

U.S. ENVIRONMENTAL PROTECTION AGENCY
FY 2012 Prohibition Against Contracting With Corporations That Have a Felony Conviction
Under Federal Law or An Unpaid Delinquent Tax Liability

FINDINGS

1. The EPA FY2012 appropriations law (*Department of the Interior, Environment, and Related Agencies Appropriations Act, 2012; H.R. 2055; Pub. L. 112-74*) includes two prohibitions that restrict the use of funds by the Agency. These two prohibitions are applicable to all EPA appropriations accounts as follows:

FUNDING PROHIBITION

SEC. 433. None of the funds made available by this Act may be used to enter into a contract, memorandum of understanding, or cooperative agreement with, make a grant to, or provide a loan or loan guarantee to, any corporation that was 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, where the awarding agency is aware of the conviction, unless the agency has considered suspension or debarment of the corporation, or such officer or agent and made a determination that this further action is not necessary to protect the interests of the Government.

LIMITATION WITH RESPECT TO DELINQUENT TAX DEBTS

SEC. 434. None of the funds made available by this Act may be used to enter into a contract, memorandum of understanding, or cooperative agreement with, make a grant to, or provide a loan or loan guarantee to, any corporation with respect to which 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, 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. In furtherance of implementing these two prohibitions, on January 27, 2012, the Civilian Agency Acquisition Council (CAAC) issued Acquisition Letter 2012-02, encouraging agencies to approve a class deviation from the FAR to implement its appropriations provisions related to suspension and debarment. The CAAC acquisition letter also referenced a class deviation issued by the Department of Defense (DOD) on January 23,

2012, for agencies to review. DOD's class deviation contains a provision that is required for all solicitations that will use funds made available by Pub. L. 112-74, where the offeror represents that it has not been convicted of a felony violation and that it has no unpaid federal tax liability.

3. The current certifications at FAR 52.209-5 (for solicitations where the contract value is expected to exceed the simplified acquisition threshold) and 52.212-3 (for the acquisition of commercial items) are not adequate to address the broad nature of the prohibition language of the Act. For example, both FAR certifications ask offerors to make representations related only to an identified set of felony convictions within the past three years, whereas the new appropriations provisions cover any felony convictions under federal law within the past 24 months. In addition, the FAR 52.209-5 certification – both for criminal convictions and tax delinquency – is required from offerors only for transactions above the simplified acquisition threshold, whereas the new appropriations provisions apply to transactions below this threshold.
4. In addition to the broad nature of the two funding prohibitions, the FY2012 Appropriations Act stipulates that funds may not be used when the agency is aware of a corporation's felony conviction or tax liability unless the agency has considered suspension and debarment and made a determination that no further action is necessary to protect the Government.
5. To address the limits of the current FAR provisions at 52.209-5 and 52.212-3, and meet the prohibition requirements of the FY2012 Appropriations Act, the Agency has written the attached provision and clause:
 - Provision EPA-2012-5 -- *Representation By Corporations Regarding A Felony Conviction Under Federal Law Or Unpaid Federal Tax Liability* -- requires a corporation to provide a representation whether it has or does not have a felony conviction under federal law or unpaid federal tax liability.
 - Clause EPA-2012-10 -- *Unpaid Federal Tax Liability & Felony Criminal Violation Certification* -- notifies the contractor of its continuing obligation to identify and report any change to the certification it provided.
6. When a contracting officer receives a positive representation from a corporation that it has a felony conviction or tax liability, the contracting officer is required to contact the Agency's Suspension and Debarment Division (SSD) for a written determination that either the corporation will be debarred or suspended or no further action is required to protect the interests of the Government. While SSD has advised that COs should allow 2

to 4 weeks for a determination, OAM and SSD have developed an expedited process for emergency acquisitions, to be used once a written determination has been made that the subject acquisition meets the FAR definition for *emergency acquisition flexibilities*.

7. Until such time as OMB or the FAR Council provides further policy or guidance to agencies on the implementation of the appropriation prohibitions, the subject D&F does not apply to subcontracts, acquisitions below the micro-purchase threshold, or purchase card transactions used to make micro-purchases as follows:
 - (i) OMB draft guidance dated 6 Feb 2012 states the appropriation requirements apply at the prime level and do not flow down to sub-recipients (e.g., subcontractors)
 - (ii) Pursuant to FAR 13.201(d) micro-purchases do not require provisions or clauses and therefore are exempt from the subject appropriations restrictions.
 - (iii) FAR 13.301(c) states the Governmentwide commercial purchase card may be used to make micro-purchases, place task or delivery orders, or make payments. FAR 13.201(b) states that the Governmentwide commercial purchase card shall be the preferred method to purchase and to pay for micro-purchases. Item (ii) above establishes that micro-purchases are exempt from the subject appropriations restrictions. Therefore, Governmentwide commercial purchase card transactions used to make micro-purchases (i.e., in accordance with FAR 13.301(c)(1)) are exempt from the subject restrictions.

When Governmentwide commercial purchase cards are used in accordance with FAR 13.301(c)(2) or (c)(3) the subject appropriations restrictions apply.

DETERMINATION

Based on the above findings, and the authority of FAR 1.401(f), the following determination is made:

1. The prohibition against contracting with corporations that have a felony conviction under federal law or an unpaid delinquent tax liability requires contracting officers include Provision EPA-2012-5 in solicitations that will use funds made available by the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2012 (H.R. 2055; Pub. L. 112-74). This applies to all solicitations for acquisitions above the micro-purchase threshold, including acquisition of commercial items under FAR Part 12,

exercising contract option periods, and issuing a Task or Delivery Order under a Governmentwide Acquisition Contract (GWAC), multi-agency contract, Federal Supply Schedule (FSS) contract, or any other procurement instrument intended for use by multiple agencies, including blanket purchase agreements (BPAs) under FSS contracts. For EPA contracts that issue Task or Delivery Orders, only one representation is needed by the corporation, either at the contract level, if a new award, or before the TO or DO is issued in FY12.

2. Contracting officers shall include Clause EPA-2012-10 in all new applicable contracts awards, including those resulting from solicitations that included Provision EPA-2012-5. Clause EPA-2012-10 notifies the contractor of its continuing obligation to identify and report any change to the certification it provided.
3. Contracting officers shall not award a contract using funds made available by the FY2012 Appropriations Act to any corporation that provides an affirmative response to the attached representation, unless and until the agency 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.
4. This determination is effective at the date of signature below and shall remain in effect until incorporated into the FAR, EPAAR or otherwise rescinded.

/signed/

8 May 2012

John R. Bashista, Director
Office of Acquisition Management

Date

Prohibition Against Contracting With Corporations That Have a Felony Conviction Under Federal Law or An Unpaid Delinquent Tax Liability.

Provision EPA-2012-5 -- Representation By Corporations Regarding A Felony Conviction Under Federal Law Or Unpaid Federal Tax Liability (Apr 2012)

Prescription - The contracting officer shall include Provision EPA-2012-5 in solicitations that will use funds made available by the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2012 (H.R. 2055; Pub. L. 112-74). This applies to all solicitations above the micro-purchase threshold including acquisition of commercial items under FAR Part 12, exercising contract option periods, and issuing a Task or Delivery Order under a Governmentwide Acquisition Contract (GWAC), multi-agency contract, Federal Supply Schedule (FSS) contract, or any other procurement instrument intended for use by multiple agencies, including blanket purchase agreements (BPAs) under FSS contracts. For EPA contracts that issue Task or Delivery Orders, only one representation is needed by the corporation, either at the contract level, if a new award, or before the first TO or DO is issued using covered FY2012 funding.

No award shall be made until the contracting officer receives the corporation's representation that it has no felony convictions nor tax delinquency, or that the CO has received a determination from the EPA Suspension and Debarment officials that they have considered suspension or debarment of the corporation and made a determination that further action is not necessary to protect the interests of the Government.

Provision Text –

- (a) In accordance with Sections 433 and 434, of the Department of the Interior, Environment, and Related Agencies Appropriations Act, 2012 (H.R. 2055; Pub. L. 112-74), none of the funds made available by the Act may be used to enter into a contract with any corporation that:
 - (1) Was 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, where the awarding agency is aware of the conviction, 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) 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, 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) The Offeror represents that:
- (1) It is is not a corporation that has 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,
 - (2) 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 agreement with the authority responsible for collecting the tax liability.
- (c) The Offeror shall provide immediate written notice to the Contracting Officer if, at any time prior to contract award, the Offeror learns that its representation was erroneous when submitted or has become erroneous by reason of changed circumstances.
- (d) A representation that any of the items in paragraph (b) of this provision exists will not necessarily result in withholding of an award under this solicitation. However, failure of the Offeror to furnish a representation or provide such additional information as requested by the Contracting Officer may render the Offeror nonresponsible.
- (e) Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render, in good faith, the representation required by paragraph (b) 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.
- (f) The representation in paragraph (b) 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 provided an erroneous representation, in addition to other remedies available to the Government, the Contracting Officer may terminate the contract resulting from this solicitation for default.

THIS REPRESENTATION CONCERNS A MATTER WITHIN THE JURISDICTION OF AN AGENCY OF THE UNITED STATES AND THE MAKING OF A FALSE, FICTITIOUS, OR FRAUDULENT REPRESENTATION MAY RENDER THE MAKER SUBJECT TO PROSECUTION UNDER SECTION 1001, TITLE 18, UNITED STATES CODE.

(End of Provision)

**Clause EPA-2012-10 -- Unpaid Federal Tax Liability & Felony Criminal Violation
Certification (Apr 2012)**

Prescription - The contracting officer shall include Clause EPA-2012-10 in contracts that will use funds made available by Division E of the Consolidated Appropriations Act, 2012 (Pub.L. 112-74). This applies to all contracts above the micro-purchase threshold including acquisition of commercial items under FAR Part 12, exercising contract option periods, and issuing a Task

or Delivery Order under a Governmentwide Acquisition Contract (GWAC), multi-agency contract, Federal Supply Schedule (FSS) contract, or any other procurement instrument intended for use by multiple agencies, including blanket purchase agreements (BPAs) under FSS contracts. No funding shall be obligated until the CO receives the contractor's certification that they have no felony convictions nor tax delinquency or that the CO has received a determination from the EPA Suspension and Debarment officials that they have considered suspension or debarment of the contractor and made a determination that further action is not necessary to protect the interests of the Government.

Clause text -

(a) In order to meet the requirements of Sections 433 and 434 of Division E of the Consolidated Appropriations Act, 2012 (Pub.L. 112-74), the contractor shall provide the contracting officer a certification whereby the contractor certifies:

- (i) It is not a corporation that has 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
- (ii) It 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 agreement with the authority responsible for collecting the tax liability.

(b) Failure of the contractor to furnish a certification or provide such additional information as requested by the Contracting Officer may render the contractor ineligible for FY2012 contract funding.

(c) The contractor has a continuing obligation to update the subject certification as required.

(End of Clause)