

E-ALERT | Government Contracts

August 1, 2012

OFFICE OF FEDERAL PROCUREMENT POLICY CONSIDERING EXTENDING FAPIS REPORTING REQUIREMENTS

On July 18th, the Office of Federal Procurement Policy (OFPP) issued a request for comments on whether changes to regulations and guidance might improve the ability of contracting officers to access relevant information in the Federal Awardee Performance and Integrity Information System (FAPIS).¹ Several questions centered on proposals to require contractors to report information about related corporate entities, such as parent corporations or subsidiaries. If adopted, these proposals would significantly expand current FAPIS reporting obligations and place a heavy burden on contractors. Comments are due by September 17, 2012.

I. BACKGROUND

Created in response to section 872 of the 2009 Defense Authorization Act,² FAPIS is a database that aggregates several sources of information for contracting officers to use in responsibility determinations.³ FAPIS provides users access to information from a reporting module in the Contractor Performance Assessment Reporting System (CPARS), proceedings information from the Central Contractor Registration (CCR) database, and suspension/debarment information from the Excluded Parties List system (EPLS). The “proceedings information” from CCR is the result of a requirement that contractors report information going back five years regarding certain civil, criminal, or administrative proceeding that results in a conviction or finding of fault and liability.

Contractors also must disclose settlements that include an acknowledgment of fault by the contractor if the proceeding could have led to any of the above outcomes.⁴ Federal Acquisition Regulation (FAR) 52.209-7 further requires contractors to report liabilities that were incurred by a “principal” of a contractor, which is defined to be an “officer, director, owner, partner, or person having primary management or supervisory responsibilities within a business entity.”

Under the original implementing regulations, only certain government personnel had access to FAPIS, and public requests for FAPIS information were handled under Freedom of Information Act procedures. On January 24, 2011, however, the government published an interim rule amending the FAR to implement section 3010 of the Supplemental Appropriations Act. This interim rule, which was finalized in January of 2012, made most of the information in FAPIS available to the general public.⁵

¹ 77 Fed. Reg. 42,339 (July 18, 2012). The full notice can be found [here](#).

² Pub. L. 110-417, § 872 (2008) (codified as amended at 41 U.S.C. § 2313(b)).

³ For a general background on FAPIS, see Alan Pemberton, Jennifer Plitsch, and Christopher Pruitt, *The Cost of Transparency: Challenges Posed by the New FAPIS Requirements*, BNA Federal Contracts, April 26, 2011, available [here](#).

⁴ 41 U.S.C. § 2313(b).

⁵ See our client alert, available [here](#), for more information.

II. RECENT DEVELOPMENTS

The July 18th notice and request for comments suggests that the government is contemplating another significant expansion of FAPIIS. The notice states that “some contend that certain practices associated with the CCR and the reporting of unique identifiers are limiting contracting officers’ access to potentially relevant data about contracting entities.” In particular, FAPIIS entries are correlated with DUNS numbers, and contractors have separate DUNS numbers for each physical location. The notice also observes that contracting officers may not be able to locate DUNS numbers “assigned to other parts of the corporate entity that are not named on the contract, such as an affiliate or subsidiary, but share the same management, infrastructure, and systems as the entity uses in doing business with the Government.” Thus, the notice suggests that OFPP is considering broadening the scope of FAPIIS reporting to include information about legal/corporate entities beyond the contracting entity.

The specific issues for comment include:

- Whether current data collection policies and practices associated with FAPIIS provide contracting personnel with access to the information they need about a potential contractor’s business ethics.
- The benefits and drawbacks of modifying current data collection policies supporting FAPIIS to:
 - (i) “[c]apture integrity information reported under each DUNS number assigned to the legal entity named in the offer, irrespective of its geographic location (e.g., Affiliate XYZ located on Main Street, Affiliate XYZ located on First Street, and Affiliate XYZ located on K Street)”; and
 - (ii) “[c]apture integrity information about an entire entity (e.g., headquarters, all affiliates and subsidiaries, etc.).”
- Whether policy or other guidance changes should be considered to further assist agency personnel in determining what information is relevant to making a responsibility determination.
- Potential data collection such as: (i) “seeking to have a third-party contractor provide information on ‘corporate hierarchies’ to the Government”; (ii) “requiring contractors to report the requisite integrity information in CCR under each and every DUNS number associated with any part of the entity (e.g., parent, subsidiary, affiliate) or location where it operates”; and (iii) “requiring offerors to identify as part of their proposals all DUNS numbers associated with the entity that would be legally bound to perform work under the contract.”
- Whether “the regulatory drafters of the FAR [should] consider a definition for the term ‘corporate entity.’”

If adopted, these proposals could be a significant expansion beyond current reporting requirements.

Contractors may wish to comment on this proposed expansion—in particular about whether the law, which applies to a “person” awarded certain contracts or grants, permits the government to require information to be reported about related, but legally distinct, corporations beyond the single recognized legal entity performing the contract. In addition, it is not clear that OFPP understands the potential burden that the proposed expansion could place on contractors that have many related corporations, as data such as the proceedings information required to be reported in FAPIIS is not always aggregated across corporate families. Nor is it clear why such information would be relevant in a responsibility determination unless the entities share management—a scenario addressed by the current regulations.

Our Government Contracts practice at Covington & Burling LLP has extensive experience advising clients on FAPIIS and other public disclosure matters associated with government contracting. We will continue to monitor this issue and other developments related to FAPIIS. Please do not hesitate to contact us with any questions.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our government contracts practice group:

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