FAR 9.104-5(a)(2) and FAR 9.104-5(b)(3) respectively before an award to that contractor can be made.

(c) If the result of the tax check demonstrates the offeror as tax compliant then the offeror is eligible for award, assuming all other standards of responsibility have been met.

(d) The contracting officer shall include in the contract file documentation that verifies the tax check was conducted and if the results confirm a delinquent Federal tax liability existed at the time of award, confirmation that the offeror was notified of such.

**1009.7005 Solicitation provision.**

(a) The contracting officer shall insert the provision 1052.209-70, Notice and Consent to Disclose and Use of Taxpayer Return Information, in all IRS solicitations regardless of dollar value, including solicitations for acquisition of commercial items (including Commercially Available Off-The-Shelf items).

**PART 1052—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

4. The authority citation for part 1052 continues to read as follows:

Authority: 41 U.S.C. 1707.

5. Add 1052.209-70 to subpart 1052.2 as follows:

**1052.209-70 Notice and Consent to Disclose and Use of Taxpayer Return Information.**

As prescribed in 1009.7005, insert the following provision:

**NOTICE AND CONSENT TO DISCLOSE AND  
USE OF TAXPAYER RETURN INFORMATION – (NOV 2017)**

(a) *Definitions.* As used in this provision—

*Authorized representative(s) of the offeror* means the person(s) identified to the Internal Revenue Service (IRS) within the consent to disclose by the offeror as authorized to represent the offeror in disclosure matters pertaining to the offer.

*Delinquent Federal tax liability* means any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability.

*Tax check* means an IRS process that accesses and uses taxpayer return information to support the Government's determination of an offeror's eligibility to receive an award, including but not limited to implementation of the statutory prohibition of making an award to corporations that have an unpaid Federal tax liability (see FAR 9.104-5(b)).

(b) *Notice.* Pursuant to 26 U.S.C. 6103(a) taxpayer return information, with few exceptions, is confidential. Under the authority of 26 U.S.C. 6103(h)(1), officers and employees of the Department of the Treasury, including the IRS, may have access to taxpayer return information as necessary for purposes of tax administration. The Department of the Treasury has determined that an IRS contractor's compliance with the tax laws is a tax administration matter and that the access to and use of taxpayer return information is needed for determining an offeror's eligibility to receive an award, including but not limited to

implementation of the statutory prohibition of making an award to corporations that have an unpaid Federal tax liability (see FAR 9.104-5).

(1) The performance of a tax check is one means that will be used for determining an offeror's eligibility to receive an award in response to this solicitation (see FAR 9.104). As a result, the offeror may want to take steps to confirm it does not have a delinquent Federal tax liability prior to submission of its response to this solicitation. If the offeror recently settled a delinquent Federal tax liability, the offeror may want to take steps to obtain information in order to demonstrate the offeror's responsibility to the contracting officer (see FAR 9.104-5).

(c) The offeror shall execute the consent to disclosure provided in paragraph (d) of this provision and include it with the submission of its offer. The consent to disclosure shall be signed by an authorized person as required and defined in 26 U.S.C. 6103(c) and 26 CFR 301.6103(c)-1(e)(4).

(d) Consent to disclosure. I hereby consent to the disclosure of taxpayer return information (as defined in 26 U.S.C. 6103(b)(2)) as follows:

The Department of the Treasury, Internal Revenue Service, may disclose the results of the tax check conducted in connection with the offeror's response to this solicitation, including taxpayer return information as necessary to resolve any matters pertaining to the results of the tax check, to the authorized representatives of [*insert OFFEROR NAME*] on this offer.

I am aware that in the absence of this authorization, the taxpayer return information of [*insert OFFEROR NAME*] is confidential and may not be disclosed, which subsequently may remove the offer from eligibility to receive an award under this solicitation.

I consent to disclosure of taxpayer return information to the following person(s):  
[*insert PERSON(S) NAME AND CONTACT INFORMATION*]: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

I certify that I have the authority to execute this consent on behalf of [*insert OFFEROR NAME*].

Offeror Name: \_\_\_\_\_

Offeror Taxpayer Identification Number: \_\_\_\_\_

Offeror Address: \_\_\_\_\_

Name of Individual Executing Consent: \_\_\_\_\_

Title of Individual Executing Consent: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

(End of provision)

Dated: November 6, 2017.

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Iris B. Cooper,

Senior Procurement Executive,

Office of the Procurement Executive

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