



New Rule Allows Contractors to Prevent Public Access to Contractor Information Reported in FAPIIS

In 2010, the Government implemented the Federal Awardee Performance and Integrity Information System (FAPIIS). FAPIIS consolidates information from various federal databases such as the Excluded Parties List System (EPLS), the Past Performance Information Retrieval System (PPIRS) and the Contractor Performance Assessment Reporting System (CPARS). Contracting Officers are required to report in FAPIIS non responsibility determinations, contract terminations for default or cause, agency defective pricing determinations, and administrative agreements executed pursuant to a suspension or debarment proceeding. Per contract clause 52.209-9, Updates of Publicly Available Information Regarding Responsibility Matters, a contractor who submits a proposal for a contract valued at greater than \$500,000 and has \$10 million or more in active contracts must report in FAPIIS information regarding civil, criminal and administrative proceedings involving the contractor or its principals. Contracting Officers must review FAPIIS in making responsibility determinations for every contract award above the Simplified Acquisition Threshold (\$150,000).

When FAPIIS was initially implemented in April 2010, the contractor information included in the system was to be available only to the Government, primarily acquisition personnel. However, per an amendment to the Supplemental Appropriations Bill of 2010, the Government was required to make information included in FAPIIS, except past performance reviews, available to the public. The final rule making FAPIIS information available to the public was published about a year ago, on January 24, 2011. While the rule was "final" in that it applied to contracts or solicitations issued after April 15, 2011, it was also published as an interim rule so that the Government could receive comments on the rule.

And there were comments. The interim rule raised a number of concerns within the government contracting community. The interim rule makes clear that contractor past performance review information will not be included in FAPIIS, but does not otherwise define or limit the type of contractor information that may be reported in FAPIIS. Indeed, in discussing the interim rule, the Government acknowledged that FAPIIS could include source selection information or other information that may not be subject to release to the public under other avenues, such as the Freedom of Information Act (also known as FOIA). The interim rule, however, did not place any controls regarding inclusion of such protected information in FAPIIS other than stating that Contracting Officers should ensure "they do not post information in the system . . . that would create a harm protected from disclosure exemption under FOIA." Critics, including this government contracts lawyer in Northern Virginia, pointed out that this offered little protection to contractors as Contracting Officers were not well equipped nor trained to determine the applicability of FOIA exemptions to the different types of information that could be included in FAPIIS. In fact, most agencies have positions dedicated to the task of processing FOIA requests.

On January 3, 2012, the Government published the final (really, truly, final) rule regarding public access to contractor information in FAPIIS which responds to the concerns raised following publication of the interim final rule last year. In the preamble to the rule, the Government states that it recognizes the risks involved if contractor information is made available to the public without first being screened in some fashion. Accordingly, under the final rule, contractors will be given the opportunity to review and comment on information reported in FAPIIS prior to the information being made available to the public.

The specifics are as follows. FAPIIS consists of two "segments": a public and non-public segment. Contracting officials and contractors report information to the non-public segment of FAPIIS. The non-public segment may only be viewed by Government personnel and authorized users performing business on behalf of the Government or by an offeror or contractor who seeks to view its own information. Under the final, final rule, Contracting Officers are still instructed to ensure that information that is otherwise exempted from release under FOIA is not reported in FAPIIS. Contracting Officers should seek assistance in applying and interpreting the FOIA exemptions from agency FOIA officials. The new rule, however, now provides an additional level of screening. The contractor now has to be notified each time new information is reported in the non-public segment of FAPIIS. The notification must inform the contractor that information included in the nonpublic segment will be transferred to the public segment of FAPIIS within 14 calendar days unless the contractor requests withdrawal of the information on the basis that such information cannot be released under FOIA. The notification will be sent to the contractor's Government business point of contact identified in the Central Contractor Registration (CCR) database unless the contractor specifies a "past performance point of contact" in the CCR record.

If a contractor believes information posted in FAPIIS would not be subject to release under FOIA, a contractor must file a request for withdrawal of the information within seven calendar days of the posting of new information in FAPIIS. A Contracting Officer that receives such a request must remove the information from the non-public segment of FAPIIS within seven calendar days and decide whether the information should be released to the public pursuant to the agency's FOIA procedures.

In addition to these screening procedures, the final, really final rule allows contractors to post comments regarding information that has been posted by the Government in FAPIIS. Information in FAPIIS is retained for six years and a contractor's comments on that information will be retained for the same period unless revised by the contractor.

After the many rules, comments and commentary on the implementation of FAPIIS, there should be little left to say. However, I still see some unresolved issues in this final, yes we mean it, final rule:

BLOG DESCRIPTION

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- The rule states that the contractor must request withdrawal of information reported in FAPIIS within seven calendar days of the *posting* of the information to FAPIIS. The rule also states that the contractor will receive notification when the Government posts new information in FAPIIS. The assumption made in this language is that the contractor will be notified the same day the information is posted in FAPIIS. If that happens, no problem, the rule makes sense. If there is any gap between the posting of the information and the notification of same to the contractor, there could be trouble because the seven calendar day for requesting withdrawal runs from posting, not notification.
- The rule states that the contractor can request withdrawal of information from the non-public segment of FAPIIS only if the contractor believes the information is exempted from release under FOIA. But what if the contractor believes the information is past performance review information? Is it permitted to request withdrawal of contractor information in FAPIIS on that basis?
- The rule states that a Contracting Officer must remove information posted in FAPIIS if a contractor advises the Contracting Officer (or other agency official that reported the information) within seven calendar days of the posting that the information falls within a FOIA exemption. Does the contractor have to specify which exemption? In the traditional FOIA case, the agency informs a contractor that there has been a request for contractor information included in an agency record. The agency then allows the contractor to make the case that the information is protected from release to the public under a specific FOIA exemption. Typically, this claim appears in a "reverse FOIA" letter submitted by the contractor, or more likely, the contractor's attorney. At what point and in what depth will these reverse FOIA arguments need to be made? If the contractor only needs to assert that the information falls within a FOIA exemption and nothing more, won't a contractor make the withdrawal request where it legitimately believes the information falls within an exemption *and also in* cases where it believes it doesn't fall within an exemption but the contractor wants to go through the process to delay the public's access to the information in question?

Not Bode Well for Sm

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We'll see what happens. The final rule applies to solicitations and contracts issued after January 17, 2012.

Posted: 1/17/2012 6:41:11 PM by **Devon Hewitt** | with 0 comments

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