

New Federal Acquisition Regulation Rules Target Contractors with Delinquent Taxes

Legal Alert
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Garvey Schubert Barer Legal Update, April 25, 2008.

On April 22, 2008, the Government announced new Federal Acquisition Regulation rules to prevent contractors with certain delinquent taxes from obtaining federal contracts. The rules go into effect on May 22, 2008. These rules contain two basic provisions. One is a contract clause requiring a certification that will be included in new contracts, and the other adds a new basis for suspension and debarment.

For contracts awarded on and after May 22, 2008, the Federal Government will require contractors to certify that within the last three years they have not been "notified of any delinquent federal taxes in an amount that exceeds \$3,000 for which the liability remains unsatisfied," and they have not violated any federal criminal tax laws or evaded taxes (federal, state, local or foreign). If a contractor cannot so certify, the government will make a finding that the contractor is not "responsible" and therefore ineligible to be awarded a contract. There is a corresponding requirement for commercial items contracts.

Additionally, being delinquent in paying over \$3,000 in federal taxes, violating any federal criminal tax law, or evading taxes (federal, state, local or foreign) will be a basis for suspension or debarment. Unlike the certification requirement, suspension or debarment can be invoked even if a contractor is not seeking a contract. A contractor that is suspended or debarred by a federal agency is ineligible to receive any federal funds during the term of its suspension or debarment.

The new rules are generally limited to federal taxes. Be aware, however, "federal taxes" is broadly defined and likely includes all federal taxes, including without limitation income taxes, payroll

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taxes, excise taxes, and any interest or penalties relating thereto. Interestingly, the new rules do not extend to state, local or foreign taxes, except in the case of tax evasion.

While the new rules represent a significant change in government contracting, conscientious contractors are unlikely to run afoul of them because taxes are not considered delinquent until all judicial appeal rights have been exhausted, among other requirements.

Companies should know immediately whether they owe delinquent taxes. Given the seriousness of the penalty for failure to comply, any company doing business or anticipating doing business with the government should ensure that it does not owe any such taxes and create measures to ensure that such liability does not accrue in the future.