



**New Required Disclosures of
Proceedings and Settlements for
Federal Contractors and Grantees**

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Webinar Agenda

- Background
- New FAR rule
- Release of new CCR questions
- Practicalities and industry implementation
- Proposed grant rules
- Required government postings and use of information
- Potential public access to information
- Impact on bid protests
- Questions

Legislative History

- “Strengthening Transparency and Accountability in Federal Spending Act of 2008” (S. 3077)
 - Introduced June 2008 by Senator Obama
 - Proposed to amend Federal Funding Accountability and Transparency Act of 2006 (statute creating usaspending.gov)
 - Would have required reporting of “any violation of law or regulation related to workplace, environmental protection, fraud, securities, and consumer protection.”

Legislative History

- S. 3001, 2009 Defense Authorization Act, Section 831 “Database for Department of Defense Contracting Officers and Suspension and Debarment Officials” – Introduced May 12, 2008 (identical language limited to DoD)
- S. 3001, amended by House to apply government-wide
- Public Law 110-417, section 872
 - Signed into law October 14, 2008

FAR Rule/Grant Guidance

- Proposed FAR rule issued September 3, 2009
- Final FAR rule issued March 23, 2010
 - Three primary components
 - ✓ Gathering certified disclosures from contractors
 - ✓ Establishment of system – FAPIIS
 - ✓ Government use of information
 - No exemption for COTS or commercial items
 - Effective April 22, 2010
- Proposed Grant Guidance issued February 18, 2010

Preamble to FAR Rule

- Purpose
 - “To significantly enhance the Government’s ability to evaluate the business ethics and quality of prospective contractors competing for Federal contracts and to protect taxpayers from doing business with contractors that are not responsible sources.”
- This is only the beginning...
 - Information about State contracts and grants will be collected
 - Information about local proceedings may eventually be collected
 - There will be a “subsequent phase of FAPIIS”

FAR Rule (9.104-7)

- New requirements located in FAR 9.1
- Pre-issuance of solicitation
 - If contracting officer expects resultant contract value to exceed \$500,000, must insert solicitation provision 52.209-7 (Information Regarding Responsibility Matters)
- After issuance of solicitation but before award
 - Some contracting officers are modifying solicitations to insert 52.209-7

FAR Rule (52.209-7)

- Check the box
 - The offeror ____ has ____ does not have current active Federal contracts and grants with total value greater than \$10 million
- Federal contracts and grants
 - The total value of all current, active contracts and grants, including all priced options; and
 - The total value of all current, active orders including all priced options under indefinite-delivery, indefinite-quantity, 8(a), or requirements contracts (including task and delivery and multiple-award Schedules)

FAR Rule (52.209-7)

- Scope
 - “Whether the offeror, and/or any of its principals, has or has not, within the last five years, in connection with the award to or performance by the offeror of a Federal contract or grant, been the subject of a proceeding, at the Federal or State level that resulted in any of the following dispositions”
- Four categories
 - Criminal proceeding
 - Civil proceeding
 - Administrative proceeding
 - Settlements with acknowledgement of fault

FAR Rule (52.209-7)

- “Whether the offeror, and/or any of its principals, has or has not, within the last five years, in connection with the award to or performance by the offeror of a Federal contract or grant, been the subject of a proceeding, at the Federal or State level that resulted in any of the following dispositions”

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- “Principal means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a division or business segment; and similar positions).”

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- Contrast the five-year requirement with 52.209-5
 - Still applicable
 - ORCA
 - Three-year period
 - Specifically enumerated types of civil and criminal judgments

FAR Rule (52.209-7)

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- What is “in connection with”?
 - Environmental actions
 - Labor disputes
 - Insurance disputes
 - Workers’ compensation
 - Contract dispute with supplier

FAR Rule (52.209-7)

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▪ Not foreign or local

- But FAR Council has expressed interest in expanding coverage of information

FAR Rule (52.209-7)

- Criminal proceeding
 - Offeror and/or principal
 - “In connection with the award to or performance by the offeror of a Federal contract or grant”
 - Federal or State level proceeding
 - Resulted in conviction

FAR Rule (52.209-7)

- Civil proceeding
 - Offeror and/or principal
 - “In connection with the award to or performance by the offeror of a Federal contract or grant”
 - Federal or State level proceeding
 - “Finding of fault and liability that results in the payment of a monetary fine, penalty, reimbursement, restitution, or damages of \$5,000 or more”

FAR Rule (52.209-7)

- Administrative proceeding
 - “Administrative proceeding means non-judicial process that is adjudicatory in nature in order to make a determination of fault or liability”
 - What it is: Securities and Exchange Commission Administrative proceeding, Civilian Board of Contract Appeals proceeding, and Armed Services Board of Contract Appeals proceeding
 - What it is not: agency actions such as contract audits, site visits, corrective plans, or inspection of deliverables

FAR Rule (52.209-7)

- Administrative proceeding
 - Offeror and/or principal
 - “In connection with the award to or performance by the offeror of a Federal contract or grant”
 - Federal or State level proceeding
 - A finding of fault and liability that results in
 - ✓ The payment of monetary fine or penalty of \$5,000 or more, or
 - ✓ The payment of any reimbursement, restitution, or damages in excess of \$100,000

FAR Rule (52.209-7)

- Administrative proceeding
 - What if...
 - ✓ OSHA visits site, determines that there is a violation, and issues a \$10,000 fine?
 - ✓ Uncontested tax penalty?

FAR Rule (52.209-7)

■ Settlements

- “Disposition of the matter by consent or compromise with acknowledgment of fault by the Contractor if the proceeding could have led to any of the outcomes specified in paragraphs (c)(1)(i), (c)(1)(ii), or (c)(1)(iii) of this provision”
 - ✓ (c)(1)(i) – criminal
 - ✓ (c)(1)(ii) – civil
 - ✓ (c)(1)(iii) – administrative

FAR Rule (52.209-7)

- Certification
 - Contractor represents, “by submission of this offer, that the information it has entered in the Federal Awardee Performance and Integrity Information System (FAPIIS) is current, accurate, and complete as of the date of submission of this offer”
 - Information submitted “with regard to each occurrence”
 - Considerations
 - ✓ Bid protests
 - ✓ False Statements
 - ✓ False Claims Act
 - ✓ Mandatory disclosure

FAR Rule (52.209-8)

■ Updates

- Contractor must update information in FAPIIS on semi-annual basis, throughout life of contract
 - ✓ But beware of the certification – “current, accurate, and complete as of the date of submission of this offer”
- Contractor “will receive notification when Government posts new information to the Contractor’s record”
- Contractor has opportunity to respond to new information
 - ✓ Comments remain part of record unless Contractor revises

CCR

- A moving target
 - We understand that there is variation
 - Update/renewal screenshots as of Wednesday, May 5, 2010
- Questions appear to differ between new registrations and updates
- Prudent to review information that has already been provided and understand what questions were asked

CCR



Central Contractor Registration

CCR Home CCR Search Federal Agency Registration News Release Notes Request Data Access **Help**

Contractors Grantees International Registrants Small Businesses Security Notes 598,609 Active Re

Quick Links

- Dynamic Small Business Search
- ORCA
- SBA
- Request DUNS Number
- Federal Business Opportunities



CCR User's Guide

- Detailed documentation on the Central Contractor Registration process

[CCR User's Guide - PDF](#) (PDF)

[CCR User's Guide - MS Word](#) (DOC)

CCR Registration Screenshots

- Step-by-step screen shots of the registration process


[CCR New Registration Screenshots](#) (PDF) ←

[CCR New Registration Screenshots](#) (DOC)

[CCR Renewal/Update Screenshots](#) (PDF) ←

[CCR Renewal/Update Screenshots](#) (DOC)


CCR Questions

 Is your business or organization (represented by the DUNS number on this specific CCR record) required to answer information regarding criminal, civil, and/or administrative proceedings in accordance with federal solicitation, contract, or assistance action requirements (Federal Acquisition Regulation (FAR) 52.209)?

Yes No

Update/Renewal Slides at p. 16

CCR Questions

 Is your business or organization (represented by the DUNS number on this specific CCR record) required to answer information regarding criminal, civil, and/or administrative proceedings in accordance with federal solicitation, contract, or assistance action requirements (Federal Acquisition Regulation (FAR) 52.209)?

Yes No

Update/Renewal Slides at p. 16

- “Required to answer” – what does that mean?
- Reference to 52.209 – without reference to specific clause


CCR Questions

***** Does your business or organization (represented by the DUNS number on this specific CCR record) have current active Federal contracts and/or grants with total value (including any exercised/unexercised options) greater than \$10,000,000?

Yes No

Update/Renewal Slides at p. 16

CCR Questions

 Does your business or organization (represented by the DUNS number on this specific CCR record) have current active Federal contracts and/or grants with total value (including any exercised/unexercised options) greater than \$10,000,000?

Yes No

Update/Renewal Slides at p. 16

- Triggers certification that information in FAPIIS is “current, accurate, and complete as of the date of submission of this offer”
- Triggers semi-annual update requirement

CCR Questions

- *** Within the last five years, has your business or organization (including parent organization, all branches, and all affiliates worldwide) and/or any of its principals, in connection with the award to or performance by your business or organization of a Federal or State contract or grant, been involved in a
1. criminal proceeding resulting in a conviction or other acknowledgment of fault;
 2. civil proceeding resulting in a finding of fault with a monetary fine, penalty, reimbursement, restitution, and/or damages greater than \$5,000, or other acknowledgment of fault; and/or
 3. administrative proceeding resulting in a finding of fault with either a monetary fine or penalty greater than \$5,000 or reimbursement, restitution, or damages greater than \$100,000, or other acknowledgment of fault?

Yes No

Update/Renewal Slides at p. 18

CCR Questions

* Within the last five years, has your business or organization (including parent organization, all branches, and all affiliates worldwide) and/or any of its principals, in connection with the award to or performance by your business or organization of a Federal or State contract or grant, been involved in a

1. criminal proceeding resulting in a conviction or other acknowledgment of fault;
2. civil proceeding resulting in a finding of fault with a monetary fine, penalty, reimbursement, restitution, and/or damages greater than \$5,000, or other acknowledgment of fault; and/or
3. administrative proceeding resulting in a finding of fault with either a monetary fine or penalty greater than \$5,000 or reimbursement, restitution, or damages greater than \$100,000, or other acknowledgment of fault?

Update/Renewal Slides at p. 18

- “Including parent organization, all branches, and all affiliates worldwide”
 - Other version: “represented by the DUNS number on this specific CCR record”
- “In connection with award to or performance by Federal or State contract or grant”
- No limitation to proceedings at the Federal or State level
- “Or other acknowledgement of fault”

CCR Questions

Proceeding Detail

Since you have answered yes to the above questions you must complete the following information: one detailed entry per proceeding, both a primary and alternate point of contact toward which additional questions may be directed.

Add New Proceeding Detail

Update/Renewal Slides at p. 18

CCR Questions

Date: (MM/DD/YYYY)

Instrument:

State:

Instrument Number:

Type:


Disposition:

Description:

Up to 500 characters

Update/Renewal Slides at p. 18

CCR Questions


 Instrument:

- U.S. Federal issued contract
- U.S. Federal issued grant / assistance instrument
- State issued contract
- State issued grant

Select Instrument

Update/Renewal Slides at p. 19


CCR Questions

 Type:

Select Proceeding Type

Update/Renewal Slides at p. 19

CCR Questions

 Disposition:

Select Proceeding Disposition

Update/Renewal Slides at p. 19

CCR Questions

Date: (MM/DD/YYYY)

Instrument:

State:

Instrument Number:

Type:

Disposition:

Description:

Up to 500 characters

Update/Renewal Slides at p. 18

CCR Questions

Date: (MM/DD/YYYY)

Instrument:

State:

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Type:

Disposition:

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Up to 500 characters



Update/Renewal Slides at p. 18

Practicalities and Industry Implementation

- CCR requires substantive responses
 - Fraud exposure
 - Risk of a non-responsibility determination
 - Impact on past performance evaluation
 - Potential referral for suspension/debarment
 - Potential release to public
- Additional resources may be required
 - Keep CCR information current
 - Review agency submissions
 - Comment on those submissions
 - Respond to inquiries from agency

Practicalities and Industry Implementation

- Need to review CCR on an enterprise-wide basis
 - How many registrants
 - Who is authorized to access and input information for contractor
- Written procedure and/or flow charts
 - Many moving parts
 - ✓ Submit
 - ✓ Update
 - ✓ Comment
 - ✓ Respond
 - ✓ Track
- Designated “owner” to ensure consistent approach
- Training

Practicalities and Industry Implementation

- New infrastructure may be required
 - Identify and keep current list of entities
 - Identify and keep current list of principals
 - Who has the five year historical information
 - Who determines if it is “in connection with...”
 - Going forward
 - ✓ How to capture the information for updates
 - CCR information must be current for every covered proposal
 - Need to track proposal activity

Practicalities and Industry Implementation

- Questions from agency
 - Careful selection of contractor POC
 - Establish procedure
 - Limited amount of time to respond to agency-posted information
 - ✓ Delay could result in non-responsibility determination
 - ✓ Careful and truthful responses required

Practicalities and Industry Implementation

- Other issues to ponder
 - How to minimize what is reportable
 - ✓ No acknowledgment of fault in a settlement agreement
 - Whether and how to report confidential settlement agreements
 - ✓ Whistleblower actions
 - ✓ Prime-sub disputes
 - Mark all FAPIIS information proprietary and confidential to strengthen argument that material is exempt from disclosure under FOIA
 - “Ground rules” qualifications may be an option

Proposed Grant Rules

- Underlying statute applies to both Federal contracts and grants
 - FAR rule is final
 - Grant rule is proposed
 - OMB extended proposed grant rule to cooperative agreements
- Some of the proposed grant rules are inconsistent with the final FAR rule (and the CCR questions pose additional conflicts)

Proposed Grant Rules

- OMB grant rule applies to grants, cooperative agreements, loans, and other forms of federal financial assistance
 - Includes States and local governments receiving federal financial assistance funds, e.g., roads, school lunch programs, ARRA, Medicaid, TANF, etc.
 - Hospitals, universities, etc.

Proposed Grant Rules

- All applicants, recipients, and first-tier subrecipients would be required to register in CCR and obtain a DUNS number and supply information
 - FAR rule for federal contractors does not require subcontractors to supply FAPIIS information
 - First-tier subrecipient prohibited unless the entity has registered with CCR and has a DUNS number

Government Use of Information

- Establishment of FAPIIS as a system
 - Preamble: “FAPIIS will provide a one-stop shop by providing a central nexus of access to the information stored in various existing systems”

Government Use of Information

- Information will come from numerous existing sources, but will also include a great deal of new information
 - Government-wide: Past Performance Information Retrieval System (“PPIRS”) and Excluded Parties List System (“EPLS”)
 - Offeror: criminal, civil, and administrative proceedings, and settlements
 - SDO: information about suspension and debarment, including administrative agreements
 - Contracting officer: terminations for default or cause, determinations of non-responsibility, and defective pricing determinations

Government Use of Information

- Purpose for all of this information (9.104-6)
 - Responsibility determination
 - Before awarding a contract in excess of the simplified acquisition threshold, the CO must consider all of the information in FAPIIS and other past performance information when making responsibility determination
 - ✓ What is a responsibility determination? (9.104-1)
 - ✓ For small businesses, CO must refer matter to SBA, which will decide whether to issue a Certificate of Competency

Government Use of Information

- Purpose for all of this information (9.104-6)
 - For source selection evaluations of past performance, contracting officers shall use sound judgment in determining the weight and relevance of the information contained in FAPIIS and how it relates to the present acquisition
 - ✓ What is relevance of an expired suspension?
 - ✓ Workers' compensation claim?
 - ✓ Prime-sub dispute?

Government Use of Information

- If the CO “obtains relevant information from FAPIIS,” the CO must
 - Request additional information from the contractor, so that the contractor can try to demonstrate present responsibility
 - Notify, prior to award, the SDO, if the information appears appropriate for the official’s consideration
 - Document how the information in FAPIIS was considered
- Other collateral uses
 - Consent to subcontractors?
 - Evaluation of proposed subcontractors?
 - Performance assessments?
 - Incentive fee determinations?
 - Past performance reviews?

Potential Public Access to Information

■ Preamble

- “...the Councils do not believe that Congress intended this database to be accessible by the public.”
- “Whether FAPIIS data is releasable under FOIA would be determined on a case-by-case basis.”
- “Administrator of GSA shall ensure that the information in the database is available...upon request, to the Chairman and Ranking Members of the committees of Congress having jurisdiction.”

Potential Public Access to Information

■ FOIA Exemptions

- Exemption 1 National security
- Exemption 2 Internal personnel rules and practices
- Exemption 3 Information exempt by other statutes
- Exemption 4 Trade secrets
- Exemption 5 Interagency communication
- Exemption 6 Personal information affecting privacy
- Exemption 7 Investigatory records
- Exemption 8 Records of financial institutions

Potential Public Access to Information

- Project on Government Oversight (“POGO”) FOIA request for all data:

Please provide all records, including:

1. All information pertaining to administrative, civil, and criminal proceedings, included in the Federal Awardee Performance and Integrity Information System (FAPIIS) as of the date this request is substantively considered;
2. Any covered person’s comments pertaining to information about such person included in FAPIIS; and
3. All records documenting the manner in which the material in the database was considered by government officials in any responsibility determination or past performance evaluation.

- Competitors
- Protecting data in “description” field and responses to CO inquiries

Impact on Bid Protests

- Use of FAPIIS data to determine present responsibility
 - Standard for challenging determination of non-responsibility
 - Standard for challenging affirmative responsibility determination
- Use of FAPIIS data to evaluate past performance
 - Relevance
 - Recency
 - “Adverse past performance” and discussions
- Strategy issues
 - Formulation of specific document requests
 - Protest allegations
 - ✓ Responsibility
 - ✓ Past performance
 - ✓ Lack of opportunity to respond to information
 - ✓ Failure to consider

Questions?

Reminder, the slides and a link to a recording of the webinar will be sent to you in the next couple of days.

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