

FAPIS: Update on Government FAPIS Postings: Quick Contractor Reaction Required

January 11, 2012 by W. Bruce Shirk

Our previous discussions of the Federal Performance and Integrity Information System (“FAPIS”) posted here in [June 2010](#) and [March 2011](#), urged contractors generally to manage affirmatively FAPIS and, specifically, to: (i) place a high priority on entry and updating of data into FAPIS; (ii) take advantage of every opportunity to comment on, explain or rebut information posted in FAPIS; and (iii) be alert for Government posting of harmful information, in particular information potentially protected from disclosure by a Freedom of Information Act (“FOIA”) disclosure exemption, Exemption 4. It is now apparent that, in light of a recent action of the Civilian Agency Acquisition Council and the Defense Acquisition Regulation Council (“the Councils”), contractors who successfully manage FAPIS will be those contractors who not only implement the above steps but do so very quickly and are, as well, hyperalert for and prepared to react immediately to Government posting of potentially harmful information.

On January 3, 2012, the Councils finalized the rule initially proposed on January 24, 2011 amending FAR sections 9.104-7, 9.105-2, 9.406-3, 42.1503 and the clause at FAR 52.209-9 to implement the requirement of Section 3010 of the Supplemental Appropriations Act, 2010. That Act requires that the information in FAPIS, “excluding past performance reviews, . . . be made publicly available.” Public Access to the Federal Awardee Performance and Integrity Information System, 77 Fed. Reg. 197 (Jan. 3, 2012). As to the final rule, the Councils note that FAPIS consists of two segments, a non-public segment, also known as the Past Performance Information System (PPIRS), and a publicly available segment, also known as the “public site.” The Councils also noted that “the structure of FAPIS ensures that ‘past performance reviews’ will not be inadvertently released . . .” because such information is stored in the PPIRS module, which is “completely separate . . . from the other [publicly available] information in FAPIS.” 77 Fed. Reg. 199. The Councils’ assurance of “complete” separation, while probably not literally inaccurate, is nevertheless confusing because, as it turns out, government-generated

information intended for ultimate posting on the public site is first entered into FAPIIS via the non-public segment – and it is at this point that the importance of a very high level of contractor alertness becomes apparent. Here's why.

Our March 2011 discussion noted that government-generated information destined to be posted on the public site includes contracting officer final determinations of:

- contractor default,
- submission of defective cost or pricing data,
- non-responsibility, and
- suspension and debarment official listing of a contractor in the Excluded Parties Listing System (“EPLS”) and related matters, (e.g., contractor execution of an Administrative Agreement). FAR 9.105-2(b)(2); 77 Fed. Reg. 199.

These determinations regarding contractor integrity, any of which can contain potentially harmful contractor proprietary information or other commercial sensitive information protected from disclosure exemption under FOIA, are to be posted to FAPIIS' non-public segment within three working days of finalization of the determination by the responsible government official. The official must also give immediate notice of the posting to the contractor who then has a mere seven calendar—not working—days to: (i) review the posted information, and (ii) assert in writing to the official that information has been posted that is covered by a disclosure exemption under FOIA and, citing FAR 52.209-9, explicitly request its removal from the site. The government official must then within seven calendar days remove the posting from the non-public FAPIIS segment and “resolve the issue in accordance with agency” FOIA procedures prior to re-posting any of the information determined to be releasable. FAR 9.105-2 (b)(2). Ominously, “[i]f the Government official does not remove the item, it will be *automatically* released to the public site within 14 calendar days after the review period began.” 77 Fed. Reg. 196; FAR 52.209-9(b)(2) (emphasis added).

Seven days is, on its face, a very brief period of time for a federal contractor to review, analyze, and respond in writing to a final determination posting that discloses proprietary or other commercial sensitive information covered by a FOIA exemption. Recognizing this fact, several individuals who submitted comments on the regulation as initially proposed urged that the Councils adopt response periods ranging from 30 to 60 days for contractors to review such information and prepare a response. But the Councils, nevertheless, have specified seven days

and contractors must accept and deal with the brevity of the period available to respond to posting of final determinations and EPLS listings. But the brevity of this particular review period perhaps holds a larger lesson, which is that the government is announcing its intention that FAPIIS operate efficiently and at high speed. Thus, while the regulations provide a somewhat longer—albeit still very brief—period of 30 days to respond to past performance information in PPIRS. The regulations place no time limit on the contractor opportunity to post comments rebutting government-generated information posted to the FAPIIS public site, probably because it is viewed as unnecessary. After all, contractors have a clear incentive to react quickly to such postings because the longer damaging information is available on the public site without contractor explanation the more harm it is likely to cause. In any event, this recently issued final rule highlights the reality that potentially damaging government-generated information can now appear on short notice in FAPIIS, whether in PPIRS or the public site. Contractors ignore this reality at their own risk.

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