



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

January 16, 2008

Mr. David Drabkin
Deputy Chief Acquisition Officer
U.S. General Services Administration
1800 F Street, NW, Room 4040
Washington, DC 20405-0002

Dear Mr. Drabkin:

The enclosed letter and justification, dated November 14, 2007, request my approval to revise two existing non-statutory certifications in the Federal Acquisition Regulation (FAR) at FAR 52.209-5, Certification Regarding Responsibility Matters and FAR 52.212-3(h), Offeror Representations and Certifications – Commercial Items.

As required by Section 29 of the Office of Federal Procurement Policy (OFPP) Act (see 41 U.S.C. 425), a new requirement for a certification by a contractor or offeror may be included in the FAR only if the (a) certification requirement is specifically imposed by statute; or (b) written justification for the certification is provided by the Federal Acquisition Regulatory Council and approved in writing by the Administrator of OFPP.

According to the justification, the revised certifications at FAR 52.209-5 and 52.212-3(h) requires offerors to certify if they, within a three-year period preceding an offer, were notified of any delinquent Federal taxes for which they remain liable. The information derived from the contractor's self certification will be used by the Government to determine an offeror's eligibility for award. Based on this information, I am approving the two revised non-statutory certifications at FAR 52.209-5 and 52.212-3(h) for inclusion into the FAR.

If you have any questions, please contact Julia Wise of my staff at (202) 395-7561 or jwise@omb.eop.gov.

Sincerely,

Paul A. Denett
Administrator

Enclosure



GSA Office of the Chief Acquisition Officer

14 NOV 2007

The Honorable Paul Denett
Administrator for Federal Procurement Policy
Office of Federal Procurement Policy
Eisenhower Executive Office Building, Room 263
Washington, D.C. 20503

Dear Mr. Denett:

The Federal Acquisition Regulatory Council (FAR Council) requests your approval of the enclosed justification for the use of a non-statutory certification in connection with the addition of a new requirement for offerors to certify as to unsatisfied liability for any Federal taxes. The FAR Council is proposing to issue a final FAR rule (FAR Case 2006-011) for inclusion of this non-statutory certification requirement with the existing certifications at FAR 52.209-5.

After you have had the opportunity to review the enclosed information, should you have any questions, please contact me at (202) 501-1043.

Sincerely,

A handwritten signature in black ink, appearing to read "Molly Wilkinson", with a long horizontal flourish extending to the right.

Molly Wilkinson
Chief Acquisition Officer

Enclosure

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
www.gsa.gov

Justification for the use of a Non-Statutory Certification in Connection with the FAR Certification of Responsibility Matters

Purpose: The purpose of this justification is to obtain approval under 41 USC 425(c)(1) from the Administrator for Federal Procurement Policy to modify in the Federal Acquisition Regulation (FAR) the certification regarding debarment, suspension, proposed debarment, and other responsibility matters (current clause title) to add a certification requirement as to whether the offeror has any unsatisfied liability for any Federal taxes.

Background

The Federal Acquisition Regulatory Council is issuing a final rule (FAR Case 2006-011) amending the FAR to add conditions regarding violation of Federal criminal tax laws and delinquent Federal taxes to standards of contractor responsibility, causes for debarment and suspension, and the certifications regarding debarment, suspension, proposed debarment, and other responsibility matters. The Federal Acquisition Regulatory Council is requesting approval of the existing certification with revisions.

Section 29 of the Office of Federal Procurement Policy Act, 41 U.S.C. Section 425(c)(1), prohibits the inclusion of a certification in the FAR unless—

- (a) The certification requirement is specifically imposed by statute; or
- (b) Written justification for such certification requirement is provided to the Administrator for Federal Procurement Policy by the Federal Acquisition Regulatory Council, and the Administrator approves in writing the inclusion of such certification requirement.

Therefore, this justification is provided to support the inclusion of a non-statutory certification into the FAR.

Justification

1. Description of the certification.

The existing certification at FAR 52.209-5 is required in order to review the offeror's status regarding some, but not all, of the criteria that determine the offeror's present responsibility to perform Government contracts. At this time, the offeror must certify whether the firm and/or any of its principals—

- Are presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any Federal agency;
- Have, within a three-year period preceding the offer, been convicted of or had a civil judgment rendered against them for a number of listed offenses;
- Are presently indicted for, or otherwise criminally or civilly charged by a governmental entity with, commission of any of the listed offenses; and

- Have, within the past three years, had a contract terminated for default by any Federal agency.

This justification requests approval of a revised version of the certification, which does not delete any of the four certification elements above, but rather, adds more. The new certification adds "Federal criminal tax laws" to the list of offenses and asks whether, within the three year period preceding the offer, the offeror was notified of any delinquent Federal taxes for which the liability remains unsatisfied. The added language is not based in statute.

The title of the clause is revised as well. The certification is also revised at the commercial item equivalent clause at 52.212-3(h).

2. Duplication. The final rule does not duplicate, overlap, or conflict with any other Federal rules.

3. Certification Process. The certification must be completed by each offeror, submitted as part of its proposal, and retained in the contract file. The certification provides appropriate blocks for the offeror to check whether it does, or does not, meet the conditions of the certification. The certification also is part of the Online Representations and Certifications Application (ORCA).

4. Purpose of the certification. The certification is used by the Government to determine an offeror's eligibility for award of a contract resulting from the solicitation (see FAR Subpart 9.1, Responsible Prospective Contractors).

5. Alternatives. There are no practical alternatives that will accomplish the objectives of this final rule.

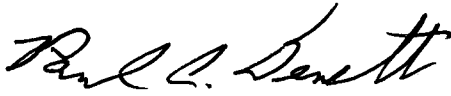
6. Benefit/Value. The offeror's self certification is accepted by the Government unless the contracting officer has reason to know that it is false. Given the statutory penalty for false statements (18 U.S.C. 1001), offerors have strong incentives to ensure the accuracy of their certification, thus shortening procurement lead time and saving taxpayer monies. The government does not want to do business with tax scoff-laws; this certification will help reach that goal.

7. Impact on small businesses. The new certification is very clearly defined. A small business should not have any difficulty identifying the correct response. The small business is not required to assess whether it has unpaid Federal, state, local or foreign tax liabilities, only whether it received notice of delinquent Federal taxes. The certification is expected to have a small positive impact on small entities, because businesses that do not pay their Federal taxes have an unfair competitive advantage due to having lower costs; this certification aids in removing those businesses from the Federal market.

Request for Approval

The Federal Acquisition Regulatory Council requests approval from the Administrator for Federal Procurement Policy for the use in the FAR of the amended certification at FAR 52.209-5 in connection with the determination of an offeror's present responsibility.

Approved:



Paul A. Denett
Administrator
Office of Federal Procurement Policy

4/16/08
Date

52.209-5 Certification Regarding Responsibility Matters.

As prescribed in 9.104-6, insert the following provision:

CERTIFICATION REGARDING RESPONSIBILITY MATTERS (DATE)

(a)(1) The Offeror certifies, to the best of its knowledge and belief, that-

(i) The Offeror and/or any of its Principals-

(A) Are are not presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any Federal agency;

(B) Have have not , within a three-year period preceding this offer, been convicted of or had a civil judgment rendered against them for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, state, or local) contract or subcontract; violation of Federal or state antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property;

(C) Are are not presently indicted for, or otherwise criminally or civilly charged by a governmental entity with, commission of any of the offenses enumerated in paragraph (a)(1)(i)(B) of this provision; and

(D) Have have not within a three-year period preceding this offer, been notified of any delinquent Federal taxes in an amount that exceeds \$3,000 for which the liability remains unsatisfied.

(1) Federal taxes are considered delinquent if both of the following criteria apply:

(i) *The tax liability is finally determined.* The liability is finally determined if it has been assessed. A liability is not finally determined if there is a pending administrative or judicial challenge. In the case of a judicial challenge to the liability, the liability is not finally determined until all judicial appeal rights have been exhausted.

(ii) *The taxpayer is delinquent in making payment.* A taxpayer is delinquent if the taxpayer has failed to pay the tax liability when full payment was due and required. A taxpayer is not delinquent in cases where enforced collection action is precluded.

(2) *Examples.*

(i) The taxpayer has received a statutory notice of deficiency, under I.R.C. § 6212, which entitles the taxpayer to seek Tax Court review of a proposed tax deficiency. This is not a delinquent tax because it is not a final tax liability. Should the taxpayer seek Tax Court review, this will not be a final tax liability until the taxpayer has exercised all judicial appeal rights.

(ii) The IRS has filed a notice of Federal tax lien with respect to an assessed tax liability, and the taxpayer has been issued a notice under I.R.C. § 6320 entitling the taxpayer to request a hearing with the IRS Office of Appeals contesting the lien filing, and to further appeal to the Tax Court if the IRS determines to sustain the lien filing. In the course of the hearing, the taxpayer is entitled to contest the underlying tax liability because the taxpayer has had no prior opportunity to contest the liability. This is not a delinquent tax because it is not a final tax liability. Should the taxpayer seek tax court review, this will not be a final tax liability until the taxpayer has exercised all judicial appeal rights.

(iii) The taxpayer has entered into an installment agreement pursuant to I.R.C. § 6159. The taxpayer is making timely payments and is in full compliance with the agreement terms. The taxpayer is not delinquent because the taxpayer is not currently required to make full payment.

(iv) The taxpayer has filed for bankruptcy protection. The taxpayer is not delinquent because enforced collection action is stayed under 11 U.S.C. § 362 (the Bankruptcy Code).

(ii) The Offeror has has not , within a three-year period preceding this offer, had one or more contracts terminated for default by any Federal agency.

(2) "Principals," for the purposes of this certification, means officers; directors; owners; partners; and, persons having primary management or supervisory responsibilities within a

business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment, and similar positions).

This Certification Concerns a Matter Within the Jurisdiction of an Agency of the United States and the Making of a False, Fictitious, or Fraudulent Certification May Render the Maker Subject to Prosecution Under Section 1001, Title 18, United States Code.

(b) The Offeror shall provide immediate written notice to the Contracting Officer if, at any time prior to contract award, the Offeror learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

(c) A certification that any of the items in paragraph (a) of this provision exists will not necessarily result in withholding of an award under this solicitation. However, the certification will be considered in connection with a determination of the Offeror's responsibility. Failure of the Offeror to furnish a certification or provide such additional information as requested by the Contracting Officer may render the Offeror nonresponsible.

(d) Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render, in good faith, the certification required by paragraph (a) of this provision. The knowledge and information of an Offeror is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

(e) The certification in paragraph (a) of this provision is a material representation of fact upon which reliance was placed when making award. If it is later determined that the Offeror knowingly rendered an erroneous certification, in addition to other remedies available to the Government, the Contracting Officer may terminate the contract resulting from this solicitation for default.

(End of provision)