

# CLIENT ALERT

## Ready Or Not, Here FAPIIS Comes -- Significant New Disclosure Requirements For Contractors

March 25, 2010

On March 23, 2010, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council issued a final rule amending the FAR to implement the Federal Awardee Performance and Integrity Information System ("FAPIIS"). The stated purpose of the rule, as required by section 872 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, is to significantly enhance the government's ability to evaluate for responsibility determinations the business ethics and performance of prospective contractors competing for federal business. Once it becomes effective on April 22, 2010, this rule will have a significant impact on the types of information contractors must disclose. Moreover, contracting officers will have an obligation to consider many new types of information in making responsibility determinations prior to awarding federal contracts over the simplified acquisition threshold.

### Vendor Reporting and Certification

For solicitations issued after April 22, 2010, agencies must insert a new implementing clause (FAR 52.209-7) that requires certified disclosures from contractors. There is no exemption for commercial item or COTS acquisitions. In addition, given the language of the new rule, it is possible that contracting officers might amend solicitations issued prior to April 22, requiring contractors to submit new information and potentially delaying awards.

This new clause requires vendors submitting proposals for federal contracts with an expected value over \$500,000 and having more than \$10 million in active contracts and grants at the time of proposal submission to report in FAPIIS certain information pertaining to criminal, civil, and administrative proceedings. According to the new rule, vendors will provide this information through the Central Contracting Registration ("CCR") database.

As a result of the new requirements, it is likely that contractors will need to revise internal processes and protocols to capture and track this information. The information required is in addition to that already called for under FAR 52.209-5 "Certification Regarding Responsibility Matters." And the offeror must certify that the information is "current, accurate, and complete as of the date of the submission of the offeror."

There are four basic categories of information that a contractor must report:

1. **Criminal Convictions.** An offeror must provide information about whether the offeror and/or any of its principals has, within the last five years, in connection with the award or performance of a federal contract or grant, been subject to a criminal proceeding - at the federal or state level - that resulted in a criminal conviction. Note that this five-year lookback is longer than the 3-year requirement under FAR 52.209-5. Moreover, while 52.209-5 requires a "check-the-box" response, the new clause requires a narrative description if there is reportable information.
2. **Civil Liability.** An offeror must provide information about whether the offeror and/or any of its principals has, within the last five years, in connection with the award or performance of a federal contract or grant, been subject to a civil proceeding - at the federal or state level - that resulted in a finding of fault and liability and required payment of a

monetary fine, penalty, reimbursement, restitution, or damages of \$5000 or more.

Again, while 52.209-5 only requires offerors to look back three years, this new clause requires offerors to look back five years. In addition, the new clause covers a broader range of civil actions than those enumerated in 52.209-5, and requires a narrative description if there is reportable information.

3. **Administrative Proceedings.** The new rule defines an administrative proceeding as a "non-judicial process that is adjudicatory in nature in order to make a determination of fault or liability." An offeror must provide information about whether the offeror and/or any of its principals has, within the last five years, in connection with the award or performance of a federal contract or grant, been subject to an administrative proceeding - at the federal or state level - that resulted in a finding of fault and liability and required the payment of monetary fine or penalty of \$5000 or more, or the payment of any reimbursement, restitution, or damages in excess of \$100,000.

The new rule provides the following examples of administrative proceedings: Securities and Exchange Commission, Civilian Board of Contract Appeals, and Armed Services Board of Contract Appeals. However, the rule indicates that agency actions such as contract audits, site visits, corrective plans, or inspection of deliverables, are not administrative proceedings.

4. **Settlements.** An offeror must provide information about whether, within the last five years, in connection with the award or performance of a federal contract or grant, a federal or state criminal, civil, or administrative proceeding was disposed of by consent or compromise with an acknowledgment of fault by the contractor, if the proceeding could have led to any of the reportable events discussed above.

## Updating Disclosures

In certain circumstances, the new rule also requires contractors to submit updates to their disclosures. Agencies must insert new FAR clause 52.209-8 into solicitations if the value is expected to exceed \$500,000 and into contracts if the contractor has more than \$10 million in active contracts and grants as of the time of proposal submission. Under this clause, the contractor must update the information in FAPIIS relating to criminal, civil, and administrative proceedings on a semi-annual basis, throughout the life of the contract.

## Establishment of FAPIIS

The new rule establishes the FAPIIS system to aggregate information from existing sources and collect new categories of information. In addition to providing access to the Excluded Parties List System ("EPLS") and past performance information ("PPIRS"), FAPIIS will also include contracting officers' non-responsibility 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, and contractor self-reporting of criminal convictions, civil liability, and adverse administrative actions as described above.

## Obligations of Contracting Officers

Once the rule goes into effect on April 22, 2010, contracting officers will be required to (i) review all the information in FAPIIS in connection with contracts over the simplified acquisition threshold for the purpose of making a responsibility determination, (ii)

document the contract file to explain how the information in FAPIIS was considered in any responsibility determination, and (iii) notify, prior to proceeding with award, the agency official responsible for initiating debarment or suspension, if information is identified in FAPIIS that appears appropriate for that official's consideration.

Contracting officers must give offerors the opportunity to provide additional information that demonstrates their responsibility before the contracting officer makes a non-responsibility determination based on relevant information from FAPIIS if such information concerns the following: criminal, civil, or administrative proceedings in connection with the award or performance of a federal government contract, terminations for default or cause, or determinations of non-responsibility because the contractor does not have a satisfactory performance record or a satisfactory record of integrity and business ethics, or comparable information relating to a grant.

According to the new rule, the FAPIIS system is to provide contractors with notification whenever the government posts new information to the contractor's record. The contractor will have an opportunity to post comments regarding information that has been posted by the government, including non-responsibility determinations, and such comments will be retained as long as the associated information is retained (for a total period of six years).

### **Other Considerations**

In our view, this new rule will present significant implementation challenges for the industry and the government, and it may lead to certain unintended consequences. Listed below are some of the issues that may arise once this rule becomes effective.

- Will this expansive collection of information have an impact on source selection decisions beyond responsibility determinations? For example, is a contracting officer likely to consider this information in the context of the past performance evaluation? Alternatively, might an agency's failure to consider this information in the context of source selection decisions outside of the responsibility setting provide a basis for protest?
- If an agency fails to provide an offeror the opportunity to respond to information posted in FAPIIS, would that give rise to a basis for a bid protest?
- The preamble to the rule provides that information collected in FAPIIS will be considered "source selection sensitive." But the preamble also notes that public requests for system information will be handled under the Freedom of Information Act procedures. How should these statements be reconciled? Will this new system generate a new wave of litigation about what is exempt from release pursuant to FOIA?
- Does the statement that information in FAPIIS will be considered source selection sensitive have implications for organizational conflicts of interest? If, for example, a government employee has access to FAPIIS and then goes to work for a company having had access to a competitor's information in FAPIIS, does that give rise to an organizational conflict of interest or an unfair competitive advantage?

We imagine that there will be many more questions in the coming weeks as the government and industry work to understand the full impact of this new rule.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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