DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4, 9, and 52

[FAC 2005–25; FAR Case 2006–011; Item V; Docket 2008–0001; Sequence 8]

RIN 9000–AK73

Federal Acquisition Regulation; FAR Case 2006–011, Representations and Certifications – Tax Delinquencies

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (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.

DATES: *Effective Date*: May 22, 2008.

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Procurement Analyst, at (202) 208–6925 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–25, FAR case 2006–011.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule was opened to consider adding conditions regarding violation of tax laws and delinquent taxes to standards of contractor responsibility, causes for debarment and suspension, and the certifications regarding debarment, suspension, proposed debarment, and other responsibility matters. The case was initiated in response to a request from the Senate Permanent Subcommittee on Investigations (PSI), which requested implementation of the following:

''To identify noncompliance with tax law . . . the Government should be asking potential contractors, not whether they have been indicted or convicted of tax evasion, but whether they have had any criminal tax law violation in the last three years, whether they have any outstanding tax indebtedness more than one year old, or whether they have any outstanding unresolved federal or state tax lien.''

The Councils published a proposed rule in the **Federal Register** at 72 FR 15093, March 30, 2007. The comment period closed on May 29, 2007. The Councils received comments from nine respondents.

In drafting the final rule, the Councils have made the following changes from the proposed rule:

1. Violating Federal criminal tax laws.

Change ''violating tax laws, failing to pay taxes'' to ''violating Federal criminal tax laws'' (9.406–2(a)(3), 9.407–2(a)(3), 52.209–5(a)(1)(i)(B), and 52.212–3(h)(2)).

2. Federal tax delinquency in an amount that exceeds $3,000.

a. Change ''tax delinquency'' to ''Federal tax delinquency in an amount that exceeds $3000'' (9.104–5(a)(2)).

b. Change ''delinquent taxes or unresolved tax liens'' to ''delinquent Federal taxes in an amount that exceeds $3,000'' and provide detailed definition of delinquent Federal taxes (which includes unresolved tax liens), with examples (9.406–2(b)(1)(v), 9.407–2(a)(7), and comparable changes to the clauses at 52.209–5(a)(1)(i)(D) and (E) and 52.212–3(h)(4) and (5)).

3. Other matters of responsibility.

a. Move 9.408 and 9.409(a) to 9.104–5 and 9.104–6, respectively.

b. Modify the new 9.104–5(a)(1) to require the offeror to provide the information it deems necessary to demonstrate its responsibility.

c. Change the title of 52.209–5 from ''Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters'' to ''Certification Regarding Responsibility Matters''.

In accordance with FAR 1.107 and Section 29 of the Office of Federal Procurement Policy (OFPP) Act, approval was requested to revise and extend the existing two non-statutory certification requirements at FAR 52.209–5, Certification Regarding Responsibility Matters, and FAR 52.212–3(h), Offeror Representations and Certifications—Commercial Items. The Administrator for Federal Procurement Policy approved the request on January 16, 2008. The basis for each change and analysis of all public comments follows.

1. General support for the rule.

Comments: Three respondents express general support for the proposed rule.

Response: None required.

2. Broad arguments against inclusion of tax delinquency as debarment criteria.

a. Historical.

Comments: Two respondents comment on the inclusion of tax delinquency as a cause for debarment. One respondent notes that the Office of Management and Budget (OMB) objected to the inclusion of tax debts as a cause for debarment in 1988, when the Nonprocurement-Common Rule was finalized, on the basis that the Internal Revenue Service (IRS) had sufficient power and authority to collect taxes without using the suspension and debarment tool. The respondent suggests that it would be prudent for OMB to reconcile the philosophical/policy differences underpinning the proposed FAR case here with those pronounced under the Nonprocurement-Common Rule in 1988.

Response: Since 1988, the Government Accountability Office (GAO) has issued various reports highlighting the fact that Federal contractors fail to pay their taxes, *e.g.*,

• Financial Management: Thousands of Civilian Agency Contractors Abuse the Federal Tax System with Little Consequence. GAO–05–637 (June 2005).

• Tax Compliance: Thousands of Federal Contractors Abuse the Federal Tax System. GAO–07–742T (April 2007).

The GAO concluded that contractors' failure to pay payroll taxes provided them with an unfair advantage in pricing their contracts.

The letter from the Senate PSI specifically requests that the Federal Acquisition Regulations include criminal tax law violations and outstanding tax indebtedness or outstanding unresolved tax liens as causes for debarment.

b. No relationship to present responsibility.

Comment: One respondent expresses concern about using the suspension and debarment process as an enforcement mechanism for violations that have no relationship to a contractor's present responsibility to perform Government contracts.

Response: A contractor's present responsibility to perform includes financial responsibility, as well as integrity. The rule is not intended as a tool to collect taxes for the IRS, but to provide information to the contracting officer on issues that may affect the contractor's responsibility.

3. Conflict with Nonprocurement-Common Rule.

Comment: One respondent notes that the OMB Interagency Suspension and

Debarment Committee was established by E.O. 12549 to monitor implementation of the Nonprocurement-Common Rule and as a vehicle of coordination of Federal suspension and debarment policies and practices. If the FAR rule is finalized, it will place the two near mirror image rules in conflict with one another.

Response: Upon issuance of this final rule, the Councils believe that the OMB Interagency Suspension and Debarment Committee will consider similar changes to the Nonprocurement-Common Rule to keep the two rules parallel.

4. Other information available to the Government.

a. Government already has the necessary information.

Comment: One respondent comments that most of the information requested by the rule is already available to the Federal Government. The respondent provides examples of ready access to IRS information, including the Central Contractor Registration (CCR) Taxpayer Identification Number (TIN) match program, Federal Payment Levy Program, and a recent DoD final rule requiring the contractor to notify the contracting officer if any tax withholding would jeopardize performance of a contract.

Response: Various Federal agencies have access to some information originating with the IRS and regarding prospective contractors. This information, including a verified Taxpayer Identification Number disclosed to the CCR and levy information disclosed to the Financial Management Service in the Federal Payment Levy Program process, is not the same information that offerors are requested to certify under this rule. Contracting officers making responsibility determinations would not be able to deduce from a TIN, levy, or tax withholding whether a prospective contractor has, within a 3-year period preceding the offer, been convicted of or had a civil judgment rendered against them for violating Federal criminal tax law, or been notified of any delinquent Federal taxes in an amount that exceeds $3,000. To a large extent, the information already released to Federal agencies involved in the procurement process would not provide the facts important to making responsibility determinations.

Furthermore, to the extent the IRS information has been disclosed to other Federal agencies, disclosure has been made under specific statutory authority allowing disclosure of the information, and use of the information once disclosed, to specifically identified recipients for specifically identified purposes. This generally does not allow the redisclosure or reuse of this information by the recipient for reasons other than that for which it was originally received. Likewise, the information in the IRS' control cannot be disclosed or used unless specifically authorized by the Internal Revenue Code (I.R.C.) (Title 26 of the United States Code). There are both civil and criminal penalties attached to the unauthorized disclosure of this information by the IRS or, in many cases, authorized recipients. Thus even to the extent some information is in the hands of other Federal agencies, it cannot be used in making responsibility determinations.

b. Use of other electronic systems for verification.

Comment: One respondent states that the proposed rule needs to be supported by a strong system of verifications. The electronic tools are already in place, or could be easily modified so that the certifications would be more than words on paper, and this could be done without imposing an additional burden on law-abiding companies doing business with the Government. This respondent recommends that the Councils back up the certifications using verifications between the systems of flags being created in the CCR and the representations in the Online Representations and Certifications Application, so that contracting officers are immediately alerted to any discrepancies.

Response: The respondent proposes the verification enhancement of requiring the contracting officer to compare and make consistent the CCR debt flag and the offeror's proposal certification regarding tax delinquencies. The Councils do not agree with this suggestion for several reasons. There will be numerous circumstances under which the two properly would be inconsistent. First, the debt flag system is designed to cover all types of Federal debt, not just tax delinquencies. Further, even if the debt flag in CCR were related to a Federal tax debt, it would give a contracting officer no indication whether an affirmative certification was required with regard to violation of Federal criminal tax law or Federal tax delinquency. Also, the Councils have relocated the former FAR 9.408 to 9.104–5, where its requirements to ask for additional information from the offeror and refer anomalies to the suspension and debarment official will be a regular part of the determination of present responsibility, thus better serving the respondent's purpose.

5. Certification issues.

a. Subject to additional criminal penalties.

Comment: One respondent states that each certification makes the business and the individual who signs it subject to criminal penalties. The company is also subject to Civil False Claims Act (CFCA) double and treble damages, even if the violations were unintended, as the Government does not need to show intent to defraud; also, the standard of proof is only a ''preponderance of evidence''. An innocent mistake under another statute could lead to a CFCA violation, which could then lead to a determination of nonresponsibility under the new certification, followed by debarment and suspension proceedings.

Response: The certification is not whether the contractor violated another statute, but whether the contractor has been convicted or had a civil judgment rendered against it, or received certain notifications.

b. S Corporations or partnerships.

Comment: One respondent states that the certification could be problematic for companies that are organized as S corporations or partnerships, because it is unclear under the proposed rule whether each shareholder or partner would be required to certify that neither they nor their fellow shareholders or partners has a tax delinquency. Given that S corporations do not file corporate tax returns, but instead report the company's tax liability on the individual tax returns on the S corporation partners, the rule could impose a significant level of personal information sharing among business partners.

Response: The rule does not change the existing procedures for the certification. The existing certification at 52.209–5 and 52.212–3(h) is that ''(a)(1) The Offeror certifies, to the best of its knowledge and belief, that— (i) The Offeror and/or any of its Principals –. . .''. The definition of principals is found at FAR 52.209–5, and includes owners and partners. The offeror already has to certify to whether it or its principals are debarred, suspended, proposed for debarment, convicted of or charged with or had a civil judgment for certain offenses. Individual certifications from each owner and each partner are not required.

c. Application to commercial items.

Comment: One respondent objects to the certification being imposed on commercial item procurements. 41 U.S.C. 430 prohibits the imposition of any certification for a commercial item that is not required to implement a statute or executive order unless the FAR Council has made a determination to impose the certification. The FAR

Council has not done so. Therefore, Part 12 acquisitions should be exempted.

Response: 41 U.S.C. 430 is the statute regarding laws inapplicable to acquisition of commercial items. It requires a covered law enacted after October 13, 1994, to be included on the list of laws inapplicable to commercial items, unless the FAR Council makes a written determination. This statute does not apply, as this regulation is not based on statute. This statute does not prohibit application of this rule to acquisitions of commercial items.

41 U.S.C. 425 is the certification statute. It forbids including a contractor certification in the FAR unless it is specifically imposed by statute, or a written justification is provided by the FAR Council to the Administrator of OFPP, and the Administrator approves the inclusion. This statute does apply. The FAR Council has obtained approval from the Administrator of OFPP for inclusion of this nonstatutory certification in the FAR.

d. Best knowledge and belief.

Comment: One respondent recommends that the certifications should include the phrase ''best knowledge and belief''.

Response: The certifications already do include this phrase in the current FAR in paragraphs 52.209–5(a)(1) and 52.212–3(h). Because no change was proposed to these prefaces, they were not republished in the proposed rule.

e. Date certain.

Comment: One respondent recommends that the contractor be allowed to add a date certain, such as the end of the last calendar quarter, to the certification.

Response: The Councils have elected not to add a ''date certain'' requirement to the certification regarding notification of delinquent taxes because such an addition would require more, not less, work by offerors. Adding a ''date certain'' requirement would effectively require offerors to perform a ''sweep'' prior to each certification. Absent a ''date certain'' requirement, offerors certify to their best knowledge and belief. With the additional clarifications regarding finality and Federal tax delinquency, offerors should be able to certify with confidence without having to conduct an internal ''sweep.''

6. New causes of suspension and debarment and required certification.

a. Inclusion of ''any'' (Federal, State, local, and foreign) tax law violation or delinquency.

Comments: The U.S. Small Business Administration, Office of Advocacy (SBA-OA) comments that the proposed rule would require a contractor to certify that it does or does not have a tax liability not just for Federal, State or local, but also foreign jurisdictions.

Another respondent comments that the rule should clearly state whether the phrase ''tax laws'' refers to ''any and all'' tax laws. Innumerable State, local, and foreign tax statutes may be applicable to an offeror, depending on the size of the business, the number of divisions or subsidiaries, nature, and location of work being performed. A contractor who frequently submits proposals may not know on a real time basis whether any notice has been received relating to all the tax areas. The respondent recommends limiting the rule to Federal income and payroll taxes.

Another respondent comments that because a multi-state company can be under audit by hundreds of Federal, State, and local taxing authorities at one time, such a company would find it virtually impossible to comply with the proposed rule. This respondent recommends that the rule be limited to Federal entities.

Response: The Councils concur with the respondents and have narrowed the scope of the final rule to Federal tax delinquency and violation of Federal criminal tax laws, except for tax evasion, which applies to evasion of any tax, not just Federal. This should limit an offeror's need to know on a real-time basis whether any notice has been received relating to other than Federal tax areas (*i.e.*, State, local, and foreign jurisdictions).

The Councils' decision to remove State, local, and foreign tax violations (except for tax evasion) from the scope of this rule is because their inclusion would unduly burden the offerors and the contracting officer, who would potentially face uncertainty when assessing the impact of multi-jurisdictional tax violations on the award process.

Although the Councils do agree to limiting to Federal criminal tax law violations and Federal tax delinquency, they have not specifically limited the final rule to address just Federal income and payroll taxes, although such taxes certainly constitute the bulk of Federal taxes. Any violation of Federal criminal tax law or Federal tax delinquency can affect the contractor's responsibility, regardless of the specific tax involved. Tracking of all Federal criminal tax violation or Federal tax delinquency (even if other than income or payroll) does not increase the complexity of the certification, but simplifies it.

b. Tax evasion, violating tax law, failing to pay taxes.

Comment: One respondent comments that the proposed rule transforms the precisely defined FAR Subpart 9.4, ''Debarment, Suspension and Ineligibility,'' inclusive of a well-defined tax code definition of tax evasion, into an undefined infraction called a tax liability for any tax law.

Another respondent recommends deletion of the term ''tax evasion'' as a basis for suspension or disbarment, because ''tax evasion'' is covered by the new causes: ''violating tax laws'' and ''failing to pay taxes''.

Response: The Councils agree that the term ''tax evasion'' is covered by the proposed phrases ''violating tax laws'', and ''failing to pay taxes'', although those phrases cover a much broader range of circumstances. However, the Councils also concur that the term ''tax evasion'' is a precisely-defined well-understood term, applicable to all types of taxes (Federal, state, local, and foreign) and therefore have retained the term. The final rule has been drafted so that the term ''tax evasion'' is no longer totally a subset of the subsequent terms.

The term ''violating tax laws'' has been made more specific to cover only the violation of ''Federal criminal tax laws'' (*e.g.*, willful failure to file). The FAR sections 9.406–2(a) and 9.407–2(a)(3) are intended to focus on criminal violations. The letter from the Permanent Subcommittee on Investigations specifically requested that the FAR should require certification with regard to criminal tax law violation. The decision to limit the cause for debarment/suspension to Federal criminal tax law violation was also based on the conclusion that violation of other than criminal tax laws probably has less bearing on contractor responsibility. Because the certification with regard to criminal tax law violation is restricted to Federal criminal tax law, it is necessary to retain ''tax evasion'' as well, which applies to evasion of any tax, not just Federal taxes.

The broad circumstance covered by the phrase ''failing to pay taxes'' is not necessarily a criminal offense, and the Councils have therefore deleted it from the specified paragraphs. The non-criminal failure to pay taxes is subsequently covered in the rule using a more precisely defined term ''delinquent taxes''.

c. Delinquent taxes – need definition.

Comment: One respondent recommends a clear definition of ''delinquent taxes'', which allows for due process to dispute the tax liability without penalty of debarment or suspension.

Another respondent states that use of the term ''delinquent taxes'' significantly lowers the standard from tax evasion. Because the IRS does not

have a clear definition of ''delinquent taxes'', it is difficult to ensure compliance with the new standard. It is unclear how this definition accommodates taxpayers who are disputing tax liability.

Another respondent recommends that the certification provide that an installment agreement or offer-in-compromise not be considered a ''delinquent'' tax subject to reporting requirements. The respondent recommends the term ''notice of delinquency'' be deleted or defined to reflect the adjudication of a tax liability after due process.

A fourth respondent recommends that the definition of ''delinquent taxes'' be revised to specify that all avenues of appeal have been closed, to allow for due process in disputing the tax liability.

Response: The Councils agree that the definitions of ''delinquent taxes'' and ''tax delinquency'' need clarification. For purposes of the FAR rule, the definition should have two components. First, the tax liability should be finally determined (*e.g.*, it is not a proposed liability subject to further administrative or judicial challenge and it has been assessed (''finality'' element)). Second, the taxpayer must have neglected or refused to pay a liability that has become due (''delinquent'' element).

The Councils considered, as a starting point, whether the definition of ''delinquent taxes'' used in certain provisions of the I.R.C. might be useful in defining the term for purposes of this rule. For example, I.R.C. section 7524 requires an annual notice of tax delinquency be provided to a taxpayer with a ''tax delinquent account''. I.R.C. section 6103(l)(3) allows disclosure of return information to a Federal agency where an applicant for a Federal loan has a ''tax delinquent account''. See also Internal Revenue Manual 11.3.29.6(8). A ''tax delinquent account'' for purposes of these provisions, however, is an account which shows up as being unpaid on the IRS computer systems. These provisions do not allow for the possibility for further dispute of the liability, for IRS error, or for whether the taxpayer is currently required to pay the liability. While for purposes of these provisions, this definition may be adequate, we agree that for purposes of this FAR rule a different definition is warranted.

i. Finality.

This definition should apply only to tax liabilities that are finally determined, not proposed or under valid dispute. For example, this would not apply to proposed deficiencies shown on a statutory notice of deficiency which a taxpayer is entitled to contest in Tax Court. The liabilities should have been assessed and should generally be subject to enforced collection action, such as a tax lien or levy (although there may be something precluding the IRS from taking enforced collection action, as further discussed below).

There should be no pending administrative or judicial challenge to the underlying liability. An administrative or judicial challenge could include a refund claim, collection due process lien or levy hearing, deficiency case, interest or penalty abatement case, etc. In the case of a judicial challenge to the liability, there would be no finality until all judicial appeal rights have been exhausted.

The Councils considered whether it would provide helpful information to the contracting officer for offerors to report in the certification tax liabilities that had no remaining administrative challenge, but might still have open avenues of judicial challenge. The Councils decided that to provide due process, it would be more useful to the contracting officer and suspending and debarring official (SDO) to focus on unpaid taxes for which there is no pending administrative or judicial challenge to the underlying liability.

ii. Delinquency.

If there is a finally determined tax liability, a taxpayer should be deemed ''delinquent'' for purposes of this definition only if that taxpayer has refused or neglected to pay that liability when full payment is due and required.

For example, some respondents suggested that a taxpayer who has entered into an installment agreement or offer-in-compromise should not be considered to be ''delinquent''. The Councils agree. A taxpayer who has entered into such an agreement with the IRS is not currently required to make full payment of the liability.

A taxpayer is also not delinquent in cases where the IRS is precluded from taking collection action, because in those cases payment from the taxpayer is also not currently due and required. For example, a taxpayer who has filed for bankruptcy protection should not be considered to be delinquent for purposes of this definition. (As discussed above, the IRS may also be precluded from taking enforced collection action in cases where the tax liability is not finally determined).

d. Unresolved tax liens.

Comment: One respondent states that the term ''received notice of a tax lien'' is too expansive or ambiguous because the notice could be mistaken and the lien filing could be contested. Another respondent states that all avenues of appeal should be allowed to dispute a filed notice of tax lien.

Response: The Councils agree with these comments, but have deleted the references to ''unresolved tax liens'' and ''received notice of a tax lien'' from the final rule. It is superfluous to have separate certification/contractor responsibility requirements for delinquent taxes and for tax liens, especially since the final rule more precisely defines ''delinquent taxes''.

e. Minimum threshold for reporting.

Comments: Three respondents propose minimum thresholds. The respondents suggest that the wide range in amounts of tax issues and the various stages of administration with various authorities suggest the establishment of a threshold for disclosure to contracting officers.

• One respondent states that the value of actionable information to contracting officials in assessing a contractor's responsibility would be improved by establishing a minimum threshold level below which reporting would be unnecessary. The respondent points out that companies receive a variety of notices, often for minor amounts that by any reasonable standard would not call into question a contractor's present responsibility. They propose $25,000 as the threshold.

• Another respondent uses the term ''materiality'' in their comments and expresses a concern that a tax dispute of $100 requires the same certification as $1,000,000 dispute. Consequently, the respondent suggests use of threshold equal to the greater of $100,000 or 1% of the contract bid amount.

• The SBA-OA suggests a minimum threshold of $2,500.

Response: The Councils agree that both contractors and contracting officers will be unnecessarily burdened by the proposed rule with numerous disclosures that do not have a direct bearing on responsibility. To mitigate such a result, the Councils have set a minimum threshold of $3,000, consistent with the legislation that was favorably reported on May 9, 2007 by the Subcommittee on Government Management, Organization and Procurement of the House Oversight and Government Reform Committee (HR 1870, Towns Substitute Amendment), but recognizing the recent inflationary adjustment to the micro-purchase threshold.

f. Increase scope of certification.

Comment: One respondent comments that the certifications should be revised to address potentially criminal behavior before it is identified by the IRS, by asking for simple certification that the

company has been paying its taxes. The respondent suggests the additional certification should be added to both FAR 52.209–5 and 52.212–3, which would read: ''Have □, have not □, paid all payroll and corporate taxes due.'' These certifications would require that the contractor affirm that it is following the law, not simply that the IRS hasn't caught the company breaking the law.

Response: While the purpose of the additional proposed certification is well-intended, such a ''have paid'' certification would only present the contractor's position or perspective regarding its tax situation, and would not account for situations where a taxing authority and the contractor may be in dispute over whether or not the contractor has paid all taxes due. Therefore, such a certification would not provide the information pertinent to a responsibility determination. Furthermore, should a contractor check the ''have not'' box, it would be the other certifications that would provide more specific information regarding violation of Federal criminal tax laws or delinquent Federal taxes. Therefore, we do not believe such an additional certification would add any important information.

7. What do contracting officers do upon receipt of a positive certification? Will ''de facto'' debarment result?

a. Lack of clear guidance to contracting officers.

Comment: The Small Business Administration Office of Advocacy (SBA-OA) indicates that small businesses are concerned that the lack of clear guidance to contracting officers, particularly after the contractor has certified that the company has a tax liability, will create widely varying interpretations of rule.

SBA-OA raised several 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?

Another respondent comments that additional guidance is needed at FAR 9.408(a) to provide criteria by which contracting officers can assess whether a potential tax issue is of sufficient magnitude to deny award. The guidance should provide examples.

Response: There is already specific guidance to the contracting officer in the FAR. FAR 9.103 prohibits any acquisition unless the contracting officer makes an affirmative determination of responsibility. The FAR provides the standards that the contracting officer is required to consider when determining contractor responsibility. This rule does not in any way change the process for determination of responsibility, just adds one more factor to consider.

FAR 9.408 provides specific direction to the contracting officer as to the appropriate procedures to follow when an offeror provides an affirmative response to paragraph (a)(1) of the certification at 52.209–5 or paragraph (h) of the provision 52.212–3. The contracting officer must—

• Request such additional information from the offeror as the contracting officer deems necessary in order to demonstrate the offeror's responsibility to the contracting officer; and

• Notify, prior to proceeding with award, in accordance with agency procedures, the agency official responsible for initiating debarment or suspension action, when an offeror indicates the existence of an indictment, charge, conviction, or civil judgment (now the Councils have also added Federal tax delinquency in an amount greater than $3,000).

In order to more clearly associate these procedures to the responsibility determination required in FAR Subpart 9.1, these procedures, as well as the clause prescription for the certifications, have been moved to FAR 9.104.

Furthermore, the Councils have modified the requirement to request such additional information as the contracting officer deems necessary. The Councils specify that the request should be made promptly, upon receipt of offers, so as not to delay the procurement, and has placed the burden upon the offeror to provide the information it deems necessary to demonstrate its responsibility. When an offeror has made an affirmative response to the certification, the offeror is in a better position to know what evidence is available to mitigate the response and demonstrate its responsibility.

Several of the other revisions to the final rule, as already discussed, better define and limit the circumstances that require reporting and will eliminate many extraneous affirmations that may have little bearing on contractor responsibility.

• The broad phrases ''violating tax laws, failing to pay taxes'' have been replaced with ''violation of Federal criminal tax law''.

• Notification of ''delinquent'' taxes is restricted to delinquent Federal taxes in an amount that exceeds $3,000, and ''delinquent'' is clearly defined, limiting applicability to tax liability that has been finally determined and which the taxpayer has not paid when it has become due, with several examples provided.

In specific response to the SBA-OA questions—

• The affirmation of a tax liability does not necessarily mean the lack of contractor responsibility. A tax liability is just one of many factors to be evaluated by the contracting officer and, as appropriate, the SDO.

• The affirmation of a tax liability does not necessarily mean the initiation of debarment and/or suspension provisions of the FAR. If the contracting officer forwards information to the SDO, the SDO will further investigate and evaluate before deciding to initiate suspension or debarment proceedings.

• The contracting officer may consult with the SDO. The SDO may determine in advance of contract award that the contractor is presently responsible, although not with regard to the award of a particular contract.

b. Certificate of Competency.

Comment: SBA-OA was concerned that the unintended result of the rule may be denial of a Certificate of Competency (COC) ruling from SBA to an otherwise qualified small business.

Response: The policy at FAR 9.103(b) is clear with regard to making responsibility determinations involving small businesses. If the prospective contractor is a small business concern, the contracting officer shall comply with Subpart 19.6, Certificates of Competency and Determinations of Responsibility. If the contracting officer determines that an apparent successful small business lacks certain elements of responsibility, the contracting officer must refer the matter to the SBA. The final rule does not change this policy or make any exceptions to compliance with Subpart 19.6, if the contracting officer determines that a small business lacks certain elements of responsibility based upon affirmative responses to the certifications. SBA's COC regulations currently state that if a small business concern is debarred from Federal procurement, proposed or suspended from Federal procurement pending debarment to protect the Government's interests, SBA will find that small business ineligible for COC consideration.

c. De facto debarment.

Comment: One respondent states that to subject a potential contractor to an informal blacklisting or a formal contracting officer decision of nonresponsibility repeatedly for the same condition may subject the Government to a legal challenge on the basis of de facto debarment. Generally,

these matters should be referred to agency suspending and debarring officials. The respondent recommends additional regulatory or guidance language to the contracting officer.

SBA-OA questions whether the lack of clarity of the rule can result in the unintended de-facto denial of a contract to a small business bidder.

Another respondent comments that the proposed rule is not de facto debarment, but simply a good way to further ensure that contractors are indeed responsible.

Response: The Councils concur that this rule will not cause de facto debarment. This rule does not change the process at all, but just adds information for consideration in the determination of a contractor's responsibility. A contracting officer is required to make an affirmative determination of responsibility in accordance with the standards in the FAR. The rule requires the contracting officer to consider the new certifications relating to taxes in the certification at 52.209–5 or 52.212–3(h), among other information when making responsibility determinations.

• An affirmative response to one of the certifications does not necessarily mean that the contractor is not responsible. Even if the contractor is determined to be not responsible, that does not constitute a de facto debarment.

• A contracting officer is required to request additional information, and notify, prior to proceeding with award, in accordance with agency procedures, the agency official responsible for initiating debarment or suspension action, where an offeror indicates the existence of an indictment, charge, conviction, or civil judgment, or Federal tax delinquency in an amount that exceeds $3,000.

• Making a single determination of nonresponsibility does not constitute de facto debarment, as long as the contracting officer refers the matter to the SDO, so that the Government will not continue to deny awards to the offeror without the due process of the suspension and debarment process.

d. Incentive for contacting officer to assume guilt.

Comment: One respondent comments that while the proposed rule would not instantaneously debar a contractor nor expressly prohibit a contracting officer from awarding a contract to a company that informs the Government of the delinquent tax or unresolved tax lien notifications, there would be a strong incentive for the contracting officer to assume guilt and award the contract to another company.

Response: The respondent does not present any evidence that there would be a strong incentive for contracting officers to assume guilt and award a contract to another company when a contractor provides an affirmative response to the certification at 52.209–5 or 52.212–3(h). The contracting officer is required to follow the regulations at FAR Subpart 9.1 when making a responsibility determination. In fact, the Councils find that a contracting officer has strong incentive not to assume guilt and find an offeror nonresponsible, as such irresponsible action would be highly likely to result in a law suit.

However, in order to further prevent contracting officers from assuming anything, the final rule has been narrowed to exclude the need to certify with regard to unpaid taxes until there has been a final determination, and there are not further avenues of administrative or judicial appeal. This will protect offerors from having to report unresolved tax disputes, which may still be resolved in their favor.

8. Small business issues.

a. Impact on small businesses.

i. *Will hurt small businesses*.

Comments: One respondent states that because the regulations are unclear, and because some small businesses do not have the financial resources to employ lawyers or tax accountants, small businesses will simply certify they have a tax liability. SBA-OA was also concerned that without a factual basis for the certification, it is impossible for the approximately 300,000 small business registered in the CCR to fully evaluate the economic impact of the proposed regulation.

One respondent comments that this certification could hurt companies that have owned up to their mistakes and paid their relevant tax liability, interest, and penalties, a standard which particularly hurts small businesses.

Response: The basis for a certification is clearly delineated in the final rule. A small business can tell without hiring a tax accountant or lawyer whether they have been convicted of violation of Federal criminal tax law or have received a notice from the IRS regarding delinquent Federal taxes.

If the tax liability has been satisfied, then the notification need not be reported in the certification. If an offeror has been convicted of violation of Federal criminal tax law or received notification of delinquent taxes for which the liability has not been satisfied, then that information will be evaluated on a case-by-case basis to determine whether the notification of delinquent taxes or conviction of violation of Federal criminal tax law is an indication that the offeror is not presently responsible.

ii. *The proposed rule will help small businesses*.

Comment: One respondent states that the organizations they represent vigorously support the Councils' efforts to better enforce the responsibility requirement for all Federal contractors. The respondent believes that further strengthening the electronic systems and FAR 9.408 will help small businesses compete.

Response: No response required.

b. Need reasonable alternatives for small business compliance.

Comment: SBA-OA states that it welcomes the efforts of the Councils to increase corporate tax accountability, but caveats this with the statement that several areas of the proposed regulation require a more balanced approach for small businesses. The SBA-OA urges the Councils to give careful consideration to the need for reasonable alternatives for small business compliance with the proposed regulation. As one alternative, the respondent recommends a minimum threshold of $2,500.

Response: As previously stated, the Councils have revised the final rule to make it less burdensome for all respondents, including small businesses:

• Limit to Federal tax delinquency and violation of Federal criminal tax laws (except for tax evasion).

• Clearly define ''delinquent taxes,'' limiting applicability to tax liability that has been finally determined and which the taxpayer has not paid when it has become due. To make it even clearer, examples are provided.

• Set a minimum threshold of $3,000 (adjusted for inflation).

c. Need Initial Regulatory Flexibility Analysis.

Comment: SBA-OA stated that an Initial Regulatory Flexibility Analysis is required by Section 603 of the Regulatory Flexibility Act when a Federal rule is expected to have a significant economic impact on a substantial number of small entities. The Councils stated in the preamble to the proposed rule that they did not expect the rule to have such a significant impact on a substantial number of small entities. SBA-OA commented that the Councils did not provide a factual basis for this assessment. SBA-OA stated that the rule is likely to increase the cost of doing business with the Government, and that due to the lack of clarity in the regulation, those increased costs could be significant.

Response: The Councils worked with SBA-OA to make the impact of the rule

on small business minimal. Small businesses must already complete the certification at 52.209–5, including information on tax evasion. The new certification only requires the offeror to certify whether it has, or has not, within a three-year period preceding the offer, been convicted of violating Federal criminal tax laws or been notified of any delinquent Federal taxes in an amount that exceeds $3,000 for which the liability remains unsatisfied. This is a very clearly defined certification, and a small business should not have difficulty identifying the correct response, especially after limiting it to delinquent Federal taxes of which it has received notice. The small business is not required to assess whether there are any unpaid tax liabilities of which it has not been notified (as some respondents requested). Either it got such notice or it did not. If it got the notice of delinquent Federal taxes, either it satisfied the liability or it did not.

After review of the final rule, SBA-OA is satisfied that the final rule achieves a more balanced approach for small business, and that a Regulatory Flexibility Analysis is not required.

9. Ways to further improve: Waiver of privacy rights; FCTCTF to resolve issues; use DCAA to monitor.

Comments: One respondent comments that the tax certification is an excellent idea and should also carry a waiver of privacy rights under I.R.C. section 6103 to permit expedited access to contractor tax records, parallel to the TIN matching process. The respondent also suggests that the joint Federal Contactor Tax Compliance Task Force (FCTCTF) is the perfect forum to resolve issues, and that the Defense Contract Audit Agency could monitor tax compliance.

Response: No waiver of privacy rights is required, because this certification creates no need for Government contracting officers to access any IRS or other tax records or submissions. Indeed, it would be improper for contracting officers to do so. The function of the certification is to provide contracting officers with information on an aspect of a prospective contractor's present responsibility (as required by FAR Subpart 9.1). Contracting officers should not, and cannot, become involved in any aspect of a tax delinquency (*e.g.*, collection, adjudication).

The Councils cannot agree with the suggestion regarding the Federal Contactor Tax Compliance Task Force because that body's charter does not include resolving tax issues. Similarly, it is not part of Defense Contract Audit Agency's mission to monitor tax compliance.

10. Intersection with Public Law 109–222.

Comments: One respondent references the law (presumably referring to Section 511 of the Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. 109–222) requiring Federal, State and certain local contracting entities to withhold 3% of each payment made after December 31, 2010. The respondent states that it strongly opposes this arbitrary payment withholding provision and looks forward to commenting on the implementing federal regulations, while simultaneously seeking a repeal of the law.

Another respondent expresses its appreciation for the Councils seeking to address the issue of delinquent taxpayers receiving Federal contracts through certifications rather than the punitive withholding envisioned by Section 511 of Pub. L. 109–222. This respondent urges the Councils to seize this opportunity to make the FAR strong enough to obviate the need for the draconian provisions of Pub. L. 109–222, which affect all contractors, regardless of their compliance practices. This respondent points out that the construction industry, where there is already a practice of retainage, will suffer in particular from the impact of the 3% withhold. Certifications and enforcement provide a much more surgical approach to the problem of the tax gap. Tax collection should be left to the tax enforcement professionals, rather than contracting personnel.

Response: While the respondents may prefer the certifications proposed by this rule to the withholding requirements of Pub. L. 109–222, this rule is not an alternative to those 3% withholding requirements, which are statutory. Any discussion of implementation of that statute is outside the scope of this case.

11. Relocation of FAR 9.408 and 9.409.

The Councils have moved two sections, FAR 9.408 and 9.409, out of FAR Subpart 9.4, Debarment, Suspension, and Ineligibility, to FAR Subpart 9.1, Responsible Prospective Contractors, for several reasons.

First, locating the material at FAR 9.408 does not appear to be the most logical placement. The Councils have moved these directions to the contracting officer as to what to do when an offeror makes a positive response to one of the certifications under FAR 52.209–5 to 9.104–5, under the section on standards for determining the responsibility of prospective contractors.

Second, the certification no longer relates solely, or primarily, to suspension or debarment. It relates to broader considerations of an offeror's general responsibility. Thus, while certain responses on the certification could result in a referral to the Suspending and Debarring Official, the main purpose of the clause is to provide information that a contracting officer should use in the mandatory pre-award determination of an offeror's present responsibility for the purpose of awarding a contract only to such responsible offerors, the subject of Subpart 9.1. In addition, the title of the clause at FAR 52.209–5 has been shortened to the broader, and more accurate, ''Certification Regarding Responsibility Matters.''

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The Councils worked with SBA-OA to make the impact of the rule on small business minimal. Small businesses must already complete the certification at FAR 52.209–5, including information on tax evasion. The new certification only requires the offeror to certify whether it has, or has not, within a 3-year period preceding the offer, been convicted of violating Federal criminal tax laws or been notified of any delinquent Federal taxes in an amount that exceeds $3,000 for which the liability remains unsatisfied. This is a very clearly defined certification, and a small business should not have difficulty identifying the correct response, especially after limiting it to delinquent Federal taxes of which it has received notice. The small business is not required to assess whether there are any unpaid tax liabilities of which it has not been notified (as some respondents requested). Either it got such notice or it did not. If it got the notice of delinquent Federal taxes, either it satisfied the liability or it did not.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the

FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0094 and 9000–0136.

List of Subjects in 48 CFR Parts 4, 9, and 52

Government procurement.

Dated: April 4, 2008.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 4, 9, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 4, 9, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 4—ADMINISTRATIVE MATTERS

■ 2. Amend section 4.1202 by revising paragraph (e) to read as follows:

4.1202 Solicitation provision and contract clause.

* * * * *

(e) 52.209–5, Certification Regarding Responsibility Matters.

* * * * *

PART 9—CONTRACTOR QUALIFICATIONS

■ 3. Add sections 9.104–5 and 9.104–6 to read as follows:

9.104–5 Certification regarding responsibility matters.

(a) When an offeror provides an affirmative response in paragraph (a)(1) of the provision at 52.209–5, Certification Regarding Responsibility Matters, or paragraph (h) of provision 52.212–3, the contracting officer shall—

(1) Promptly, upon receipt of offers, request such additional information from the offeror as the offeror deems necessary in order to demonstrate the offeror's responsibility to the contracting officer (but see 9.405); and

(2) Notify, prior to proceeding with award, in accordance with agency procedures (see 9.406–3(a) and 9.407–3(a)), the agency official responsible for initiating debarment or suspension action, where an offeror indicates the existence of an indictment, charge, conviction, or civil judgment, or Federal tax delinquency in an amount that exceeds $3,000.

(b) Offerors who do not furnish the certification or such information as may be requested by the contracting officer shall be given an opportunity to remedy the deficiency. Failure to furnish the certification or such information may render the offeror nonresponsible.

9.104–6 Solicitation provision.

The contracting officer shall insert the provision at 52.209–5, Certification Regarding Responsibility Matters, in solicitations where the contract value is expected to exceed the simplified acquisition threshold.

■ 4. Amend section 9.105–1 by revising paragraph (c)(3) to read as follows:

9.105–1 Obtaining information.

* * * * *

(c) * * *

(3) The prospective contractor—including bid or proposal information (including the certification at 52.209–5 or 52.212–3(h) (see 9.104–5)), questionnaire replies, financial data, information on production equipment, and personnel information.

* * * * *

■ 5. Amend section 9.406–2 by removing from paragraph (a)(3) ''tax evasion,'' and adding ''tax evasion, violating Federal criminal tax laws,'' in its place; and by adding paragraph (b)(1)(v) to read as follows:

9.406–2 Causes for debarment.

* * * * *

(b) * * *

(1) * * *

(v) Delinquent Federal taxes in an amount that exceeds $3,000.

(A) Federal taxes are considered delinquent for purposes of this provision if both of the following criteria apply:

(*1*) *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.

(*2*) *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.

(B) *Examples.* (*1*) 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.

(*2*) 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.

(*3*) *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.

(*4*) *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).

* * * * *

■ 6. Amend section 9.407–2 by—

■ a. Removing from paragraph (a)(3) ''tax evasion,'' and adding ''tax evasion, violating Federal criminal tax laws,'' in its place;

■ b. Removing from the end of paragraph (a)(6) the word ''or'';

■ c. Redesignating paragraph (a)(7) as paragraph (a)(8); and

■ d. Adding a new paragraph (a)(7) to read as follows:

9.407–2 Causes for suspension.

(a) * * *

(7) Delinquent Federal taxes in an amount that exceeds $3,000. See the criteria at 9.406–2(b)(1)(v) for determination of when taxes are delinquent; or

* * * * *

9.408 [Removed and reserved]

■ 7. Remove and reserve section 9.408.

■ 8. Amend section 9.409 by revising the section heading; by removing paragraph (a); and by removing the paragraph designation (b). The revised heading reads as follows:

9.409 Contract clause.

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 9. Amend section 52.209–5 by—

■ a. Revising the section heading;

■ b. Removing from the introductory paragraph ''9.409(a)'' and adding ''9.104–6'' in its place;

■ c. Revising the clause heading and the date;
■ d. Removing from paragraph (a)(1)(i)(B) ''tax evasion, or receiving stolen property; and'' and adding ''tax evasion, violating Federal criminal tax laws, or receiving stolen property;'' in its place; and
■ e. Removing from the end of paragraph (a)(1)(i)(C) the period and adding ''; and'' in its place; and
■ f. Adding paragraph (a)(1)(i)(D) to read as follows:

52.209–5 Certification Regarding Responsibility Matters.

* * * * *

CERTIFICATION REGARDING RESPONSIBILITY MATTERS (MAY 2008)

(a)(1) * * *

(i) * * *

(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).

* * * * *

■ 10. Amend section 52.212–3 by—
■ a. Revising the date of the clause;
■ b. Removing from paragraph (h) ''*Debarment, Suspension or Ineligibility for Award*'' and adding ''*Responsibility Matters*'' in its place;
■ c. Removing from the end of paragraph (h)(1) the word ''and'';
■ d. Removing from paragraph (h)(2) ''tax evasion, or receiving stolen property; and'' and adding ''tax evasion, violating Federal criminal tax laws, or receiving stolen property;'' in its place;
■ e. Removing from paragraph (h)(3) ''offenses.'' and adding ''offenses enumerated in paragraph (h)(2) of this clause; and'' in its place; and
■ f. Adding paragraph (h)(4) to read as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

OFFER REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS (MAY 2008)

* * * * *

(h) * * *

(4) □ 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.

(i) Taxes are considered delinquent if both of the following criteria apply:

(A) *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.

(B) *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.

(ii) *Examples.* (A) 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.

(B) 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.

(C) 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.

(D) 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).

[FR Doc. E8–8508 Filed 4–21–08; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 33

[FAC 2005–25; FAR Case 2006–031; Item VI; Docket 2008–0001; Sequence 9]

RIN 9000–AK79

Federal Acquisition Regulation; FAR Case 2006–031, Enhanced Access for Small Business

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement Section 857 of the John Warner National Defense Authorization Act for Fiscal Year 2007.

DATES: *Effective Date*: May 22, 2008.

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, Procurement Analyst, at (202) 208–6925 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–25, FAR case 2006–031.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 72 FR 46950 on August 22, 2007. No