

## E-ALERT | Government Contracts

January 18, 2012

### FAPIIS FINAL RULE ON PUBLIC ACCESS TO CONTRACTOR INFORMATION ALLOWS CONTRACTORS LIMITED OPPORTUNITY TO DISPUTE DATA RELEASE

The Government recently issued a Final Rule regarding the public disclosure of contractor information that provides only a limited ability to challenge such disclosure on a very short deadline, and fails to clarify ambiguous reporting requirements. The FAR Council (DoD, GSA and NASA) adopted an interim rule in January of 2011 making the Federal Awardee Performance and Integrity Information System (FAPIIS) database publicly available.<sup>1</sup> This rule implemented section 3010 of the Supplemental Appropriations Act of 2010. The FAPIIS database contains potentially sensitive contractor information, including certain integrity and performance information from the FAPIIS reporting module in the Contractor Performance Assessment Reporting System (CPARS), information about legal and regulatory proceedings that contractors must enter into the Central Contractor Registration (CCR) database, and suspension/debarment information from the Excluded Parties List system (EPLS). We summarized the interim rule and its implications in a previous e-Alert, “New Regulations Will Mandate Public Disclosure of Contractor Information in FAPIIS Database,” Feb. 2, 2011, available [here](#).

On January 3, 2012, the FAR Council issued the final version of this rule. The Final Rule is mostly unchanged from the interim rule, with the exception of one key revision. Several commenters noted that the interim rule would allow FAPIIS information to be published live without the opportunity for contractors to review it for the presence of confidential or proprietary data. In response to this concern, the FAR Council revised the rule to establish a brief review period before FAPIIS information is posted to the publicly available portion of the FAPIIS website.

Under the new Final Rule, contractors must review the information to be posted, identify whether the post contains any information that is protected by an exemption under the Freedom of Information Act, and notify the government in writing of its assertion that a disclosure exemption applies—all within 7 calendar days. This change will require contractors to be vigilant and to act fast in reviewing new postings and drafting legal objections to their public disclosure. Failure to do so may result in automatic disclosure of protected information on the public FAPIIS site.

The FAR Council declined to make any other suggested changes in the Final Rule, leaving several key terms without clear definitions. A common criticism of the interim rule had been that it did not provide adequate clarity regarding what information is required to be reported. The FAR Council’s Federal Register announcement notes that commenters requested that it provide further clarity about the types of proceedings that must be reported—in particular, that the Council define terms contained in the FAPIIS regulations such as “in connection with a Federal contract or grant,” “administrative proceeding,” and “consent or compromise.” However, the FAR Council responded

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<sup>1</sup> Federal Acquisition Regulation; Public Access to the Federal Awardee Performance and Integrity Information System, 77 Fed. Reg. 197, 197-202 (Jan. 3, 2012). The FAR Councils issued a correction to this rule on January 11, 2012, that sets an applicability date of January 17, 2012, for the Government to institute the pre-posting review process. See Federal Acquisition Regulation; Public Access to the Federal Awardee Performance and Integrity Information System; Correction, 77 Fed. Reg. 1640, 1640-41 (Jan. 11, 2012).

that the FAR Case at issue “was established to implement section 3010” and a new rulemaking would need to be opened to address this issue. The Council did not state whether it planned to open a new rulemaking to address these shortcomings in the Final Rule.

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If you have any questions regarding the specific implications of the Final Rule or regarding the obligations imposed on contractors by the FAPIIS regulations, please contact the following members of our Government Contracts practice group:

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