

Government Contracts Update

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The Public Disclosure of Contractor Information on FAPIIS is Here to Stay

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On January 3, 2012, the Department of Defense (“DoD”), the General Services Administration (“GSA”) and the National Aeronautic and Space Administration (“NASA”) adopted as final, with changes, an interim rule amending the Federal Acquisition Regulation (“FAR”) to implement section 3010 of the Supplemental Appropriations Act, 2010. Specifically, section 3010 requires that the information in the Federal Awardee Performance and Integrity Information System (“FAPIIS”), excluding past performance reviews, be made available to the public. Consequently, contractors should be mindful of information relating to their company contained within FAPIIS as it may not only be accessed by government procurement officials, but by the media, public interest groups, and/or competitors.

Implementation of the Public Availability of FAPIIS Information

On March 23, 2010, the DoD, GSA, and NASA published an interim rule to implement the requirements of FAPIIS, which the government purports as an ongoing effort to enhance its ability to evaluate the business ethics and quality of prospective contractors competing for federal contracts. That rulemaking also addressed requirements set forth in section 872 of the Clean Contracting Act of 2008 (subtitle G of title VIII of Pub. L. 110–417) (41 U.S.C. 417b) for a system containing specific information on the integrity and performance of federal contractors. This system would be called the Federal Awardee Performance and Integrity Information System or FAPIIS.

As originally enacted, FAPIIS was for government eyes only. However, Section 3010 of the Supplemental Appropriations Act, 2010 (Pub. L. 111–212), enacted July 29, 2010, modified section 872 (e)(1) to require that the GSA post all FAPIIS information, excluding past performance reviews, on a publicly available website. As a result, effective April 15, 2011, under the interim rule, FAPIIS made publicly available contractors’ non-responsibility determinations, terminations for default or cause, final defective pricing determinations, and administrative agreements with suspension and debarment officials.

Under the interim rule, contractors are given an opportunity to respond and are further required on a semi-annual basis under applicable contract provisions to ensure the information contained in FAPIIS is current. Notwithstanding the clear Freedom of Information Act (“FOIA”) issues the public availability of FAPIIS information presented, as in many cases the information being posted to FAPIIS is exempt under FOIA, the public dissemination of this information creates further reputational harm, will provide unwarranted arguments by competitors in both commercial and public procurement processes and forums (i.e., bid protests), and will likely lead to the unintended use of such information, such as de facto debarments.

Notwithstanding the far-reaching consequences of FAPIIS’s interim rule, a final rule, with modest changes, was issued on January 3, 2012. The final rule attempts to resolve the FOIA concerns expressed by the industry during the interim rule’s comment period by including a framework by which information arguably exempt under FOIA can be shielded from the publicly available aspect of FAPIIS. Under the final rule’s framework, contractors will be notified when new information is posted to FAPIIS (and before such information made public). The contractor will then have seven calendar days to respond to the government official that the posted information is exempt under FOIA. The government official then has seven calendar days to remove the information from FAPIIS. The government official is then required to address the purported FOIA exemption pursuant to its agency’s FOIA procedures.

This framework is problematic in several respects. First, the seven-calendar-day period for contractors to respond is unduly burdensome. A one-week timeframe can easily go unnoticed by contractors until after the time period has passed. Moreover, the rule provides no explicit flexibility to allow an agency to extend this timeframe for good cause. Further, the final rule completely avoids any discussion of when information deemed not exempt under FOIA by the agency might be re-posted. If a contractor objects to

the agency's FOIA exemption determination, the rule does not explain how the re-posting of information should be handled in the event the contractor files an appeal or a reverse-FOIA lawsuit.

The New Rule under FAPIIS

In this brave new world, where the federal government is disseminating a myriad of information publicly, contractors must be ever mindful of their conduct with their federal customers. Obviously, the best course of action is to avoid any incidents or actions that may result in FAPIIS-listed data, however, should a contractor become embroiled in circumstances that result in a FAPIIS reportable event, contractors should:

- Closely examine government postings on FAPIIS in a timely manner for information that may be exempt under FOIA;
- Ensure that contractually required semi-annual updates are performed timely and accurately;
- Provide complete and accurate comments to FAPIIS reported data in order to give potential government and commercial customers the entire context for the incident at issue; and
- Apprise government and commercial salespeople (as appropriate) of adverse information contained in FAPIIS so such individuals can accurately represent and respond to questions regarding the circumstances if asked by potential customers.

For more information, please contact any of the attorneys in Venable's [**Government Contracts Practice Group**](#).