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## FAPIIS Goes Public: Contractor Performance and Integrity Information Database Will Be Made Publicly Available

When the President signed the 2010 Supplemental Appropriations Act on July 29, 2010, a provision of that law<sup>1</sup> directed the General Services Administration ("GSA") to make nearly all of the information in the recently-created Federal Awardee Performance and Integrity Information System ("FAPIIS") database available to the public. Past performance reports are the only information exempted from this new public disclosure requirement.

On April 22, 2010, when FAPIIS originally went into effect, the regulatory history revealed many concerns about the potential for inaccuracies and misuse of sensitive information about contractors. See 75 Fed. Reg. 14059, Mar. 23, 2010. Despite the effort expended in addressing those concerns and the current Federal Acquisition Regulations clause's assurance that "only Government personnel and authorized users performing business on behalf of the Government will be able to view the Contractor's record," (see FAR 52.209-9(b)(3)) contractors must prepare for the new reality that significant amounts of sensitive and potentially misleading information about their companies, teammates and competitors will now be publicly available. Contractors must be aware of the parameters of their self-reporting obligations and should monitor several proposals to expand the FAPIIS database that are presently under consideration.

### FAPIIS Overview

The FAPIIS database includes data from the Past Performance Information Retrieval System ("PPIRS") and the Contractor Performance Assessment Reporting System ("CPARS") relating to contractor performance, data from the Excluded Parties List System ("EPLS") relating to responsibility determinations, and contractor self-reported information from the Central Contractor Registry ("CCR") including, among other things, information concerning criminal, civil and administrative actions and/or settlements involving contractors and their business principals.

FAPIIS was created to satisfy requirements imposed by Section 872 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417). In accordance with Section 872(e)(1) of that Act, the FAPIIS database was only to be made available to contracting officers, certain other government personnel by request, individual contractors for the purpose of verifying the accuracy of information about themselves, and to the Chairperson and Ranking Member of Congressional committees.

By a single amendment to the Supplemental Appropriations bill, however, all of this highly sensitive and potentially misleading, incorrect, and/or outdated information must be made available to the public. The GSA has stated that it expects to open FAPIIS to the public by the end of the year, but regulations regarding the open version still must be approved by GSA officials. Federal Acquisition Regulation Case 2010-016 has been opened for the development of an interim rule. Contractors should review and consider commenting upon the interim rule once it is published.

### Mandatory Self-Reporting in CCR

For every proposal relating to a government contract or grant opportunity with a value expected to exceed \$500,000, companies must report certain criminal or civil violations, administrative actions, or settlements of such matters within the last five years. See FAR 9.104-7(b); FAR 52.209-7(c). This requirement applies to all such opportunities including those for commercial and commercial off the shelf ("COTS") items. Moreover, there is no exemption for small businesses. Companies that hold government contracts or grants in excess of \$10 Million are deemed to have represented that the information they have entered into FAPIIS via the CCR website is "current, accurate, and complete as of the date of submission" of their offer. FAR 52.209-7(c), Information Regarding Responsibility Matters (APR 2010).

The current FAR clause specifically requires contractors to report via CCR information regarding whether, within the last five years, the offeror or its principals have been the subject of a proceeding at the Federal or State level resulting in: (1) a conviction in a criminal proceeding; (2) a civil judgment of greater than \$5,000 in damages with a finding of contractor liability; (3) an administrative finding of fault or liability with greater than a \$5,000 fine or damages, restitution or reimbursement greater than \$100,000; and (4) a settlement of any such matter that could have led to the above results where the contractor admits liability. The requirement to report such events does not apply unless the contractor's or principals' underlying actions were related to the award or performance of a federal government contract or grant. *Id.*

## Proposed Expansions of FAPIIS Reporting

There are several legislative and regulatory proposals that would sweep more information into the FAPIIS reporting requirements. As noted in the preamble to the current FAR clause, information concerning state-level contracts will eventually be added to FAPIIS. Additionally, the government is considering a proposed rule that would (1) lower the threshold for triggering FAPIIS reporting from \$500,000 to the simplified acquisition threshold, and (2) include required reporting of violations of laws not related to Federal contracts and grants. The Federal Contracting and Oversight and Reform Act of 2010 (S. 3323) would increase the period for retaining FAPIIS data from 5 to 10 years, and require reporting of all administrative proceedings (not just those where there is a finding of fault or liability). In an apparently related development, there is an Advanced Notice of Proposed Rulemaking (75 Fed. Reg. 26916 (May 13, 2010)) which asks for input as to how the Government could make contracts public but still protect contractors' proprietary information, in anticipation of a potential future requirement to expand public availability of Federal contracts.

## Practitioners' Tips

Contractors should be cognizant of the specific parameters of their reporting obligation and should ensure that they provide accurate information, but not more information than is required. Any information submitted by a contractor will be available to the public, and may be used by so-called watchdog organizations or even competitors to cast the company or its leadership in a negative and potentially misleading light. Accordingly, contractors must monitor all information concerning their company and its principals in FAPIIS and take prompt action to correct any inaccurate or false information.

When contractor personnel update information in the CCR database, they should seek advice and guidance from counsel as new questions and issues arise and must carefully evaluate what information falls within the requirements of the FAPIIS reporting regulation. Moreover, contractors must monitor the potential developments and expansion of FAPIIS discussed above in order to ensure that they comply with all pertinent reporting and certification requirements. Now that the database exists, lawmakers and regulators are likely to continue to expand FAPIIS' coverage, and contractors' compliance systems must evolve to meet the increasing demand for data and expansion of reporting requirements.

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1. See Supplemental Appropriations Act of 2010 (Pub. L. 111-212), § 3010, Public Availability of Contractor Integrity and Performance Database.

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