

# AGAR ADVISORY

## ADVISORY NO. 104 A

### **FAR Class Deviation: Prohibition Against Contracting with Corporations that have an Unpaid Delinquent Tax Liability or a Felony Conviction under Federal Law.**

#### **1. SUMMARY**

This Advisory issues a class deviation to the Federal Acquisition Regulation (FAR) to prohibit the use of funds to enter into a contract with a corporation that has unpaid Federal tax delinquencies or certain felony convictions unless the corporation has been considered for suspension or debarment and the agency determines that further action is unnecessary to protect the interests of the government. This requirement is prescribed in the Consolidated Appropriations Act, 2012 (Pub. L. 112-74) and the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2012 (Pub. L. 112-55).

**Revision A.** This Advisory revision extends the prohibition beyond Fiscal year 2012 to include subsequent fiscal years. Changes are indicated by vertical lines in the right margin.

A rule amending the FAR will be issued by the FAR Council in the near future. In the meantime, covered agencies have been encouraged by the Civilian Agency Acquisition Council to approve a FAR class deviation to implement their appropriations statutes.

#### **2. REFERENCES**

- a. Federal Acquisition Regulation (FAR) 48 CFR, Part 9, *Contractor Qualifications*. Agriculture Acquisition Regulation (AGAR) 48 CFR Chapter 4, Section 409.471, provision at 452.209-70 and clause at 452.209-71.
- b. Sections 433 and 434 of the Consolidated Appropriations Act, 2012 (Pub. L. 112-74), as amended and/or subsequently enacted.
- c. Sections 738 and 739 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2012 (Pub. L. 112-55), as amended and/or subsequently enacted.
- d. Civilian Agency Acquisition Letter 2012-02, dated January 27, 2012.

#### **3. DISCUSSION**

**Acting on Behalf of the Corporation.** The appropriations restrictions say that funds cannot be used to make awards to corporations that have had "an officer or agent of such corporation acting on behalf of the corporation convicted" of a felony. This means that if an officer or agent of a corporation, for example the chief financial officer, is convicted of a felony for something that he or she did for the corporation, then the appropriations restrictions would apply. However, if the officer or agent was convicted of a felony for actions on his or her own behalf, the appropriations restrictions would not

apply. For example, if the chief financial officer of Corporation ABC is convicted of a felony for filing false corporate financial reports with the Internal Revenue Service, then that would be acting on behalf of the corporation, therefore the appropriations restrictions would apply to Corporation ABC. If, however, the chief financial officer of Corporation ABC is convicted of a felony for domestic abuse that is not something that is done for the corporation, then the appropriations restrictions would not apply to Corporation ABC.

**The Officer or Agent no longer works at the Corporation.** The restrictions on the corporation would still apply even if the offending officer or agent was fired or no longer works at the corporation. A corporation cannot purge itself of the taint of an officer's or agent's conviction by firing the officer or agent.

**Responsibility.** An offeror having an applicable felony conviction or tax delinquency would be considered statutorily ineligible for award because of the appropriations restrictions, but would not be considered non-responsible.

#### 4. DEFINITION

**Corporations** means entities that have filed articles of incorporation in one of the fifty states, the District of Columbia, or the various territories of the United States including American Samoa, Federated States of Micronesia, Guam, Midway Islands, Northern Mariana Islands, Puerto Rico, Republic of Palau, Republic of the Marshall Islands, U.S. Virgin Islands. (Note that this includes both for-profit and non-profit entities.)

With respect to municipal corporations and tribal corporations, USDA is still awaiting OMB guidance. However, if a for-profit or non-profit organization is organized under the corporate laws of a state or tribe, but happens to be wholly-owned by a state, local, or tribal government, the better view at the moment is that they are covered by the prohibitions.

These appropriations restrictions do not apply to foreign corporations.

#### 5. ACTIONS

a. **For new awards made using fiscal year 2012 and subsequent fiscal year funds.** Contracting officers shall insert the provision prescribed at 452.209 – 70, *Representation by Corporations Regarding an Unpaid Delinquent Tax Liability or a Felony Conviction* (See Attachment 1), and the clause at 452.209-71, *Assurance Regarding Felony Conviction or Tax Delinquent Status for Corporate Applicants* (Attachment 1) in all solicitations and contracts above the micro-purchase threshold, including those for the acquisition of commercial items under FAR Part 12. For all Forest Service solicitations and contracts above the micro-purchase threshold, contracting officers shall use Alternate 1 of the provision and clause.

b. **For solicitations already released without a representation, where proposals/offers have already been received, but where award has not yet been made.** The contracting officer shall issue an amendment to the solicitation in writing (e-mail is acceptable), notifying every offeror who submitted a proposal/offer about the new appropriations restrictions and requesting them to submit signed representations (provision at 452.209-70, or its Alternate 1), to be added to their proposals/offers. Contracting officers shall also add the clause (assurance) to award documents for any awards made to corporations.

The notification sent to all offerors should read:

*"This is to notify you of recent award prohibitions contained in Sections 433 and 434 of the Consolidated Appropriations Act, 2012 (Pub. L. 112-74), as amended and/or subsequently enacted, and in sections 738 and 739 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2012 (Pub. L. 112-55), as amended and/or subsequently enacted regarding corporate felony convictions and corporate tax delinquencies. Under the Appropriations Acts, no awards can be made to any corporation (for profit or non-profit) that has a tax delinquency or felony conviction as defined in the Appropriations Act and described in the attached representation. To comply with these provisions, all offerors are required to return the attached representation to [insert name and submission address] no later than [insert date and time]. Please note that if you have a tax delinquency or felony conviction, as defined in the Appropriations Act and described in the attached representation, you are not eligible for award. If you are ineligible for award because of these prohibitions it is possible that you can regain eligibility for award, but only if the [insert agency name] suspension and debarring official considers your tax delinquency and/or felony conviction and determines that suspension or debarment is not necessary to protect the interests of the Government."*

The representation provision at 452.209-70, or its Alternate 1, shall be included with the notification.

c. **Prohibition on award.** The following prohibitions are in accordance with sections 738 and/or 739 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2012 (Pub. L. 112-55), as amended and/or subsequently enacted for all of USDA except the U. S. Forest Service, or with sections 433 and/or 434 of the Consolidated Appropriations Act, 2012 (Pub. L. 112-74), as amended and/or subsequently enacted for the Forest Service.

**Except as provided in the following paragraph of this advisory (paragraph d, below), the following prohibitions apply:**

(1) **All** contracting officers (both Forest Service and non-Forest Service) are prohibited from making an award to any corporation:

- (i) that fails to comply with the requirement to fill out the representation, or
- (ii) that fills out the representation in the affirmative, for having a felony conviction and/or tax delinquency.

(2) **Contracting officers from all agencies except the Forest Service** are prohibited from making an award to any corporation:

(i) that submits an affirmative response to the representation at 452.209-70 for having been convicted (or had an officer or agent of such corporation acting on behalf of the corporation convicted) of a felony criminal violation under any Federal or State law within the preceding 24 months, where the awarding agency is aware of the conviction, and/or

(ii) that submits an affirmative response to the representation at 452.209-70 for having has 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, where the awarding agency is aware of the unpaid tax liability

(iii) if the awarding agency is aware of the corporation having a felony conviction or tax delinquency, as described in (i) and (ii) above, even if the corporation has not submitted an affirmative representation.

(3) **Contracting officers only from the Forest Service** are prohibited from making an award to any corporation:

(i) that submits an affirmative response to Alternative 1 of the representation at 452.209-70 for having been convicted (or had an officer or agent of such corporation acting on behalf of the corporation convicted) of a felony criminal violation under any Federal law within the preceding 24 months, and/ or,

(ii) submits an affirmative response to Alternative 1 of the representation at 452.209-70 for having 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, where the awarding agency is aware of the unpaid tax liability, and/or,

(iii) if the awarding agency is aware of the corporation having a felony conviction or tax delinquency, as described in (i) and (ii) above, even if the corporation has not submitted an affirmative representation.

*(Clarification: In the phrase "if the awarding agency is aware of the unpaid tax liability" awareness will be imputed at the level of the contracting officer, or awarding official, who signs the award on behalf of the agency.)*

*(Clarification of paragraph (i), above: Note that the only difference between the provision that the Forest Service must follow and the rest of USDA must follow is that the Forest Service does not have the "Federal and State law" felonies to contend with, only Federal.*

**d. Suspension or Debarment Determination.**

(1) **Determination.** An award may be made despite the restrictions in the previous paragraph (paragraph c) if the debarring and suspending official has considered suspension or debarment of the corporation and has made a written determination that this action is not necessary to protect the interests of the Government.

(2) **Notification.** In the event of any of the above situations (paragraph c(1) through (3)), the contracting officer shall refer the incidents to the Head of the Contracting Activity Designee (HCAD) who shall notify in writing the Chief of the Procurement Policy Division, Office of Procurement and Property Management (OPPM) for the consideration of the debarring and suspending official. Included in the notification shall be the name and address of the corporation, names of officers or agents, and a summary of the incident including any additional information needed to assess the incident.

(3) **Award to Another Offeror prior to any Suspension or Debarment Determination.** While awaiting final guidance from OMB, our best advice is that these prohibitions do not require an agency to delay award to another eligible offeror pending review of the ineligible offeror by the suspending and debarring official but the agency certainly has the discretion to delay award if it wishes to do so.

e. **Existing Contracts.** For existing contracts, no modification adding the representation will be required. If, during the course of administering an existing contract, a contracting officer becomes aware of a felony or tax delinquency for a corporate contractor, the contracting officer shall raise this issue to the HCAD. The HCAD shall contact the Chief, Procurement Policy Division, OPPM, who will consult with the Office of the General Counsel.

**f. Issuance of Task or Delivery Orders or Modifications that Add Funds Under Existing Contracts with Corporations.** While existing contracts do not have to be modified to add the representation or assurance at 452.209-70, changes to existing contracts that obligate previously unobligated fiscal year 2012 appropriated funds will have to include the new representation or assurance. Changes that will require a contractor under an existing contract to complete the new representation or assurance include:

- (1) issuance of a task or delivery order under an existing indefinite quantity-indefinite delivery (IDIQ) contract,
- (2) issuance of an order under an existing blanket purchase agreement or basic ordering agreement, or
- (3) issuance of a modification that adds previously unobligated fiscal year 2012 appropriated funds to an existing contract.

**g. Making Awards for Other Federal Agencies.** The appropriations restrictions are not the same for every department or agency of the Federal Government. Contracting officers making an award for a non-USDA agency, using that agency's fiscal year 2012 appropriated funds, shall check with the agency to determine what appropriations restrictions apply to their funds and how they are complying with those restrictions. Each agency's procurement policy office will have that information.

**h. Application to Non-procurement Contracts, such as Forest Service Timber Sale Contracts.** For the moment, USDA concludes that the appropriations restrictions do not apply to timber sale contracts. However, if the contract is a mixture of procurement and sale, for example, a hybrid-like stewardship contract, then we believe that the appropriations restrictions do apply.

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**EXPIRATION DATE:** Effective upon issue date until canceled. **[END]**