



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

MAR 27 2014

PROCUREMENT MEMORANDUM 2014-02

ACTION

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

FROM: Barry E. Berkowitz *BE 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 536 and 537 of Division B of Public Law 113-76 Consolidated Appropriations Act, 2014, 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 (CAAC) issued a memorandum dated January 27, 2012 which provided the effect of a consultation for a class deviation to allow agencies to address the prohibitions contained within the agency's appropriation language. The CAAC Chair subsequently extended this deviation to cover the Fiscal Year 2013 Continuing Appropriations Resolution and on November 21, 2013, this consultation was again extended to apply to any future appropriations.

Purpose

The purpose of this memorandum is to extend 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 2014 Consolidated Appropriations 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 2014 Consolidated Appropriations 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 B) 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 2014 Consolidated Appropriations 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 2014 Consolidated Appropriations 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 C) 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 2014 Consolidated Appropriations 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 Suspending and Debarring Official prior to award; and
- b) Comply with the determination of eligibility by the Suspending and Debarring Official.

Effective Date

This Procurement Memorandum is effective immediately and supersedes Procurement Memorandum 2013-07 dated January 31, 2013. This class deviation remains in effect until rescinded or Fiscal Year 2014 Consolidated Appropriations funding has been obligated.

The point of contact for this matter is Stephen Boutwell who may be reached at 202-482-3340 or sboutwell@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 536 and 537 of Division B of Public Law 113-76 Consolidated Appropriations Act, 2014.

Findings

Sections 536 and 537 of Division B of Public Law 113-76 Consolidated Appropriations Act, 2014, 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.

The Chair of the Civilian Agency Acquisition Council (CAAC) issued a memorandum dated January 27, 2012 which provided the effect of a consultation for a class deviation to allow agencies to address the prohibitions contained within the agency's appropriation language. The CAAC Chair subsequently extended this deviation to cover the Fiscal Year 2013 Continuing Appropriations Resolution and on November 21, 2013, this consultation was again extended to apply to any future appropriations.

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 Consolidated Appropriations Act, 2014 funding in accordance with the prohibitions contained in the Act.

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.

Appropriate action will be taken by the Suspending and Debarring 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 Consolidated Appropriations Act, 2014 funding, to: (a) obtain representations from offerors/contractors; (b) require use of the DOC representations by servicing agencies under interagency acquisitions; and (c) 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 Consolidated Appropriations Act, 2014 funding has been obligated.



Approved:

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



Date:

Contracting officers shall include the following language *in all solicitations* for award for contracts, including funding modifications to existing contracts, prior to obligation of Consolidated Appropriations Act, 2014 funding:

Representation by Corporations Regarding an Unpaid Delinquent Tax Liability or a Felony Conviction Under Any Federal Law (Class Deviation) (March 2014)

- (1) In accordance with Sections 536 and 537 of Division B of Public Law 113-76 Consolidated Appropriations Act, 2014, none of the funds made available by Consolidated Appropriations Act, 2014 funding 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 C

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 Consolidated Appropriations Act, 2014 funding:

Assurance by Corporations Regarding an Unpaid Delinquent Tax Liability or a Felony Conviction Under Any Federal Law (Class Deviation) (March 2014)

- (1) In accordance with Sections 536 and 537 of Division B of Public Law 113-76 Consolidated Appropriations Act, 2014, none of the funds made available by Consolidated Appropriations Act, 2014 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)