

# Government Contracts Blog

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## **FAPIIS: An Update On The Integrity Database For Government Contractors**

By [Bruce Shirk](#)

We last discussed the Federal Awardee Performance and Integrity Information System (“FAPIIS”) [in June 2010](#). We noted then that, as implemented, the rule gives rise to two questions:

1. Whether FAPIIS creates a risk of disclosure of source selection sensitive information under FOIA; and
2. Whether FAPIIS will be used when evaluating a contractor’s past performance.

This posting updates our June 2010 discussion and undertakes to answer the above-stated questions in light of regulatory developments since that time.

When Congress directed the establishment of a database containing contractor “integrity” and “performance” information, a central repository for the latter half of that equation already existed in the form of the Past Performance Information and Retrieval System (“PPIRS”), which was established in FY 2002 and was designated as the standard government-wide repository for past performance assessments in July 2009. See [GAO, \*Federal Contractors: Better Performance Information Needed To Support Agency Contract Award Decisions\* \(GAO-09-374, April 2009\)](#); [OFPP Memorandum for Chief Acquisition Officers and Senior Procurement Executives, \*Improving Contractor Past Performance Assessments Summary of the Office of Federal Procurement Policy’s Review, and Strategies for Improvement\* \(January 21, 2011\)](#); see also 41 U.S.C. § 2313 (c); 74 Fed. Reg. 31557 (July 1, 2009); FAR 42.1503(c). However, with the exception of suspension and debarment information collected in the Excluded Parties Listing System (“EPLS”), there was not, in October 2008, any centrally maintained database for information relevant principally to determinations of contractor responsibility, *e.g.*, determinations of non-responsibility, terminations for default and criminal, civil and administrative proceedings entailing a finding of contractor fault or liability. See 75 Fed. Reg. 14059 (March 23, 2010). It was this lack of readily available information relevant to contractor responsibility that Congress meant to address by creating FAPIIS. See 41 U.S.C. § 2313(a).

FAPIIS is now operational and collecting information “on an ongoing basis”, as follows:

- Existing systems within the Government, *i.e.*, EPLS and PPIRS, are linked to FAPIIS. Both of these systems will themselves be continuously in receipt of new information from suspension and

debarment and agency procurement officials. 75 Fed. Reg. 14063 (March 23, 2010).

- Agencies are to establish focal points for submission and receipt of FAPIIS information, including information relating to determinations of non-responsibility, terminations for default and determinations that a contractor has submitted defective cost or pricing data. Agencies are to ensure information is reported directly to FAPIIS within 3 working days after a contracting officer issues “a final termination for default for cause or default notice” or “a final determination that a contractor has submitted defective cost or pricing data,” by accessing [www.cpars.csd.disa.mil](http://www.cpars.csd.disa.mil) and selecting “the FAPIIS module.” FAR 9.105-2(b)(2); FAR 42.1503(f). A contracting officer’s “subsequent withdrawal or conversion of the termination of default to a termination for convenience” or “subsequent change to the final determination concerning defective pricing,” is likewise to be reported directly to the FAPIIS module within 3 working days of the officer’s action. 75 Fed. Reg. 60258 (September 29, 2010); FAR 42-1503(f).
- Suspension and debarment officials are similarly to submit information regarding administrative agreements directly to the FAPIIS module within 3 working days after the agreement is executed. 75 Fed. Reg. 14066 (March 23, 2010); 75 Fed. Reg. 60258 (September 29, 2010); FAR 9.406-3(f).
- Contractors are (a) to designate representatives responsible for the actual submission and receipt of FAPIIS information and (b) to submit directly to FAPIIS and “update on a semi-annual basis throughout the life of the contract” information relating to criminal, civil or administrative proceedings occurring within the last five years relating to performance of a Federal contract or grant. 75 Fed. Reg. 14063 (March 23, 2010); 75 Fed. Reg. 4190 (January 24, 2011); FAR 9.1004-7(a); FAR 52.209-7; FAR 52.209-9; FAR 52.209-9.

Contractors are entitled to “timely notification” when information about them is posted in the FAPIIS module, and they are to be afforded the opportunity to submit comments pertaining to that information. 41 U.S.C. § 2313(d)(2)(B) and (C). Contractors registered with the Central Contractor Registration (“CCR”) can “post comments” on any information that has been posted by the Government in the FAPIIS module by accessing CCR and selecting “FAPIIS.” FAR 52.209-9(b). Contractor postings regarding information posted in the FAPIIS module are distinct from “the rebuttal process for past performance information as specified in FAR 42.1503(b).” The FAR Part 42 process requires that “...evaluations of contractor performance...shall be provided to the contractor as soon as practicable after completion of the evaluation...[and that] [c]ontractors shall be given a minimum of 30 days to submit comments, rebutting statements or additional information” by accessing the PPIRS module through the CCR website. 75 Fed. Reg. 60259 (September 29, 2010); FAR 42.1503(b); *see also* [Past Performance Information Retrieval System](#).

#### **Use Of FAPIIS Information.**

Subject to a determination of relevance, any information in FAPIIS, including information linked from PPIRS and information in the FAPIIS module, may be used: (i) to make responsibility determinations; and (ii) to evaluate offerors’ past performance. 41 U.S.C. §2313(3)(2)(A); 75 Fed. Reg. 14062, 14065, 14067 (March 23, 2010); 75 Fed. Reg. 60259 (September 29, 2010); FAR 9.104-6; FAR Subpart 42.15. As to “responsibility determinations, the contracting officer is to “consider all the information in [the FAPIIS module] and other past performance information [contained in the PPIRS module] when making a responsibility determination.” FAR 9.104-6; 9.105-1(c); 42.1503(c). As to the separate process of evaluating offerors’ past performance, “[t]he final rule incorporates the use of FAPIIS into the procedures addressing agency evaluations of past performance in FAR 42.1503 since there may be

information in FAPIIS, such as terminations for default or cause and defective pricing assessments, that is not in PPIRS but still may be appropriately used, along with information in PPIRS to evaluate an offeror's performance." 75 Fed. Reg. 14062 (March 23, 2010); 75 Fed. Reg. 66258 (September 29, 2010); FAR 42.1503(e); *see also* FAR 15.305(a)(2).

### **Public Disclosure of FAPIIS Information**

A recent amendment to the 2010 Supplemental Appropriations Act, provides that – as of April 15, 2011 – “the information in FAPIIS, excluding past performance reviews [which are considered to be and marked as source selection sensitive], is to be made publicly available” and that “FAPIIS will now become the publicly available website.” 74 Fed. Reg. 4188 (January 24, 2011); FAR 42. 1503(b). Noting that “[p]ublic requests for information posted prior to April 15, 2011” will continue to be “handled under Freedom of Information Act procedures,” the FAR Councils make no mention of “source selection sensitive” information, but merely instruct Government officials to take steps to ensure that information is not posted either before or after April 15, 2011 that “could create a harm protected by a disclosure exemption under FOIA.” 75 Fed. Reg. 4190 (January 24, 2011). It is obviously possible that information posted to FAPIIS by the Government – information relating to, *e.g.*, to a termination for default or a non-responsibility determination – could contain facts, opinions or conclusions potentially harmful to a contractor's competitive position in a pending procurement. Contractors must therefore be alert to the possibility that harmful information could be disclosed and, to the extent possible, work with the Contracting Officer to identify such information before the decision or determination is final so as to assure it is redacted prior to posting.

We anticipate additional changes to the FAPIIS rule, including but not limited to a pending change included in the National Defense Authorization Act of 2011, Sections 831 and 834, which requires the posting of final determinations of fault relating to security contractors whose recklessness or gross negligence has caused injury or death to government military or civilian personnel. We will update this FAPIIS posting to address significant changes in the rule as they appear.

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