



## Window For FAPIIS Objections Forces Contractors To Hustle

By **Dietrich Knauth**

*Law360, New York (January 20, 2012, 10:19 PM ET)* -- Under a new federal regulation, government contractors will be allowed to preview and object to entries in the government's central contract performance database, but the short time frame for doing so will force companies to stay alert in order to protect sensitive or confidential information, attorneys said.

The federal rule amends the Federal Awardee Performance Integrity Information System, a database intended to give the government a better way to determine which companies are most worthy of receiving federal contracts. FAPIIS includes information on civil and criminal proceedings, suspension and debarment proceedings, and contractor performance reviews.

The database — with the exception of contractor past performance reviews — was opened to the public in April, causing contractors to worry that errors or rushed entries by government officials could wrongly damage a company's reputation or disclose a company's sensitive information, such as pricing or trade secrets.

The new regulation, which was published Jan. 3, adds a requirement that contractors be given seven calendar days to object to the public release of information on the grounds that such information is exempt from disclosure under the Freedom of Information Act. Previously, contractors could add comments to public entries.

Despite having the opportunity to weigh in, the quick turnaround time creates its own difficulties for contractors and doesn't quite negate their concerns, attorneys said.

"It's a move in the right direction, but I think the process falls short," said Frederic M. Levy, a partner in McKenna Long & Aldridge LLP's government contracts practice.

Companies must diligently police their FAPIIS entries, because many of the now-public records could contain sensitive commercial information about the company's pricing or internal policies that are protected as trade secrets.

"A suspension and debarment decision, for example, could contain all kinds of business information," said W. Bruce Shirk of Sheppard Mullin Richter & Hampton LLP. "Those things can be rife with commercial data that you don't want out."

Other entries could be problematic for a company even if the finding is positive, such as a defective pricing decision, in which the government examines whether a contractor knowingly submitted false cost or pricing data.

"If there were some sort of detailed discussion of a defective pricing finding, you might see a situation where contractor's proprietary information could be contained in that description," Peter Eyre of Crowell & Moring LLP said.

Mitigating the risks will require companies to be diligent, quick and well-organized, with internal policies that ensure the FAPIIS notices get into the right hands as promptly as possible.

"It is something that contractors will need to be aware of and understand that it is a quick turnaround time," Eyre said.

The tight deadline could be a burden for contractors, if they have to submit proposed redactions or identify the specific portions of a document that cause concern. The regulation is unclear on whether the information will be pulled immediately and in its entirety if an objection is raised, according to Levy, and going through the entries for suggested redactions could be difficult.

"It often can take a long time to make that determination in terms of what is and what isn't protected," Levy said. "The point person for FAPIIS might not know if certain information in there is proprietary business information; they might not know if the information might involve some privacy right."

Levy and Shirk recommended that clients consider aggressively challenging entries as FOIA exempt, even when the exemption is in doubt.

FAPIIS remains unwieldy and thin on information, and is currently useful only to government employees, according to critics like government watchdog group the Project On Government Oversight. The entries in FAPIIS often required further research or translation from indecipherable acronyms and jargon, and were sometimes cut off abruptly, POGO said.

But the database offers promise if it continues to mature, according to POGO, and improvements that make it easier to use could increase the concern for contractors. The federal government as a whole is taking past performance concerns more seriously, so contractors should devote high-level attention to the database, Shirk said.

"There should be infrastructure for the contractor to act on these things," Shirk said. "FAPIIS should be regularly monitored, actively [and] daily, by a person with enough authority to protect the company as a whole."

The mechanism for responding should include the company's contract management and legal divisions, but also public relations and any social networking staff.

"It's an unfriendly website, but at some point, some reporter is going to figure out how to start routinely checking this looking for dirt," Shirk said. "There's a whole public relations concern here that people just aren't being as alert to as they need to be."

Under FAPIIS regulations, contractors are required to self-report criminal convictions, civil liability and administrative proceedings related to the performance of government contracts, if those proceedings resulted in a finding of fault and the contractor paid \$5,000 or more in damages, restitution or fines.

--Editing by Elizabeth Bowen.

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