

Government Contracts Blog

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FAPIIS: The New Integrity Database For Government Contractors

By [John W. Chierichella](#)

Effective April 22, 2010, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (“FAR Councils”) amended the Federal Acquisition Regulation (“FAR”) to implement the Federal Awardee Performance and Integrity Information System (“FAPIIS”). 75 Fed. Reg. 14059 (March 23, 2010).

FAPIIS is just one element of the continuing Administration effort to increase the already intensive scrutiny of contractor integrity and the quality of contractor performance of government contracts. FAPIIS will supposedly consolidate all data that contracting officers currently use when making their responsibility determinations, thus enabling contracting officers “across the government” to monitor the integrity and performance of entities performing federal contracts, grants, and cooperative agreements. 75 Fed. Reg. 14059 (Mar. 23, 2010).

FAPIIS’s purpose, according to Section 872 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, is to “significantly enhance the Government’s ability to evaluate the business ethics and quality of prospective contractors competing for Federal contracts and to protect taxpayers from doing business with contractors that are not responsible sources.” *Id.* The rule imposes heavy obligations on both government contractors and the Government by requiring contractors to disclose additional information to the Government and obligating contracting officers to consider all available new information when making responsibility determinations. Thus, “[a]lthough FAPIIS is designed to be a ‘one-stop’ resource,” its existence will “not alter contracting officers’ obligation . . . to possess or obtain information sufficient to determine that a prospective contractor meets the applicable standards for establishing responsibility.” 75 Fed. Reg. 14060 (Mar. 23, 2010).

FAPIIS Logistics

FAPIIS is to be established and maintained by the General Services Administration and is intended both to consolidate information from existing systems such as the Excluded Parties List System (“EPLS”), the Past Performance Information Retrieval System (“PPIRS”), and the Contractor Performance Assessment Reporting System (“CPARS”) and to collect new information from government contractors, including contracting officer non-responsibility

determinations, contract terminations for default or cause, agency defective pricing determinations, administrative agreements entered into following a resolution of a suspension or debarment, and contractor self-reporting of criminal convictions, civil liability and adverse administrative proceedings. *Id.*

Under the new rule, the FAPIIS database will notify the contractor when the government posts new information regarding the contractor's record of responsibility. The contractor will then have an opportunity to post a response concerning the information posted by the government.

The contractor's response will be retained as long as the associated information is retained, *i.e.*, for a total of six years, although "only government personnel and authorized users performing business on behalf of the government will be able to view the contractor's record on the system." 75 Fed. Reg. 14067 (March 23, 2010).

Reporting Requirements

Agencies must insert FAR clause 52.209-7, "Information Regarding Responsibility Matters," in all solicitations issued after April 22, 2010. The clause requires vendors who are submitting proposals for government contracts with an expected value of over \$500,000 and having more than \$10 million in active contracts and grants at the time of proposal submission to report information relating civil, criminal, and administrative proceedings. 75 Fed. Reg. 14063 (Mar. 23, 2010). The information is to be entered through the Central Contractor Registration ("CCR") system. *Id.* FAPIIS contains no exemption for commercial item or commercial off-the-shelf ("COTS") acquisitions.

Government contractors must report and maintain accurate information on FAPIIS concerning occurrences "within the last five years" relating to the following categories:

- **Criminal Convictions**: An offeror must provide information concerning whether the offeror and/or its principals has, in connection with the award or performance of a federal contract or grant, been subject to a federal or state criminal proceeding that resulted in a criminal conviction. The clause also requires the contractor to write a narrative description for all reported actions. 75 Fed. Reg. 14067 (Mar. 23, 2010).
- **Civil Proceedings**: An offeror must provide information concerning whether the offeror and/or its principals has, in connection with the award or performance of a federal contract or grant, been subject to a federal or state civil proceeding that resulted in a finding of fault and liability and required the payment of a monetary fine or penalty, reimbursement, restitution or damages of \$5000 or more. *Id.*
- **Administrative Proceedings**: The new rule defines an "administrative proceeding" as a "non-judicial process that is adjudicatory in nature in order to make a determination of fault or liability." *Id.* The rule provides the following examples of what is considered an administrative proceeding: (1) Securities and Exchange Commission proceedings; (2) Civilian Board of Contract Appeals proceedings; and (3) Armed Services Board of Contract Appeals proceedings. The rule also states that the definition does not include

agency actions such as contract audits, site visits, correction plans, or inspection of deliverables. *Id.*

Under the new rule, an offeror must provide information concerning whether the offeror and/or its principals has, in connection with the award or performance of a federal contract or grant, been subject to a state or federal administrative proceeding that resulted in a finding of fault and liability that required the payment of a monetary fine or penalty of \$5,000 or more, or the payment for any reimbursement, restitution, or damages in excess of \$100,000. *Id.*

- **Settlements:** An offeror also must provide information relating to the award or performance of a government contract or grant where a federal or state administrative proceeding was disposed of by consent or settlement with an acknowledgment of fault by the contractor. *Id.*

Contractor Certification

Additionally, a government contractor must certify that the information provided is “current, accurate, and complete as of the date of the submission.” *Id.* Therefore, in order to ensure that the information provided is “current, accurate, and complete,” many contractors will find it necessary to amend their internal procedures and processes because the information required goes above and beyond the pre-FAPIIS requirements set forth in FAR 52.209-5, “Certification Regarding Responsibility Matters.” The increased reporting obligation is readily apparent from a comparison of the existing requirements of FAR 52.209-5 with the additional requirements of FAR 52.209-7, “Information Regarding Responsibility Matters.” Examples include:

- FAR 52.209-5 only requires the government contractor to check a box if a contractor has or has not been criminally convicted. In contrast, FAR 52.209-7, requires the contractor to draft a narrative commenting on the activity;
- FAR 52.209-5 requires offerors to look back three years while the new FAR 52.209-7 requires a five year look-back.

Semi-Annual Reporting Requirements

The new rule also imposes a requirement that certain contractors update their FAPIIS disclosures. The new clause set forth at FAR 52.209-8, “Updates of Information Regarding Responsibility Matters,” must be incorporated into (1) all solicitations where the expected value exceeds \$500,000 and (2) contracts where the contractor has more than \$10 million in active contracts and grants as of the time for proposal submission. Pursuant to the new clause, contractors must update the information in FAPIIS relating to the criminal, civil, and administrative proceedings discussed above on a semi-annual basis for the entire life of the contract. 75 Fed. Reg. 14060 (Mar. 23, 2010).

The Contracting Officer's Role

Contracting officers will also have additional obligations under the new rule in that they will be required to:

- Review the information in FAPIIS in connection with contracts over the simplified acquisition threshold for the purpose of making a responsibility determination;
- Document the contract file to explain how the information in FAPIIS was considered in any responsibility determination (as well as the action that was taken as a result of the information); and
- Prior to proceeding with award, notify the agency official responsible for initiating debarment or suspension if information is identified in FAPIIS that appears appropriate for that official's consideration. [\[1\]](#)

Most importantly, contracting officers must give offerors the opportunity to provide additional information that demonstrates their responsibility before the contracting officer makes a non-responsibility determination if the information concerns:

- Criminal, civil, or administrative proceedings in connection with the award of a Government contract;
- Terminations for default or cause; or
- Determinations of non-responsibility because the contractor does not have a satisfactory performance record or a satisfactory record of integrity and business ethics, or comparable information relating to a grant.

75 Fed. Reg. 14059 (Mar. 23, 2010).

Future of FAPIIS

Efforts are already underway to expand the scope of FAPIIS. The FAR Councils and the Office of Management and Budget have signaled that they have plans to expand its scope so as to mandate that contractors also provide data to FAPIIS concerning state government contracts and grants, violations of laws outside the government contracts context, and contract actions below the \$500,000 threshold set by the current rule. 75 Fed. Reg. 14060 (Mar. 23, 2010). Further, the Federal Contracting and Oversight Act of 2010, introduced by Senators Feingold and Coburn, would increase the period for retaining data in FAPIIS to ten years and would expand the information collected to include *all* administrative proceedings and not just those that result in a

finding of fault or liability. S. 3323, 111th Cong. (2010). Given the breadth of the FAR definition of “proceeding” in FAR 31.205-47(a), this proposal could result in the coerced disclosure of every investigation initiated against the contractor, irrespective of its merits or demerits. The Federal Contracting and Oversight Act would also allow any member of Congress to access the FAPIIS database and require agency Inspectors General to investigate whether agency officials are appropriately considering the information in the database in their acquisition decisions. *Id.*

Moreover, on May 27, 2010 the Senate approved an amendment to the \$60 Billion supplemental appropriation (H.R. 4899) that would require the General Services Administration, which maintains the system, to “post all such information, excluding past performance reviews, on a publicly available Internet website.”

Implications for Contractors

The new rule could have unintended consequences for both government contractors and the Government. For example, the rule states that the information collected on FAPIIS will be used for responsibility determinations. This begs the question as to whether contracting officers will also use FAPIIS when evaluating an offeror’s past performance. Further, the rule states that FAPIIS information may be releasable through a FOIA request even though the rule acknowledges the information is “source selection sensitive.” This means that a contractor could make a FOIA request and obtain “source selection sensitive” information about its competitors. Inevitably, this will lead to FOIA litigation.

In sum, contractors should assure that:

- Their compliance and legal functions are knowledgeable about the new rule’s requirements and place a high priority on the entry and updating of data into FAPIIS.
- They take advantage of every opportunity to comment on the information provided in FAPIIS through a clarification or a rebuttal in order to ensure that the information in FAPIIS is accurate.

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[1] 75 Fed. Reg. 14059 (Mar. 23, 2010).