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Contracting and Tax Accountability: Ensuring a Level Playing Field

How the passage of the Contracting and Tax Accountability Act of 2009 will ensure a level playing field among prospective contractors in competing for federal contracts.

BY JUANITA M. RENDON AND RENE G. RENDON

Introduction

On January 15, 2009, the Contracting and Tax Accountability Act of 2009 was introduced in the House of Representatives (H.R. 572) and the Senate (S. 265). The purpose of this bill is to prohibit the awarding of a contract or grant in excess of the simplified acquisition threshold unless the prospective contractor or grantee certifies in writing to the agency awarding the contract or grant that the contractor or grantee has no seriously delinquent tax debts, and for other purposes.¹ The introduction of this act reflects the federal government's new focus on contractor accountability, as well as a much needed collaborative effort between the U.S. Department of the Treasury and federal agency contracting offices.

The purpose of this article is to discuss the need for the Contracting and Tax Accountability Act in the federal contracting process, the act's role in ensuring a level playing field among prospective contractors in competing for federal contracts, and its role in maintaining the integrity of the federal contracting process.

The Federal Acquisition Regulation (FAR)

The *FAR* states that no contract award shall be made unless the contracting officer makes an affirmative determination of the contractor's responsibility. Additionally, the *FAR*

prescribes policies, standards, and procedures pertaining to a prospective contractor's responsibility.² The *FAR* states that, in order to be classified as a "responsible prospective contractor," a contractor must:

- Have adequate financial resources to perform the contract or the ability to obtain them;
- Be able to comply with the required delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
- Have a satisfactory performance record;
- Have a satisfactory record of integrity and business ethics;

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- Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor or subcontractors);
- Have the necessary production, construction, and technical equipment and facilities or the ability to obtain them; and
- Be otherwise qualified and eligible to receive an award under applicable laws and regulations.³

Specifically within the areas of financial responsibility, the *FAR* states that prospective contractors must have adequate financial resources to perform the contract or the ability to obtain them. Additionally, the contracting officer must require acceptable evidence of the prospective contractor's ability to obtain the required resources.⁴

The *FAR* provides ample policy and guidance for contracting officers in making contractor responsibility determinations, and through the use of pre-award surveys, contracting officers have access to information sufficient to be satisfied that a prospective contractor meets the applicable standards.⁵ In addition, offerors must now certify, in accordance with FAR 9.104-5, "Certification Regarding Responsibility Matters," that they meet contractor responsibility standards.

FAR 52.209-5 requires a certification that includes a statement by the offeror that the "offeror or any of its principals have or have not, within a three-year period preceding [the] offer, been notified of any delinquent federal taxes in an amount that exceeds \$3,000 for which the liability remains unsatisfied."⁶ It should be noted that an offeror's certification of delinquent federal taxes, in accordance with this *FAR* provision, will not necessarily result in the withholding of a contract award, but will be considered by the contracting officer in making a determination of contractor responsibility.⁷ Furthermore, contracting officers are required by FAR 9.104-5(a)(2) to notify the appropriate agency when an offeror indicates the existence of a federal tax delinquency in accordance with the *FAR* provision.

Recent U.S. Government Accountability Office (GAO) reports have indicated that federal government contractors are abusing the tax system by taking advantage of the existing tax enforcement and administration system to avoid fulfilling federal tax obligations.⁸ In a 2004 report, GAO stated that

over 27,000 U.S. Department of Defense (DOD) contractors owed about \$3 billion in unpaid taxes as of September 30, 2002. In that same report, GAO discovered abusive or potential criminal activity related to the federal tax system through its audit and investigation of 47 DOD contractors.⁹ In a 2005 report, GAO stated that about 30,000 civilian agency contractors owed over \$3 billion in unpaid federal taxes as of September 30, 2004.¹⁰ More recently, in a 2006 report, GAO identified over 3,800 U.S. General Services Administration (GSA) contractors that had tax debts totaling about \$1.4 billion as of June 30, 2005.¹¹

A Level Playing Field

Government contracting officers should be concerned that contracts are being awarded to contractors who are not in compliance with federal tax laws for at least two reasons. The first reason is that these contractors may have an unfair competitive advantage because they may enjoy lower operating costs than tax compliant contractors. Numerous GAO reports have determined that many of these contractors have been awarded contracts based on a price differential over tax compliant competing contractors.¹²

The second reason focuses on the issue of integrity and business ethics, which is a required standard of contractor responsibility as stipulated in the *FAR*.¹³ Contractors who abuse the federal tax system or who do not pay their taxes should not be considered as organizations maintaining a satisfactory record of integrity and business ethics. In fact, adequate evidence of a contractor committing tax evasion is a cause for debarment or suspension.¹⁴ However, "tax evasion" and "tax avoidance" are two separate issues.

Of critical importance to consider are the challenges affecting the ability of contracting officers in considering the abuse of the federal tax system by contractors and in accessing tax information of potential contractors. Since the disclosure of taxpayer data is generally prohibited by federal law, contracting officers currently do not have any access to a prospective contractor's tax records for use in making contractor responsibility determinations. However, federal tax liens, which are filed at the county courthouse against the property of a taxpayer who owes federal taxes, are a matter of public record and accessible by anyone. Consequently, the current lack of a coordinated and integrated mechanism for accessing taxpayer information between the government contracting agencies and the Internal Revenue Service (IRS) seems to be one of the main challenges in effecting a complete and accurate contractor determination of responsibility by contracting officers.

Federal Tax Compliance Requirements

As indicated by the various GAO reports previously mentioned, the issue of unpaid taxes by government contractors has been an ongoing problem since the early 1990s, and still continues to be a major problem today.¹⁵ As shown in **FIGURE 1** below, the majority of the unpaid taxes were payroll taxes (42 percent) and corporate income taxes (39 percent).¹⁶

It is important to note that “tax evasion” is illegal and constitutes the fraudulent failure to pay and deliberate underpayment of taxes.¹⁷ “Tax avoidance,” on the other hand, constitutes taking legal actions in attempt to lessen the overall tax liability and to maximize after-tax income through proper tax planning.¹⁸

As shown in **FIGURE 2** on page 12 and **FIGURE 3** on page 13, the IRS statistical information indicates that employment tax evasion and corporate fraud investigations have increased over the last few years.¹⁹ Since actions on a specific investigation may cross fiscal years, the data shown in cases initiated may not always represent the same universe of cases shown in other actions within the same fiscal year. As the GAO reports indicate, payroll and corporate income taxes constitute the majority of unpaid taxes by federal contractors.

Payroll Taxes

For businesses that have employees, the IRS stipulates specific compliance requirements. Business owners who hire employ-

ees are responsible for employment taxes, which include federal income tax withholding (Federal Insurance Contributions Act [FICA]), social security and Medicare taxes, and federal unemployment taxes (Federal Unemployment Tax Act [FUTA]).²⁰ In general, employers must withhold federal income tax from their employees’ wages. The tax can be calculated by using the employees’ Form W-4 (“Employee’s Withholding Allowance Certificate”) and Publication 15 (“Employer’s Tax Guide”).²¹

The IRS’s Web site, www.irs.gov, provides specific guidance for business owners who have employees. Under the “Businesses with Employees—Trust Fund Taxes” section, the IRS describes a “trust fund tax” as money withheld from an employee’s wages (income tax, social security, and Medicare taxes) by an employer and held in trust until paid to the U.S. Treasury Department via federal tax deposits to a designated financial institution.²²

Employees pay their contributions toward retirement benefits (social security and Medicare) and the income taxes reported on their tax returns through the tax withholding by their employers. The employees’ trust fund taxes, along with the employer’s matching share of FICA, are paid to the Treasury Department via the federal tax deposit system, and Congress has established large penalties for delays in turning over employment taxes to the Treasury Department.²³

A major area of abuse involves situations where potential federal contractors are withholding the required employment taxes but are failing to turn over the trust funds to the IRS

Figure 1. DOD Contractor Unpaid Taxes by Tax Type

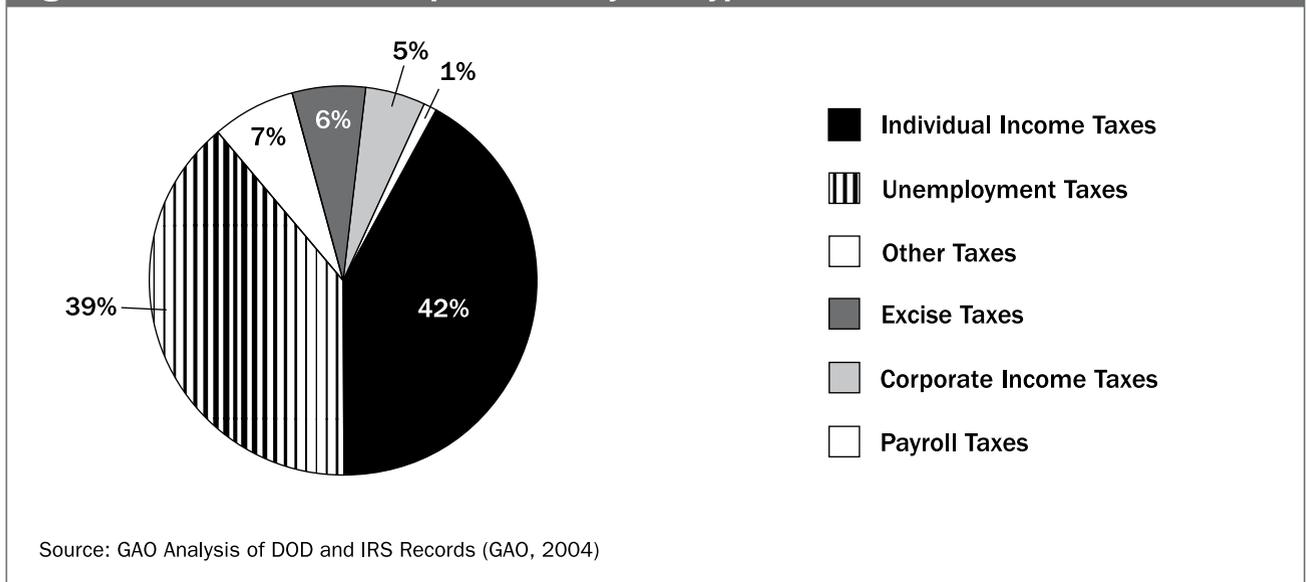


Figure 2. Employment Tax Evasion

	FY 2008	FY 2007	FY 2006
Investigations Initiated	164	167	47
Prosecution Recommendations	103	47	53
Indictments/Informations	51	42	50
Sentenced	42	45	52
Incarceration Rate*	81.0%	82.2%	78.8%
Average Months to Serve	29	22	19

*Incarceration includes confinement to federal prison, halfway house, home detention, or some combination thereof.

Source: IRS Criminal Investigation Management Information System

via a depository at an authorized financial institution. These potential federal contractors have an unfair cost advantage over those contractors who fully comply with the IRS's laws and regulations regarding employment taxes.

The trust fund recovery penalty²⁴ can be imposed on individuals who are determined by the IRS to be willful and responsible for the nonpayment of withheld payroll taxes, such as employers and/or corporate officers who purposely and willfully do not properly remit the withheld payroll taxes to the IRS.²⁵ In addition, willfully failing to remit payroll taxes is a criminal felony offense that is punishable by imprisonment of not more than five years.²⁶ However, a recent GAO report found that many GSA contractors blatantly used these withheld payroll taxes for personal use, as well as to run their businesses.²⁷ Unfortunately, unless the potential federal contractor has been debarred or suspended due to tax evasion, federal law does not require contracting officers to consider a potential federal contractor's tax noncompliance.²⁸

Internal Revenue Regulations Section 31.3402(a)-1 provides more details regarding the employment tax withholding requirements. Additionally, Section 31.3403-1 states the following:

Every employer required to deduct and withhold the tax under section 3402 from the wages of an employee is liable for the payment of such tax whether or not it is collected from the employee by the employer. If, for example, the employer deducts less than the correct amount of tax, or if he fails to deduct any part of the tax, he is nevertheless liable for the correct amount of the tax.... The employer is relieved of liability to any other person for the amount of any such tax withheld and paid to the district director or deposited with a duly designated depository of the United States.²⁹

Internal Revenue Regulations Section 601.401, regarding employment taxes, states the following:

Federal employment taxes are imposed by Subtitle C of the Internal Revenue Code.... Chapter 24 (collection of income tax at source on wages) requires every employer making payment of "wages" to deduct and withhold upon such wages the tax computed or determined as provided therein. The tax so deducted and withheld is allowed as a credit against the income tax liability of the employee receiving such wages.³⁰

What this means is that even when employers do not turn over the trust funds of withheld payroll taxes to the IRS, the IRS allows the employees a credit of the withheld taxes against the employees' tax liability on their federal income tax returns. In essence, the IRS ends up not receiving the appropriate withheld payroll taxes from the employer and does not deny the employees a full credit on their individual federal income tax returns of the withheld payroll taxes, which, of course, the IRS never received.

An area closely related to payroll tax compliance is the issue of the proper classification of workers. Employers need to properly determine whether the individuals providing services are "employees" or "independent contractors." If individuals are categorized as "employees," employers generally must withhold federal income taxes, withhold and pay social security and Medicare taxes, and pay unemployment tax on wages paid to their employees. If individuals are categorized as "independent contractors," business owners are not generally required to withhold or pay any taxes on payments made to independent contractors for services rendered.³¹

It is vitally important for business owners to correctly classify individuals since incorrectly classifying employees as independent contractors can result in being held liable for employment taxes for those particular individuals, in addition to being assessed a penalty by the IRS. The Publication 1779, "Independent Contractor or Employer," can be found on the IRS Web site. Unfortunately, there are many business owners who purposely classify their workers as "independent contractors," even though they do not qualify as such, in order to avoid having to deal with employment taxes. This is a serious business decision on the part of business owners, who may end up creating many problems for themselves. First, these business owners are in violation of the IRS's laws and regulations. Second, they end up having an unfair cost advantage over those business owners who are dutifully in compliance with payroll tax rules and regulations with their appropriate classifications of workers.

Corporate Income Taxes

As shown in the GAO reports, another type of unpaid taxes by government contractors was in the area of corporate federal income taxes, which are taxes based on a corporation’s taxable net income. The IRS Web site provides examples of corporate fraud investigations for fiscal year 2005. One particular case involved a government contractor who was sentenced to federal prison. After pleading guilty in September 2003 to two counts of submitting false claims to the U.S. Department of Transportation, the government contractor was sentenced to 33 months of imprisonment in February 2005. In addition, he waived indictment and pleaded guilty to tax evasion.³²

The government contractor was the owner of several companies and was involved in a scheme that defrauded the state transportation agencies of Connecticut, New York, and Massachusetts, as well as the Federal Highway Administration. The contractor falsely and fraudulently indicated through invoices that corporate employees had performed specified work, when in fact they had not performed any work at all. In addition, by including fictitious people on the corporate payrolls, the contractor inflated the corporation’s overhead rate, which in turn increased the contractor reimbursements from the state transportation agencies. The investigation in this case disclosed that the contractor had diverted corporate receipts totaling \$4,340,949 into one of his personal bank accounts, which resulted in evading \$1,694,730 in individual income taxes from 1995 through 2000.³³

Disclosure of Taxpayer Information

Another challenge faced by contracting officers in determining contractor responsibility in relation to tax compliance is the issue of tax data disclosure. Federal law generally prohibits the disclosure of taxpayer information, including tax debts.³⁴ Specifically, 26 U.S.C. 6103, “Confidentiality and Disclosure of Returns and Return Information,” states that tax returns and return information shall remain confidential and no person should be allowed to disclose such information obtained in connection with an individual’s service as an officer or an employee of the government or otherwise.³⁵

Therefore, unless potential contractors willingly provide their tax information or certain tax information, such as a federal tax lien disclosed in public records, the taxpayer data for potential contractors is not readily available to federal contracting officers. Because of the need to fully comply with the statutory restriction on disclosure of taxpayer information, problems arise in effectively dealing with the issue of federal

Figure 3. Corporate Fraud

	FY 2008	FY 2007	FY 2006
Investigations Initiated	117	124	40
Prosecution Recommendations	60	77	76
Indictments/Informations	80	53	78
Sentenced	57	51	36
Incarceration Rate*	78.9%	68.6%	86.1%
Average Months to Serve	49	20	49
*Incarceration includes confinement to federal prison, halfway house, home detention, or some combination thereof.			

Source: IRS Criminal Investigation Management Information System

contractors abusing the federal tax system and not paying their payroll taxes, as well as their corporate income taxes.

Currently, there are limited coordinated systems or processes in place between government contracting agencies and the IRS to identify contractors that are abusing the federal tax system and to convey that important information to federal contracting officers prior to awarding contracts to potential contractors.³⁶ There are some processes in place, however, that may aid and support federal contracting officers in accessing contractor tax data and in being made aware of a contractor’s tax debt. These include federal tax liens and the Federal Payment Levy Program.

Federal Tax Liens

Under Internal Revenue Code (IRC) Section 6321, the IRS is authorized to file federal tax liens upon all real or personal property, and rights to real or personal property, of a taxpayer who owes federal taxes.³⁷ If contracting officers choose to use federal tax lien information, they need to verify whether or not the federal tax lien has been released by confirming the federal tax lien information directly with the potential contractor.

Sometimes, however, federal tax lien release forms are not always filed at the courthouse in public records. If the federal tax lien has been released, the potential contractor will usually have a copy of the release form that he or she can provide to the contracting officer.

Another area of concern is the fact that an absence of a federal tax lien in public records does not necessarily mean that the potential contractor does not have a tax debt. The potential contractor may be making arrangements with the IRS for any tax debt, and the IRS may not have filed a federal tax lien yet.

Federal Payment Levy Program

The Federal Payment Levy Program (FPLP) is an automated process that the IRS currently uses to serve tax levies and collect unpaid taxes. The FPLP authorizes the IRS to continuously levy up to 15 percent of certain federal payments made to businesses and individuals who owe federal taxes until the federal tax debt is paid in full. Furthermore, payments to federal contractors can be reduced by 100 percent, or the amount of the overdue tax, whichever is lower.³⁸ However, since the IRS is legally required to consider installment agreements and “offers-in-compromise” requests made by delinquent taxpayers, as well as work with businesses and individuals to achieve voluntary compliance, taking enforcement action such as levies of federal contractor payments usually comes much later in the collection process.³⁹

Other situations that exclude delinquent taxpayers from entering the levy program include bankruptcy, litigation, and financial hardship. Therefore, delays in case determinations, IRS policies, and the IRS’s inability to pursue collections more actively due to resource constraints prevent many delinquent taxpayers from entering the levy program.⁴⁰ It should be noted that the FPLP will include only taxpayers who have been assessed federal taxes, not necessarily those who are currently accruing delinquent taxes or who have not been assessed the taxes by the IRS.

While the IRS continues to enhance its FPLP, many additional improvements are still needed. In efforts to implement procedures that will ensure that federal contractors pay their taxes and appropriate enforcement actions are taken in a timely manner, the IRS and DOD formed the Federal Contractor Tax Compliance (FCTC) Task Force in 2004.⁴¹

The coordinated efforts of the FCTC have resulted in improvements to the levy program. For example, FPLP collections in fiscal year 2005 exceeded \$109 million, as compared to only \$50 million in fiscal year 2004.⁴² Therefore, the FPLP is one method of dealing with contractors who abuse the federal tax system. This program can assist in making the contracting officer aware of the potential federal contractor’s tax debt situation, and thus provides the contracting officer with information on the contractor’s financial status.

Contracting and Tax Accountability Act to the Rescue

The current requirements in FAR Part 9, specifically the section dealing with “Certification Regarding Responsibility

Matters,” are a needed approach in the right direction. If the Contracting and Tax Accountability Act eventually becomes law, it will be a significant step toward maintaining a level playing field among competing prospective contractors, maintaining the integrity of the federal contracting process and federal tax system, as well as improving the collaboration between the IRS and federal contracting agencies.

The act will establish the policy that “no government contracts or grants should be awarded to individuals or companies with seriously delinquent federal tax debts.”⁴³ The act only applies to contracts valued above the simplified acquisition threshold, currently set at \$100,000.⁴⁴ Also, the language of the act defines “seriously delinquent tax debt” as an outstanding debt under the IRC for which a notice of lien has been filed in public records pursuant to Section 6323.⁴⁵ The act will also require prospective contractors to include in their bid or proposal a certification that they do not have any seriously delinquent tax debts. Additionally, the act will require prospective contractors to authorize the secretary of the treasury to disclose to the head of the agency information limited to describing whether the person has a seriously delinquent federal tax debt.⁴⁶

The act’s major elements—the requirements for prospective contractors to submit evidence of tax compliance in bids and proposals and for government contracting officers to specifically consider prospective contractor tax debts prior to making contracting decisions—will significantly level the playing field of contractors competing for federal contracts. Additionally, the act’s allowance of heads of agencies to work with the secretary of the treasury to verify prospective contractor tax status reflects greater integration and collaboration between the IRS and government contracting agencies. This will greatly help maintain the integrity of the federal tax system, as well as the federal contracting system.

Conclusions and Recommendations

The fact that some federal contractors are failing to pay their taxes and are continuing to win government contracts is a serious problem. These contractors have an unfair competitive advantage over compliant contractors. However, the Contracting and Tax Accountability Act of 2009 would provide an integrated and collaborative effort between the IRS and the federal contracting agencies to deal with those contractors who are abusing the federal tax system. In addition, the act would provide a systematic process requiring contractors to report their tax compliance status as part of the proposal submission process. Without the Contracting and Tax Accountability Act,

this problem will continue to keep growing and will undermine the integrity of both the federal tax system and the federal procurement system, and will discourage those contractors who are dutifully complying with federal tax laws.

Although both H.R. 572 and S. 265—the “Contracting and Tax Accountability Act of 2009”—were introduced and referred to committee on January 15, 2009, no further action has been taken on this legislation. Currently, both H.R. 572’s and S. 265’s reporting by committee and voting by the House and Senate are pending.⁴⁷ *JCM*

ENDNOTES

1. “Contracting and Tax Accountability Act of 2009,” Library of Congress, accessed at www.thomas.gov.
2. See, e.g., FAR Part 9.
3. FAR 9.104-1.
4. FAR 9.104-3.
5. FAR 9.105-1.
6. FAR 52.209-5(a)(1)(i)(D).
7. FAR 52.209(a)(2)(c).
8. GAO report (GAO-05-637), “Financial Management: Thousands of Civilian Agency Contractors Abuse the Federal Tax System with Little Consequence” (June 16, 2005).
9. GAO report (GAO-04-95), “Financial Management: Some DOD Contractors Abuse the Federal Tax System with Little Consequence” (February 12, 2004).
10. GAO-05-637, *op. cit.*
11. GAO report (GAO-06-492T), “Financial Management: Thousands of GSA Contractors Abuse the Federal Tax System” (March 14, 2006).
12. *Ibid.*
13. See, e.g., FAR 9.104-1(d).
14. As stipulated at FAR 9.406-2(b)(3) and 9.407-2(a)(3).
15. See, e.g., notes 8, 9, and 11.
16. GAO-04-95, *supra* note 9.
17. IRS, “Tax Evasion” definition (2006), accessed at www.irs.gov/app/understandingTaxes/whys/thm01/les03/media/ws_ans_thm01_les03.pdf.
18. IRS, “Tax Avoidance” definition (*ibid.*).
19. IRS, “Statistical Data—Employment Tax Evasion,” and “Statistical Data—Corporate Fraud,” accessed at www.irs.gov/compliance/enforcement/article/0,,id=121471,00.html.
20. IRS, “What are Employment Taxes?” (2006), accessed at www.irs.gov.
21. *Ibid.*
22. IRS, “Businesses with Employees—Trust Fund Taxes” (2006), accessed at www.irs.gov.
23. *Ibid.* Publication 15, Circular E, “Employer’s Tax Guide,” provides more details regarding employment taxes.
24. A civil penalty under 26 U.S.C. 6672.
25. GAO-04-95, *supra* note 9; see also 26 U.S.C. 6672.
26. 26 U.S.C. 7202.
27. GAO-06-492T, *supra* note 11.
28. See, e.g., GAO-04-95, *supra* note 9.
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30. 26 C.F.R. 601.401.
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33. *Ibid.*
34. See, e.g., 26 U.S.C. 6103.
35. *Ibid.*
36. GAO-04-95, *supra* note 9.
37. Cornell Law School, “U.S. Code Collection” (August 31, 2005), accessed at www.law.cornell.edu/uscode/search/display.html?terms=6321&url=/uscode/html/uscode26/usc_sec_26_00006321---000-.html.
38. GAO-04-95, *supra* note 9.
39. *Ibid.*
40. *Ibid.*
41. GAO-05-637, *supra* note 8.
42. *Ibid.*
43. “Contracting and Tax Accountability Act of 2009,” *supra* note 1.
44. FAR 2.101.
45. “Contracting and Tax Accountability Act of 2009,” *supra* note 1.
46. *Ibid.*
47. Govtrack.us, accessed at www.govtrack.us/congress/bill.xpd?bill=h111-572.