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OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503**

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BEFORE THE  
PERMANENT SUBCOMMITTEE ON INVESTIGATIONS  
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE

MAY 24, 2011

Chairman Levin, Ranking Member Coburn, and Members of the Subcommittee, I appreciate the opportunity to appear before you today to discuss steps we are taking to limit contractors with serious tax delinquencies from receiving government contracts. The Administration shares your desire to ensure that federal agencies spend money wisely and eliminate waste and abuse of public resources. As guardians of the taxpayer's resources, our agencies have an obligation to make every possible effort to do business with contractors that place a premium on performance and quality and not do business with firms who are proven bad actors.

Nowhere is this vigilance more pronounced than for contractors and grantees that received Federal funds as part of the American Recovery and Reinvestment Act ("Recovery Act"). Congress set out unprecedented requirements for accountability and transparency in the disbursement of Recovery Act funds to ensure that the public had complete visibility into how their tax dollars were being spent. Congress also set up the independent Recovery Accountability and Transparency Board ("Recovery Board") to conduct oversight of these funds and work with the audit community in rooting out and preventing any waste, fraud, and abuse in

the program. Using cutting edge forensic technology and a dedicated team of fraud analysts, the Recovery Board has carefully examined recipient data, comparing it with other relevant databases to detect patterns and ensure that Recovery Act funds do not go to lawbreakers. As a result of this oversight, the Recovery Board reports that expenditures under the Act have experienced a remarkably low rate of waste, fraud and abuse – less than 0.4% of awards.

Responsible stewardship includes taking appropriate action to protect taxpayers when a tax-delinquent contractor is trying to win a Federal contract and when a current contractor is found to be tax delinquent. Over the past several years, important actions have been taken to better protect taxpayer interests when dealing with companies with tax delinquencies. These actions include mandatory self-certifications by prospective contractors to identify if they have tax delinquencies and greater efforts to levy government payments when companies who already hold government contracts are identified as delinquent. While these are important steps, there is more to be done, as the findings in the recent report by the Government Accountability Office (GAO) remind us.

The President's January 20, 2010 Memorandum on Tax Delinquency reiterates the importance of ensuring that our contracting officials have the information they need about a contractor's tax status to protect the government's interests. Today, I would like to briefly discuss the progress we have made in better protecting taxpayers from tax-delinquent contractors and steps we are planning to further help contracting officials in considering an offeror's tax status.

## **Considering tax delinquency in responsibility determinations**

Before a federal contract is awarded, contracting officers must determine that the contractor is “responsible” – that is, qualified to do business with the Federal Government, which includes having the integrity and business ethics to work for our taxpayers. Tax compliance is appropriately considered in determining if the contractor has a satisfactory record of integrity and business ethics, a critical element of a responsibility determination. However, before 2008, there was no mechanism built in the responsibility determination process that allowed a contracting officer to determine the tax status of a prospective contractor. We have changed that. Today, pursuant to changes made to the Federal Acquisition Regulation (FAR) in 2008, any company trying to obtain a federal contract with a value above the simplified acquisition threshold (currently \$150,000) must certify whether it has been notified, within a three-year period preceding submission of its proposal, of any delinquent federal taxes in amounts that exceed \$3,000 for which the liability remains unsatisfied.<sup>1</sup> Taxes are delinquent if the tax liability has been assessed and all judicial appeal rights have been exhausted and the taxpayer has failed to pay the tax liability when full payment was due and required.

Offerors enter their certifications into the “Online Representations and Certifications Application,” (ORCA), a web-based system that collects representation and certification information government-wide.<sup>2</sup> When an offeror is preparing a proposal that requires a tax certification, the offeror must go into ORCA to make the required certification. Consistent with the terms of the certification, the offeror must notify the contracting officer if, at any time prior

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<sup>1</sup>The tax certification is part of FAR clause 52.209-5, Certification Regarding Responsibility Matters. The tax certification was added to this clause by FAR Case 2006-011. See 73 Fed. Reg. 21791 (April 22, 2008).

<sup>2</sup> Requirements for contractors to complete annual representations through ORCA are set forth in FAR Subpart 4.12. ORCA may be accessed at <http://orca.bpn.gov>.

to contract award, the offeror learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances. The FAR also requires contractors to update the certifications submitted to ORCA “as necessary, but at least annually, to ensure they are kept current, accurate, and complete.”<sup>3</sup>

An offeror’s certification to a tax delinquency may lead or contribute to a determination by the contracting officer that the offeror is non-responsible, and therefore ineligible for a contract. Certification to a tax delinquency may also be grounds for suspension or debarment. Furthermore, companies can face stiff penalties if they submit a false certification of tax status, including criminal or civil sanctions for making false statements or claims.

In the winter of 2010, the President directed the Office of Management and Budget (OMB) and the Internal Revenue Service (IRS) to evaluate the effectiveness of the contractor self-certifications. OMB worked with agencies to evaluate whether contracting officers awarded new contracts to companies that had certified to having a tax delinquency. The IRS evaluated the overall accuracy of contractor certifications based on a statistical sampling of certifications made after the FAR changes took effect. OMB’s review showed that, for the most part, contractors who certify to tax delinquencies do not receive federal contracts. Only a small fraction of contract obligations involved federal funds going to a contractor with a certified tax delinquency. IRS’s review revealed that the great majority of contractors certify accurately.

These conclusions show promise, suggesting that self-certification acts as a positive deterrent. At the same time, we recognize that there is more to do. Even a low rate of misrepresentation in certifications could potentially represent tax dollars being obligated to tax

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<sup>3</sup> FAR 4.1201(b).

delinquent contractors without appropriate protection of taxpayers' interests. Although at least one agency – the Department of Defense (DoD) – reported several instances where it referred contractors with tax delinquency certifications to the suspension and debarment official (SDO), agencies rarely reported using a contractor self-certification of tax non-compliance as the basis for a debarment or suspension action. A number of agency officials, including senior procurement executives and suspension and debarment officials, have noted the challenge associated with taking action based on the certification as currently worded. The limited information provided in the certification (i.e., an attestation of delinquency of \$3,000 or more) makes it difficult to gauge the seriousness of the delinquency and the extent to which the non-compliance calls into question the contractor's integrity and business ethics, so that it is not clear whether the delinquency would justify a non-responsibility determination or indicates a systemic problem that might justify a suspension or debarment to protect the government's interests. Several agencies reported reaching out to contractors for additional information but few reported making such requests to the Treasury Department. In part, the lack of exchange of information between Treasury and contracting officers is due to the fact that disclosure of tax return information, which is governed by section 6103 of the Internal Revenue Code, is carefully and narrowly prescribed. Improved sharing of information between the IRS and agency contracting offices could enable the government to further reduce its business with tax delinquent firms.

In recent years, several bills have been introduced in Congress intended to help the Treasury Secretary share information concerning serious tax delinquencies to agency heads—information that could then be used to help inform SDOs on the need for debarments and suspension and contracting officers on whether a potential contractor is non-responsible. One

such bill was introduced by the President when he was in the Senate. We welcome the opportunity to work with Congress to craft statutory authority for information on tax delinquencies, with appropriate safeguards, so that IRS can more effectively alert agencies if would-be contractors are misrepresenting their tax status and agencies can stop such entities from receiving government contracts.

We believe that legislation can help us crack down on serious tax delinquents, while also affording due process to contractors and preserving the discretion both of our contracting officers to determine, on a case-by-case basis, if a prospective contractor has the requisite business integrity to be determined presently responsible, and of our SDOs to also determine, based on the specific facts and circumstances, including any mitigating factors, whether suspension or debarment is necessary to protect the interests of the government. While the filing of a notice of lien is often cited as an indicator for a seriously delinquent tax debt that might warrant the initiation of a proposed debarment, we understand there may be situations where the existence of a filed lien may not warrant denying a contract to the entity – for example, where the contractor is current on payments under an approved payment plan. In short, giving both effective tools to our contracting agencies and discretion for them to structure an appropriate remedy in the circumstances of the specific case is critical for the system to be effective and fair.

We must also look for opportunities to take better advantage of technology, to the extent possible with available resources. A year ago, we unveiled the “Federal Awardee Performance and Integrity Information System” (FAPIIS) – a one-stop source for a comprehensive range of data, such as information on suspensions and debarments, contract terminations, and contractor disclosure of adverse, criminal, civil and administrative actions. Broadened and easier access to

this information is giving our contracting officers the information they need to more easily determine whether a company is playing by the rules and has the requisite integrity to do business with the government. OMB will work with the agencies who manage our procurement systems and with the IRS to identify enhancements and determine required resources to support improved information exchange.

We must also expand training for our acquisition workforce so they can make the most of the authorities and tools to root out bad actors. The Federal Acquisition Institute (FAI) is currently developing on-line training on FAPIIS, so that all contracting officers and other officials can have free and easy access to the help they need to navigate through the new system. Despite the important role played by responsibility determinations, many of the agencies that OMB surveyed when it reviewed agency consideration of contractor tax self-certifications indicated that they do not formally train their personnel on the development and documentation of responsibility determinations or on internal agency policies and practices that they have developed to supplement the FAR's coverage in this area (e.g., checklists, business clearances). Consistent with our leadership responsibilities for FAI and the acquisition workforce generally, we will work to evaluate the type of training (government-wide or agency-specific), developmental activities, or additional tools that can further help contracting officers in making effective responsibility determinations.

#### **Increasing consideration of tax delinquencies in disbursement process**

In addition to increasing attention on the tax status of prospective contractors, we are continuing to strengthen policies and processes that directly result in increased debt collection.

Unlike the environment in 2004, when GAO concluded that DoD contractors were able to abuse the federal tax system with “little consequence,” we now move vigorously to collect tax debts; specifically:

- Increasingly, federal payment offices are sharing information with Treasury’s Financial Management Service electronically to identify contractors subject to its Federal Payment and Levy Program (FPLP). Where payments may be levied, the agency will be advised, on a payment-by-payment basis, how much to pay the IRS in satisfaction of the levy and how much, if any, to pay the contractor.
- All Taxpayer Identification Numbers (TINs) that are entered in the CCR database 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 CCR flags contractors with delinquencies, including tax debt that is subject to collection under the Treasury Offset Program (TOP). Under a FAR change which took effect a year ago this past February, the Government-wide commercial purchase card can no longer be used as a method of payment if there is a debt indicator associated with the contractor because the government is not able to offset purchase card payments.

The President’s 2012 Budget includes a provision to allow the IRS to continuously levy up to 100% of federal payments made to a federal vendor for goods and services sold to the Government if the vendor owes delinquent taxes. This technical correction would increase the current unintended levy limitation of 15% to 100% on vendor payments made for the sale or

lease of real estate or other types of property. It would allow Treasury to levy up to 100% of any payment due to a federal vendor with unpaid federal tax liabilities.

### **Conclusion**

We must take all appropriate actions to ensure that government contracts are awarded to responsible, law-abiding contractors who take their tax obligations seriously. We have raised the visibility of tax delinquency by making contractors self-certify to their tax status, but there is more to be done. In particular, we must secure legislation to support the establishment of improved processes for sharing information between IRS and our buying agencies, which will further deter and reduce the government's business with tax delinquent firms. We look forward to working with this Subcommittee and other members of Congress on this effort.

This concludes my statement. I am happy to address any questions you may have.