

ALERT

Agencies Finalize Rule Prohibiting Federal Contracts with Corporations that have Federal Tax Liability or a Felony Conviction

September 30, 2016

WHAT: The FAR Council has issued a final rule, without changes, to implement the Consolidated and Further Continuing Appropriations Act of 2015, which prohibits the Government from using certain appropriated funds for a contract with any corporation having a delinquent federal tax liability, or a federal felony conviction within the last 24 months, unless the agency suspension and debarment official has made a determination that suspension or debarment is not required to protect the interests of the Government.

WHEN: Effective September 30, 2016.

WHAT DOES IT MEAN FOR INDUSTRY: Although the final rule is a continuation of congressional policy, and the FAR Council made no changes to the interim rule, the Council's discussion of the comments it received is notable in three regards: the discussion of corporations covered, the *de minimis* certification requirement, and the apparent inapplicability of the normal processes for suspension and debarment in FAR subpart 9.4.

The final rule, and the interim rule that it adopts without change, require offerors for all solicitations to make a representation regarding whether the offeror is a corporation with a delinquent tax liability or a felony conviction under federal law. See FAR 52.209-11. If an offeror-corporation provides an affirmative response, the contracting officer is required to request additional information and will not award the contract to the offeror-corporation unless a suspension and debarment official has considered suspension or debarment of the corporation and determined that further action to

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protect the Government's interests is not necessary. The rule also includes a certification regarding tax matters, FAR 52.209-12, that applies to solicitations for which the contract may have a value greater than \$5,000,000, and that will use funds appropriated under Division B of the Consolidated and Further Continuing Appropriations Act, 2015. Division B of the Act appropriates funds for the Department of Commerce, DOJ, NASA, EEOC, the International Trade Commission, and other agencies.

Notable issues with the final rule include the following. First, asked whether the rule applies to various different corporate forms, the FAR Council stated that the FAR does not define "corporation" and thus, the dictionary definition applies. Thus, a variety of corporate types are potentially covered. Regarding joint ventures, the Council stated that whether the rule applies depends on the structure of the venture. If the joint venture is a corporation, and it is the prime contractor, it is subject to the rule. If the arrangement is actually a prime-subcontractor teaming arrangement, with no separate corporate entity formed, the prime contractor is subject to the rule if it is a corporation.

Second, the final rule requires representations under FAR 52.209-11 regarding any federal tax delinquency, regardless of amount, despite the fact that another FAR clause, FAR 52.209-5, requires certification of federal tax delinquency only in excess of \$3,500. Thus, under the final rule, there is no *de minimis* amount of federal tax delinquency. Contractors are not required to report state and local tax delinquencies, however, because they are beyond the scope of the statute.

Third, a commenter asked the FAR Council to impose a five-day deadline on suspension and debarment officials to determine whether a contractor with tax delinquencies or felony convictions is responsible. The Council declined, and in doing so stated: "Sections 744 and 745 do not require the suspension and debarment 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)." This is notable because the FAR Council did not identify the process that it believes would apply in this circumstance.

Although the only things certain in life are death and taxes, it is a fair bet that Congress will continue to include similar prohibitions in future appropriations acts. Thus, contractors with finally-determined delinquent taxes, or with felony convictions under federal law, should be prepared to establish their present responsibility. Given some of the statements in the final rule, it is unclear exactly how that determination will be made. Finally, as with all certification requirements, contractors must ensure the accuracy of their representations to avoid the specter of False Claims Act and other Government remedies.