



May 25, 2007

Via Facsimile and Electronic Mail

Laurieann Duarte
Regulatory Secretariat
General Services Administration
1800 F Street, NW, Room 4035
Washington, DC 20405

Electronic Address: www.regulations.gov

RE: FAR Case 2006-011, Representations and Certifications-Tax Delinquency

Dear Ms. Duarte:

The U.S. Small Business Administration's (SBA) Office of Advocacy (Advocacy) submits the following comments on the proposed rule to require contractors to certify their tax delinquency status to the federal government, state and local governments and any other jurisdictions including foreign governments. The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) *requested comments on the proposed Representations and Certifications-Tax Delinquency Regulation.*¹ Advocacy and small businesses welcome the efforts of the Councils to increase the level of corporate tax accountability. Companies that have unsatisfied tax liabilities should be held accountable. However, to achieve maximum benefit from this increased level of corporate tax accountability, several areas of the proposed regulation require a more balanced approach for small businesses.

Advocacy has been contacted by several small business organizations concerning the impact of the proposed rule on small business. Advocacy strongly recommends that the Councils publish an initial regulatory flexibility analysis as required by Section 603 of the Regulatory Flexibility Act.²

Office of Advocacy

¹ Request for public comments; 72 Fed. Reg. 61, 15093(March 30, 2007).

² 5 U.S.C. § 603.

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),³ as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),⁴ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.⁵ Moreover, on August 13, 2002, President Bush signed Executive Order 13272,⁶ which requires federal agencies to notify Advocacy of any proposed rules that are expected to have a significant economic impact on a substantial number of small entities and to give every appropriate consideration to any comments on a proposed or final rule submitted by Advocacy. Further, the agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule.

Background

The Federal Acquisition Regulations (FAR) Part 9.4 provides for debarment, suspension, and ineligibility of federal contractors. Among other things this Part of the FAR places an affirmative duty on contractors to certify whether or not, within a three year period preceding an offer, they have been convicted of or had a civil judgment rendered against them for tax evasion, or are presently indicted for, or otherwise criminally or civilly charged with the commission of tax evasion.

The proposed rule would expand this provision by requiring contractors to certify whether or not they have, within a three-year period preceding the offer, been convicted of or had a civil judgment rendered against them for violating “**any tax law or failing to pay any tax,**” or been notified of any delinquent taxes for which the liability remains unsatisfied or the lien has not been released.

The Councils believe that adding the above additional certification requirement to FAR Part 9 is needed to identify prospective offerors that may have outstanding and delinquent tax obligations. The Councils believe this new information will help the Government make an informed responsibility determination before awarding a contract.

Discussion

³ 5 U.S.C. § 601 et seq.

⁴ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

⁵ 5 U.S.C. § 603.

⁶ See, Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking* (67 Fed. Reg. (53461) (August 16, 2002).

Under the RFA, federal regulations must generally undergo certain regulatory analyses and review before they are finalized. One of these analyses is an Initial Regulatory Flexibility Analysis (IRFA) required by Section 603 of the Regulatory Flexibility Act (RFA). An IRFA is required whenever a federal rule is expected to “have a significant economic impact on a substantial number of small entities.”⁷ In this instance, the Councils did not prepare an IRFA because of the expectation that there would not be an economic impact on a substantial number of small entities.⁸ As such, the Councils “certified” the rule in accordance with section 605(b) of the RFA. Advocacy believes that the Councils have not provided a factual basis for this certification. The rule is likely to increase the cost of doing business with the government, and due to a lack of clarity in the regulation, those increased costs could be significant for a substantial number of small businesses. Under these circumstances, the Councils should provide a complete Initial Regulatory Flexibility Analysis.

The proposed regulation transforms the precisely defined FAR Part 9 debarment, suspension, and ineligibility of contractor’s violations, a well defined tax code definition of tax evasion, into an undefined infraction called a tax liability for any tax law. Currently, the Federal Tax Code identifies many types of tax liabilities. Moreover, under the Code the taxpayer has the right to dispute any request for additional federal taxes.

The proposed regulation would require the contractor to certify that he does or does not have a tax liability not just for federal, state or local, but it may include foreign jurisdictions. This certification requirement will be part of the contractor’s official Representations and Certification agreement that is a material component of the executed contract between the government and the contractor. This level of mandatory compliance without clear definitions may increase small businesses’ costs of doing business with the government. Moreover, small businesses will be required to have knowledge of local and foreign tax regulations.

Small businesses bear a disproportionate share of the regulatory burden. A 2005 Advocacy-funded study by W. Mark Crain entitled *The Impact of Regulatory Costs on Small Firms*⁹ found that of the nearly \$1.1 trillion annual regulatory burden, small businesses with less than 20 employees faced an annual regulatory cost of \$7,647 per employee, nearly forty-five percent higher than regulatory costs facing large firms (with 500 or more employees).¹⁰ There is a concern that because some small businesses do not have the financial resources to engage the professional services of lawyers or tax

⁷ See, Executive Order 12866, *Regulatory Planning and Review*, available at http://www.whitehouse.gov/omb/inforeg/eo12866/eo12866_amended_01-2007.pdf

⁸ 5 U.S.C § 603(a).

⁹ *The Impact of Regulatory Costs on Small Firms* (September 2005) is available at <http://www.sba.gov/advo/research/rs264tot.pdf>.

¹⁰ *Id.* at page v.

accountants they will simply certify that they have a tax liability, when in actuality, with a better-defined regulation a tax liability may not exist.

Small businesses are concerned that a lack of clear guidance to the contracting officer will create widely varying interpretations of the rule. Under current FAR requirements, if a contracting officer makes a determination that a small business bidder does not meet the responsibility test, the contracting officer, before rejecting the bid as not being responsible, must seek a Certificate of Competency (COC) ruling from the Small Business Administration (SBA). The proposed regulation would seem to not provide the contracting officer with clear guidance as to what must be done after the contractor has certified that the company has a tax liability. Thus, the unintended result of this proposed regulation may be the denial of a COC to an otherwise well-qualified small business. Advocacy does not believe this was the intent of the proposed regulation; yet if clarity is not incorporated in the final regulation the end result may be that eligible small business contractors will be prevented from competing for government contracts.

Advocacy would further urge the Councils to give careful consideration to the need for reasonable alternatives for small business compliance with the proposed regulation. In this regard, Advocacy also recommends that the Councils review HR 1870, Contractor Tax Enforcement Act, the Towns Substitute Amendment, and other initiatives that would seem to be more equitable to the vast majority of hard working tax paying small business owners. As an example, the Towns Substitute to HR 1870 defines a serious tax debt as, “an outstanding debt under the Internal Revenue Code of 1986 that is above \$2,500 and has not been paid within 180 days after an assessment of a tax, penalty, or interest under the Internal Revenue Code of 1986. Such a debt does not include a debt that is being paid in a timely manner pursuant to an agreement under section 6159 or section 7122 of the Internal Revenue Code of 1986.”

Other recent corporate tax accountability initiatives have been spear headed by the Federal Contractor Tax Compliance Task Force. The Federal Contractor Tax Compliance Task Force has promoted significant and permanent improvements to policies and processes that directly result in increased debt collection. For example:

- IRS and other federal agencies now share information electronically to identify contractors that should be subject to the Treasury Department’s Federal Payment Levy Program (FPLP). Delinquent contractors are identified and their government payments levied.
- All Taxpayer Identification Numbers (TINs) that are entered in the Central Contractor Registration (CCR) database, the government’s principal repository for contractor banking information, are validated to ensure that contractors subject to the FPLP are correctly identified. Ensuring that the name and TIN of the contractor match increases the number of payments available for levy.
- The IRS is now using data from the Federal Procurement Data System to identify contractors with outstanding tax debts, which will assist the IRS in prioritizing future offset actions and increasing tax debt recovery.

Small businesses have raised several questions as to how the proposed rule will synchronize with Part Far 9.4 including these questions:

- Does the affirmation of a tax liability mean the lack of contractor responsibility?
- Does the affirmation of a tax liability also mean the initiation of debarment and/or suspension provisions of the FAR?
- Is the contracting officer the only decision-maker in this contract determination/award process?
- Can this lack of clarity result in the unintended de-facto denial of a contract to a small business bidder?

Conclusion

There are more than 300,000 small businesses registered in the Central Contractor Registration system. These businesses either have federal contracts or are seeking federal contracts. The Councils' RFA certification of this proposed regulation without a factual basis makes it impossible for these 300,000 small businesses to evaluate fully the economic impact of the proposed regulation. Moreover, it is clear that the Councils should delay further action on this proposed regulation until such time that an IRFA is published for comment. Advocacy would also urge the Councils to consider carefully integrating the actions of other corporate tax accountability initiatives that do not overly burden small business into the design of the regulation.

Please feel free to contact me or Major Clark at (202) 205-7150 (major.clark@sba.gov) if you have any questions or require additional information.

Sincerely,

Thomas M. Sullivan
Chief Counsel of Advocacy

Major Clark
Assistant Chief Counsel

cc: The Honorable Susan Dudley, Administrator, Office of Information and Regulatory Affairs
The Honorable Paul A. Denett, Administrator, Office of Federal Procurement Policy