February 2, 2016

General Services Administration
Regulatory Secretariat (MVCB)
ATTN: Ms. Flowers
1800 F Street NW, 2nd Floor
Washington, D.C. 20405

RE: Federal Acquisition Regulation: Prohibition on Contracting with Corporations with Delinquent Taxes or a Felony Conviction

Dear Ms. Flowers,

On behalf of the Associated General Contractors of America (AGC), I would like to thank you and the Federal Acquisition Regulation (FAR) Council for soliciting comments on this proposed rule to prohibit the federal government from entering into a contract with any corporation having a delinquent federal tax liability or a felony conviction under any federal law, unless the agency has considered suspension and debarment of the corporation and has made a determination that such action is unnecessary. AGC and its members both: (1) believe it is critical to operate within the ethical and legal confines of the law; and (2) understand the need to protect the public interest from bad actors in the federal procurement arena. However, AGC is concerned that the proposed rule—as written—is unnecessary, could ensnare and confuse law-abiding contractors and would further delay the federal procurement process.

AGC is the leading association for the construction industry, representing both union and non-union prime and subcontractor/specialty construction companies. AGC represents more than 26,000 firms including over 6,500 of America’s leading general contractors and over 9,000 specialty-contracting firms. More than 10,500 service providers and suppliers are also associated with AGC, all through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation’s commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more.

Below, AGC explains the reasons why this proposed rule is unnecessary given existing statutory and regulatory frameworks already in place that levy penalties, including incarceration, for violating federal tax and criminal law. Additional protections exist to protect the public interest through the suspension and debarment process. For that reason, the FAR Council should withdraw this proposed rulemaking process. In the event the FAR Council moves to issue a proposed rule, AGC puts forth several concerns that must be addressed: (1) defining the term “corporation;” (2) ensuring the finality of criminal convictions for disclosure; and (3) preventing bureaucratic delays from impacting the economy and efficiency of the federal procurement process.

I. The Proposed Rule is Unnecessary given Existing Statutory and Regulatory Frameworks

Current federal tax and criminal statutes and procurement regulations already include clear penalties for violating their terms and a proven suspension and debarment process for contractors that endanger the public interest. The debarment process, in fact, already addresses contractors with delinquent federal taxes.
or criminal violations. To that extent, this proposed rule is redundant and unnecessary. The information below details the existing system of laws and regulations already applicable and working to protect the public interest in the areas of federal tax, criminal and procurement law.

A. Tax and Criminal Statutes already include Penalties for Tax Delinquency and Felony Convictions

Congress has passed and the president has signed into law hundreds of pages of statutes codified in Title 26 of the U.S. Code—the Internal Revenue Code—and Title 18—the Criminal Code. Those statutes include clear penalties, including fines and imprisonment for violations. Where a tax delinquency exists, a federal contractor needs the ability to work in order to make payments to the Internal Revenue Service (IRS), especially when interest and penalties apply. To charge a contractor with penalties and interest for late tax payments or violations, while also depriving it of the ability to work to pay its debt effectively penalizes that contractor twice for the same violation. A similar argument applies to contractors with felony convictions. When a contractor is guilty of a federal criminal statute, the person or persons guilty are generally incarcerated or fined. Those that are innocent within the contracting company may continue the business with the wrongdoers gone. However, this proposed rule presents the possibility of not only penalizing the wrongdoings within a company of which these may be only a few, but also penalizing those within the company who have done nothing wrong by preventing the possibility of further contract awards.

B. The FAR already includes Federal Tax Delinquency and Criminal Malfeasance as Causes for Debarment

The existing federal government-wide suspension and debarment process is designed to protect the public interest by ensuring that the government conducts business only with responsible contractors. The FAR provides all federal agencies with broad discretion to suspend or debar contractors and subcontractors for a wide range of improper conduct, including commission of any offense indicating a lack of business integrity or having adequate financial resources to perform the contract. The FAR further provides that a contractor or subcontractor may be debarred or suspended for any other cause “of so serious or compelling a nature that it affects the present responsibility . . .” of the contractor.¹ In addition, the FAR empowers an agency debarring official to debar contractors for:

- Violation of federal and state antitrust statutes relating to the submission or offers;
- Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property;
- Delinquent federal taxes in an amount that exceeds $3,500; and
- Many other offenses.²

Therefore, for all intents and purposes, the tax and criminal concerns addressed in this proposed rule are already accounted for in the FAR’s suspension and debarment process.

Furthermore, the proposed rule is likely motivated, at least in part, by a concern that under existing law a contractor could delay a suspension or debarment through legal maneuvering while continuing to bid on

¹ FAR 9.406-2; 9.407-2
² See Far 9.406-2
and receive federal contracts. Such concern is misplaced, and this proposed rule is not necessary. The existing regulatory scheme permits federal agencies to debar or suspend a contractor convicted or indicted of wrongdoing that involves any offense indicating a lack of business integrity or honesty and for such determination to become effective upon its issuance. The company would not again be eligible for the award of a federal contract or subcontract until such time as the suspension or debarment expired, was terminated by the agency, or was determined to be improper by a federal court. The regulations do not provide a contractor with the right to a hearing or to otherwise challenge a proposed debarment or suspension before it becomes effective.

It must also be noted that agencies already reliably utilize the suspension and debarment processes. In fact, they use these processes more now than ever. According to a 2014 GAO report, the number of suspension and debarment actions government-wide has more than doubled from 1,836 in FY 2009 to 4,812 in FY 2013.\(^3\) This has occurred despite the fact that total federal contracting dollars have decreased by approximately $80 billion over the same time period. Similarly, the Interagency Suspension and Debarment Committee (ISDC) emphasized in a recent letter to Congress how it has worked with agencies to strengthen their programs by promoting best practices and leveraging the experience of agencies with well-established programs.\(^4\) ISDC also notes that “these efforts have demonstrated results” as exhibited in the GAO report. Given these facts, it appears that this FAR rule would instate an unnecessary step in the procurement process that would only serve to delay contract award and project delivery.

For the reasons noted above, AGC holds that this proposed rule is unnecessary. However, in the event that the FAR Council does not withdraw this rule, AGC puts forth below several concerns for its consideration.

II. The FAR Council must address the Lack of Clarity Concerning the Term “Corporation” in the Proposed Rule

The proposed rule applies only to “corporations.” However, the FAR Council does not define the term “corporation” as applicable to the relevant subsections and FAR clauses. The FAR, additionally, does not define the term “corporation” in the generally applicable defined terms under FAR 2.101. Rather, it defines several varieties of corporations throughout the regulation, including inverted domestic corporations (FAR 9.108-1) and Alaskan Native Corporations (FAR 19.701), and not the term “corporation” itself.

This lack of clarity concerning what entities are and are not corporations for the purposes of this proposed rule will be very confusing for AGC contractor members. The “term” corporation could encompass C-corporations, S-corporations, and limited liability corporations (LLCs), among others. For example, an AGC member company established as an LLC may not think that it is a “corporation.” Generally speaking, AGC members that are LLCs made cognitive business decisions to structure themselves in that fashion, as opposed to either a C- or S-corporation. LLCs, thus may not think that they fall under the definition of corporation for this reason. Such LLC contractors are often small businesses that may not be highly sophisticated and could under-analyze the apparent applicability of this proposed rule. To remedy this situation, AGC suggests that the FAR Council define the term “corporation” using business entity definitions from the Internal Revenue Code as a means to clearly articulate the entities covered.

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Furthermore, AGC questions how this proposed rule will impact LLCs and “S” Corporations, through which tax liability falls at the individual rather than corporate level. The tax structure of these entities allow for a situation where just one shareholder or member could fail to pay their income taxes based upon their pro-rata share of the profits. Where this happened, would this proposed rule apply? Such a situation could be especially difficult for LLCs that have 40 members and one is delinquent on their taxes.

Similarly, AGC questions how this rule would be applied if a shareholder or member of the entity is convicted of a felony. AGC assumes that felony conviction unrelated to the business entity would not need to be disclosed. However, that is something that is not clarified in the proposed rule. What would have to be disclosed in the case of a member or shareholder convicted of a felony against the LLC, not the government? There could be a situation where a member of the LLC, for instance, is convicted of embezzlement. Would this rule require disclosure and then consideration of disbarment for the entire LLC when one member in 40 sought to defraud his business partners? These are the types of questions AGC members, especially small business members, have when it comes to the lack of a definition for “corporation” and the unintended consequences of not doing so.

Lastly, AGC wonders how this rule would work in the joint venture and teaming contexts. For instance companies often form joint ventures (JVs) for project-specific, limited durations. Such JVs could provide a loophole through which corporate entities seek to avoid disclosure, and possible suspension and debarment. It could also be an area where partnership entities form a corporate JV and may not otherwise know about this proposed rule. Will the FAR Council require the underlying entities that make up the majority/minority interests of a joint venture to disclose tax delinquencies and felonies if the JV is a corporate entity? AGC respectfully requests that the FAR Council considers these questions prior to issuing the final rule.

III. The FAR Council must provide the Same Finality for Felony Criminal Convictions in a Final Rule as it does for Federal Tax Liability in the Proposed Rule

The proposed rule requires contractors to report assessed, unpaid federal tax liability only when all judicial and administrative remedies have been exhausted or have lapsed. This position is in line with the debarment causes under FAR 9.406-2(A) and AGC applauds the FAR Council for adopting this standard in the proposed rule. However, conversely, the proposed rule does not provide a contractor with the same right to judicial finality when it is convicted of a felony. As written, the proposed rule requires a contractor to disclose that it “was convicted of a felony criminal violation under any Federal law within the preceding 24 months.” Such a disclosure appears to be mandatory whether or not the contractor appeals the decision and such an appeal is pending. This is patently unfair to the contractor. The judicial process provides parties with avenues for appeal, because mistakes can be made early in the process that could influence a decision. By requiring contractors to report convictions that are under appeal, the government is effectively upholding a conviction that is not necessarily final. The FAR Council should address the incongruence between finality for tax liability and felony convictions by only mandating the disclosure of convictions after all judicial remedies have been exhausted.

IV. The FAR Council must require an Agency Debarring Official to Issue a Suspension or Debarment Determination in a Reasonable Amount of Time to Advance the Economy Efficiency of the Federal Procurement Process

The proposed rule requires an agency debarment official to consider the suspension or debarment and make a determination concerning a corporation with either (1) delinquent federal tax liability; or (2) a
felony conviction under any federal law. However, the proposed rule places no timeline by which an official must make this decision. As it stands, the federal procurement process is prone to a host of regulatory and bureaucratic delays. The lack of a reasonable response time for a debarring official to make such a decision will likely further delay that process.

AGC suggests that the FAR Council require the debarment official to make a determination within five business days of receiving the inquiry from a contracting officer. After the five day period expires, the determination automatically should default to no suspension or debarment. If the FAR Council does not adopt such an approach, a procurement delay could extend for long periods of time waiting for such a determination to be made, impacting tight procurement deadlines for the government and contractors alike. For example, take the case of agency debarment officials taking extended vacations during the fourth quarter of the fiscal year (July, August, and September). This time period is always the busiest for contracting officers as a result of the federal budgeting process. If debarment officials take vacation for two weeks during this timeframe and are unable to make a determination, contracting officers may have to delay procurements—leaving less time for source selection evaluation boards to review proposals—or lose funds because of appropriations time limits kicking the procurement into a new fiscal year. Such a situation neither advances the federal government’s interest in advancing the economy or efficiency of the federal procurement process. Consequently, the FAR Counsel must adopt a reasonable time period for debarring officials to make a determination and allow for such a determination to be dispensed with if that time period lapses.

V. Conclusion

AGC and its construction contractor members strive to operate in an ethical and law-abiding manner. To do so, these companies hire in-house and outside counsel, consultants and other experts and extensively train their employees. Because AGC contractors play by the rules, efforts to remove ‘bad actors’ from the federal procurement world are generally welcome. When those efforts—as here—are redundant and could drag down innocent, law-biding contractors, AGC becomes greatly concerned. Not all contractors, especially small business contractors, have the resources or sophistication to mitigate gray areas of risk in regulations. The proposed rule, as noted above, presents such risks. As such, in the event that the FAR Council does not withdraw this rule, AGC hopes its concerns are addressed in any final rule to prevent the innocent from being penalized along with the bad actors.

Thank you for your consideration of this matter.

Sincerely,

/S/

Jimmy Christianson
Director, Government Affairs
Federal & Heavy Construction Division
The Associated General Contractors of America