

New Information Requirements for Government Contractors: FAR Amendments Implement New Contractor Database

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Under new requirements effective April 22, government contractors must now submit to the government information regarding past criminal, civil, and administrative proceedings when bidding for a contract or grant. Along with other data, the reported information will be available for government review on a government database, which must be accessed by contracting officers prior to granting contracts or grants. Proposed legislation seeks to expand the scope of the available information further, including providing access to the database to all members of Congress.

Issued by the Civilian Agency Acquisition Council and Defense Acquisition Regulations Council, the new requirements amend the Federal Acquisition Regulation (FAR). The amendments implement the Federal Awardee Performance and Integrity Information System (FAPIS), a database designed to improve the government's ability to evaluate the business ethics and expected performance quality of prospective contractors, and to protect the government from awarding contracts to contractors that are not responsible sources. To accomplish this goal, FAPIS broadens the scope of information available to contracting officers as they evaluate prospective contractors.

Based on information provided by vendors, agencies, and contracting officers, the database will include:

- Nonresponsibility determinations
- Contract terminations for default or cause
- Agency defective-pricing determinations
- Administrative agreements entered into by suspension and debarment officials to resolve a suspension or debarment
- Contractor self-reporting of criminal convictions, civil liability, and adverse administrative actions

The rules require vendors submitting a proposal on a federal contract over \$500,000 and having more than \$10 million in active contracts and grants as of the time of the proposal submission to report in FAPIS information pertaining to criminal, civil, and administrative proceedings through which a "requisite determination of fault was made." After a contract is granted, the information in the database must be updated on a semiannual basis through the life of the contract.

Government contractors should note that any information placed on FAPIIS will likely be considered material to the award of a contract. Therefore, any error or omission in the information provided for use in the database could be interpreted as the submission of false information to the government, potentially giving rise to False Claims Act liability.

According to the notice and comment responses for the new rules, the FAPIIS information will be available to government officials as deemed appropriate by the administrator of the General Services Administration. Upon request, the information may also be provided to the chairman and ranking members of the committees of Congress having jurisdiction, as well as inspectors general and federal law enforcement agencies. The notice and comment responses also state that public requests for system information will be handled under the Freedom of Information Act.

New legislation is already being proposed to broaden access to this information. On May 6, Senator Russ Feingold (D-Wisc.) introduced the Federal Contracting Oversight and Reform Act of 2010. The proposed legislation would allow every member of Congress to access the FAPIIS database. The bill would also provide contracting officers with information regarding misconduct occurring more than five years prior, and would widen the scope of past misconduct that can be reviewed in considering a potential contractor.

This rulemaking is part of an ongoing initiative to increase consideration of contractor integrity and the quality of a contractor's performance in awarding federal contracts. Additional information on the initiative is available in our September 11, 2009 LawFlash, "USCIS Issues Guidance on E-Verify for Federal Contractors," available at http://www.morganlewis.com/pubs/ImmAlert_GuidanceOnEVerifyForFederalContractors_11sept09.pdf, and our August 27, 2009 LawFlash, "Federal Contract E-Verify Rule Survives Legal Challenge; Will Take Effect September 8, 2009," available at http://www.morganlewis.com/pubs/ImmigrationAlert_E-VerifySurvivesChallenge_27aug09.pdf. Government contractors should review the new rules in detail to ensure compliance.

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