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Felons and Tax Cheats Beware: Regulators Want To Stop You From Winning Federal Government Contracts

By

A new final rule targeting tax cheats and convicted felons who try to bid on federal government contracts was published on September 30, 2016. The rule is effective immediately and makes permanent an interim rule published back in December 2015 which has already been in effect since February 26, 2016. The final rule adopts the interim rule in its entirety without any changes; only three public comments had been submitted in response to the interim rule, two of which were in support.

The purpose of the rule, as noted in the summary published in the Federal Register, is "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." The rule is intended to implement provisions of the Consolidated and Further Continuing Appropriations Act of 2015.

Here's how it works: Any bidder responding to a federal agency solicitation must disclose whether it is a corporation with a delinquent tax liability or a felony conviction under federal law. If the answer is yes, "the contracting officer is required to request additional information from the offeror and notify the agency official responsible for initiating debarment or suspension action.

Significantly, the rule only applies to the bidding corporations themselves. It generally excludes the separate felony records or tax delinquencies of individual shareholders or parent companies of those corporations, unless there is cause to pierce the corporate veil. (But note that a *separate* new rule that we have blogged about also requires bidders to disclose labor law violations, which include many *non*-felonies.) Depending on the specific transactional arrangement, a joint venture is subject to this rule if it is considered a corporation, "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." It appears that a bidding entity that is not a *corporation*, such as an LLP or other partnership, may be exempt from this rule altogether, which may have important implications for potential contractors considering how to structure their entity if they have any felony record or tax delinquencies.

Because the interim rule has already been in effect for the last seven months, contractors have already been subject to its terms and should already be familiar with it. This final rule merely makes the interim rule permanent without any changes. However, the final rule does contain some additional explanatory language to clarify the scope of the rule.

Some federal agencies may have already had their own individual rules prohibiting awards to bidders with felony records or tax debts, but the new rule is *government-wide*. While noting some overlap with existing laws that penalize tax delinquencies and felony convictions, the acquisition rule-drafting Councils concluded that the new rule, proposed by DOD, GSA, and NASA as the joint agencies responsible for amending FAR, is "not identical to existing laws and regulations, and must be implemented in order to avoid misuse of appropriated funds."

The final rule clarifies the different ways in which appeal processes affect, or do not affect, contractor obligations. Unpaid federal tax liabilities need not be disclosed until a contractor has fully exhausted all judicial and administrative remedies. By contrast, any felony conviction under federal law within the preceding 24 months must be disclosed, regardless of whether an appeal is pending.

Additionally, the final rule notes that the debarment review provision is not subject to the timelines of the normal suspension and debarment process set forth in FAR Subpart 9.4. In other words, the consideration

and determination by an agency as to the necessity of suspension or disbarment of a corporation in light of a felony or tax liability pursuant to the new rule is not limited to a specific timeline. Moreover, if an applicable felony conviction or tax delinquency exists, the prohibition on awarding a contract is *presumptive*; not until after "the suspending or debarring official makes a positive determination that suspension or debarment is not necessary to protect the interests of the Government" can an agency proceed with an award to that corporation. This begs the question: if the agency sits on its review of a bidder's felony or tax record for long enough, will that bidder be excluded by *default*, even if it the agency eventually concludes that exclusion of this bidder wasn't necessary after issuing the award to another offeror?

Unlike other rules governing federal contractors, this rule contains no minimum thresholds for applicability when it comes to the size of the tax delinquency. Nor does it contain any exemptions based on contract type (e.g., services, supplies, commercial products, etc.) or acquisition threshold amount. For *every* size and type of federal agency contract, even a tax delinquency of *one dollar* will need to be disclosed as long as the offeror is a corporation and the delinquency involves federal taxes. However, the rule does not apply to state or local government tax delinquencies or to state or local felony convictions – only to federal ones.

