UNITED STATES DEPARTMENT OF COMMERCE
Chief Financial Officer
Assistant Secretary for Administration
Washington, D.C. 20230

MAR 22 2012

PROCUREMENT MEMORANDUM 2012-04

ACTION

MEMORANDUM FOR: **BUREAU PROCUREMENT OFFICIALS**
HEADS OF CONTRACTING OFFICES

FROM: Barry E. Berkowitz
Senior Procurement Executive
and Director for Acquisition Management

SUBJECT: Federal Acquisition Regulation (FAR) Class Deviation: Prohibition Against Contracting With Corporations That Were Convicted of a Felony Criminal Violation or That Have Unpaid Federal Tax Liability

Background
Sections 543 and 544 of Public Law 112-55 Commerce, Justice, Science, and Related Agencies Appropriations Act 2012, Title V (General Provisions) [the Act] prohibit the use of any of the funds made available by the Act to enter into a contract, including interagency acquisitions, with any corporation that was 1) convicted of a felony criminal violation under any Federal law within the preceding 24 months, unless any agency has considered suspension or debarment of the corporation and made a determination that this further action is not necessary to protect the interest of the Government; **and/or** 2) 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, unless an agency has considered suspension or debarment of the corporation and made a determination that this further action is not necessary to protect the interest of the Government.

The Chair of the Civilian Agency Acquisition Council issued a memorandum dated January 27, 2012, providing the effect of consultation for class deviation to allow agencies to prescribe the required actions to address the prohibitions contained within the agency's appropriation language (the Act).

Purpose
The purpose of this memorandum is to issue a class deviation in accordance with FAR 1.404 to require that contracting officers follow the procedures described herein to comply with the prohibitions against the use of Fiscal Year 2012 funding for the Department of Commerce.

Applicability
This memorandum and class deviation are applicable to contracts; task orders against contracts including Federal Supply Schedule; and contracts and task orders resulting through interagency acquisitions requiring Fiscal Year 2012 appropriated funding.

Required Actions

1. **Representation by Offeror/Contractor (Written Solicitation)**

Contracting officers shall:

a) Include the *Representation by Corporations Regarding an Unpaid Delinquent Tax Liability or a Felony Conviction Under Any Federal Law* (Attachment A) in any solicitation for award of a contract, or task order against a contract, including contracts or task orders resulting from an interagency acquisition requiring Fiscal Year 2012 appropriated funding; and

b) Obtain a completed *Representation by Corporations Regarding an Unpaid Delinquent Tax Liability or a Felony Conviction Under Any Federal Law* from offerors prior to award of a contract, or task order against a contract, including contracts or task orders resulting from an interagency acquisition or modification to such actions which obligate Fiscal Year 2012 funding.

c) Ensure that the appropriate representations are completed for contracts or task orders that result from an interagency acquisition as the requesting agency or the servicing agency.

2. **Assurances by Offeror/Contractor (No Written Solicitation)**

Contracting officers shall:

a) Include the *Assurance by Corporations Regarding an Unpaid Delinquent Tax Liability or a Felony Conviction Under Any Federal Law* (Attachment B) in all awards for which a written solicitation is not issued, e.g., placement of a task or delivery order against a General Services Administration (GSA) Federal Supply Schedule (FSS) contract or an order under an indefinite delivery vehicle (IDV), an open market order, the exercise of an option or other types of funding modifications to existing contracts or orders, including those resulting from an interagency acquisition, requiring Fiscal Year 2012 appropriated funding; and

b) Ensure that the appropriate assurance(s) are included for contracts and task orders described in 2 a) above against a contract including Federal Supply Schedules that result from an interagency acquisition as the requesting agency or the servicing agency.

3. **Remediation of Affirmative Representation**

In the event of an affirmative representation or declination of assurance, contracting officers shall:

a) Notify the Suspension and Debarment Official prior to award; and

b) Comply with the determination of eligibility by the Suspension and Debarment Official.

Effective Date

This class deviation is effective immediately and remains in effect until rescinded or until all Fiscal Year 2012 funding has been obligated.

My points of contact for this matter are Lori Donovan, 202-482-1716, ldonovan@doc.gov and Nancy Barrere, 202-482-5519, nbarrere@doc.gov.

cc: Acquisition Community
Acquisition Council
Office of General Counsel

CLASS DEVIATION FROM THE FEDERAL ACQUISITION REGULATION

Reference FAR Parts 9, 12, 13, 15, 14, 35, 36 and 43 – Prohibition Against Contracting With Corporations That Were Convicted of a Felony Criminal Violation Under Any Federal Law or That Have Unpaid Federal Tax Liability

Determination and Findings

The Department of Commerce is authorizing a class deviation which prescribes required actions to address compliance with the prohibitions contained in Sections 543 and 544 of Public Law 112-55 Commerce, Justice, Science, and Related Agencies Appropriations Act 2012, Title V (General Provisions) [the Act].

Findings

1. Sections 543 and 544 of Public Law 112-55 Commerce, Justice, Science, and Related Agencies Appropriations Act 2012, Title V (General Provisions) [the Act] prohibit the use of any of the funds made available by the Act to enter into a contract with any corporation that was a) convicted of a felony criminal violation under any Federal law within the preceding 24 months, unless any agency has considered suspension or debarment of the corporation and made a determination that this further action is not necessary to protect the interest of the Government; **and/or** b) 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, unless an agency has considered suspension or debarment of the corporation and made a determination that this further action is not necessary to protect the interest of the Government.

2. The Chair of the Civilian Agency Acquisition Council issued a memorandum dated January 27, 2012, providing the effect of consultation for class deviation in accordance with FAR subpart 1.404 to allow agencies to prescribe required procedures to comply with the prohibitions contained in the agency's appropriation for Fiscal Year 2012.

3. The attached representations/assurances by offerors/contractors will afford contracting officers an awareness of non-compliance so that appropriate action can be taken prior to obligation of Fiscal Year 2012 funding in accordance with the prohibitions contained in the Act.

4. The required actions prescribed herein are applicable to all contracts, task orders against contracts including Federal Supply Schedules, and contracts and task orders resulting through interagency acquisitions.

5. Appropriate action will be taken by the Suspension and Debarment Official, with legal counsel, in accordance with the prohibitions contained in the Act.

Determination

In accordance with FAR 1.404, I hereby authorize this class deviation requiring contracting officers, prior to obligation of Fiscal Year 2012 funding, to: 1) obtain representations from offerors/contractors; 2) require use of the DOC representations by servicing agencies under interagency acquisitions; and 3) obtain a determination of eligibility from the Suspension and Debarment Official, DOC, in the event of an affirmative representation. This determination is based on analysis of the findings described herein.

This class deviation will remain in effect until rescinded or until Fiscal Year 2012 funding has been obligated.

Barry Berkowitz

Approved:
Barry E. Berkowitz
Senior Procurement Executive and
Director for Acquisition Management

3/22/12

Date:

Attachment A

Contracting officers shall include the following language *in all solicitations* for award for contracts, including funding modifications to existing contracts, prior to obligation of Fiscal Year 2012 funding:

Representation by Corporations Regarding an Unpaid Delinquent Tax Liability or a Felony Conviction Under Any Federal Law (Class Deviation) (March 2012)

(1) In accordance with Sections 543 and 544 of Public Law 112-55 Commerce, Justice, Science, and Related Agencies Appropriations Act 2012, Title V (General Provisions) none of the funds made available by that Act may be used to enter into a contract with any corporation that-

(a) Was convicted of a felony criminal violation under any Federal law within the preceding 24 months, unless the agency has considered suspension or debarment of the corporation and made a determination that this further action is not necessary to protect the interests of the Government.

(b) 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, unless the agency has considered suspension or debarment of the corporation and made a determination that this further action is not necessary to protect the interests of the Government.

(2) The Offeror represents that, as of the date of this offer -

(a) It is [ ] is not [ ] a corporation that was convicted of a felony criminal violation under a Federal law within the preceding 24 months.

(b) It is [ ] is not [ ] a corporation that 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 agreements with the authority responsible for collecting the tax liability.

(End of provision)

Attachment B

Contracting officers shall include the following language *in all awards* for which a written solicitation is not issued, e.g., placement of a task or delivery order against a General Services Administration (GSA) Federal Supply Schedule (FSS) contract or an order under an indefinite delivery vehicle (IDV), an open market order, the exercise of an option or other types of funding modifications to existing contracts, prior to obligation of Fiscal Year 2012 funding:

Assurance by Corporations Regarding an Unpaid Delinquent Tax Liability or a Felony Conviction Under Any Federal Law (Class Deviation) (March 2012)

(1) In accordance with Sections 543 and 544 of Public Law 112-55 Commerce, Justice, Science, and Related Agencies Appropriations Act 2012, Title V (General Provisions) none of the funds made available by that Act may be used to enter into a contract with any corporation that-

(a) Was convicted of a felony criminal violation under any Federal law within the preceding 24 months, unless the agency has considered suspension or debarment of the corporation and made a determination that this further action is not necessary to protect the interests of the Government.

(b) 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, unless the agency has considered suspension or debarment of the corporation and made a determination that this further action is not necessary to protect the interests of the Government.

(2) *By accepting this award or order, in writing or by performance,* the offeror/contractor assures that -

(a) The offeror/contractor is not a corporation convicted of a felony criminal violation under a Federal law within the preceding 24 months.

(b) The offeror/contractor is not a corporation that 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 agreements with the authority responsible for collecting the tax liability.

(End of Provision)