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General Services Administration  
Regulatory Secretariat (MVCB)

*Attn:* Hada Flowers

1275 First Street, NE  
Washington, DC 20417

### **Re: FAC 2005-49, FAR Case 2010-016, Public Access to the Federal Awardee Performance and Integrity Information System**

Dear Ms. Flowers,

On behalf of The Coalition for Government Procurement, the following comments are provided on the interim rule amending the Federal Acquisition Regulation (FAR) to implement section 3010 of the Supplemental Appropriations Act. The proposed rule was published in the Federal Register on January 24, 2011.

The Coalition for Government Procurement is a non-profit association of more than 300 firms selling commercial services and products to the Federal Government. Our members collectively account for approximately 70% of the sales generated through the GSA Multiple Award Schedules (MAS) program and about half of the commercial item solutions purchased annually by the Federal Government. Many of our members also are information technology contractors on most, if not all, of the Governmentwide Acquisition Contracts. In addition, our members are contractors on many agency wide multiple award contracts as well as multi-agency contracts. Coalition members include small, medium and large business concerns. The Coalition is proud to have worked with Government officials over the past 30 years towards the mutual goal of common sense acquisition.

The interim rule implementing section 3010 of the Supplemental Appropriations Act is of interest to our organization as it makes information reported in the Federal Awardee Performance and Integrity Information System (FAPIIS) publicly available. There are still a number of issues that have yet to be clarified for contractors. We recommend that in making FAPIIS open to the public, the process for doing so should be fully vetted by all parties impacted by this significant change. Section 3010 of the Supplemental Appropriations Act of 2010 states that:

“Section 872(e)(1) of the Clean Contracting Act of 2008 (subtitle G of title VII of Public LAW 110-417; 41 U.S.C. 417b(e)(1)) is amended by adding at the end the following: “In addition, the Administrator shall post all such information, excluding past performance reviews, on a publicly available Internet website.”

The statute does not impose a specific date that FAPIIS should be made available to the public. The current April 15<sup>th</sup> deadline is rather arbitrary. Before moving forward with this release, the Coalition suggests that certain issues that have yet to be resolved have an opportunity to be vetted through a public process, especially how FOIA protected information will be handled by the Government and what specific training and guidance will be developed clarifying the type of information that should be reported in FAPIIS.

## **1. Release of FOIA Protected Information**

Contractors face a number of risks associated with the release of FAPIIS data, including the release of information subject to the Freedom of Information Act (FOIA). Under the interim rule, any information posted to FAPIIS prior to April 15, 2011 shall remain subject to the FOIA request process. The interim rule lacks guidance on the implementation of the public access requirement and the scope of information to be withheld even though the GSA Administrator and the Office of Management and Budget were tasked with providing such information (Supplemental Appropriations Act for Fiscal Year 2010,

Pub. L. No. 111-212; § 3010, 124 Stat. 2302, 2340). A process for ensuring the protection of information under FOIA disclosure exemptions should be provided in advance of the release of FAPIIS to the public.

## **2. Guidance re: Information in FAPIIS**

In the FAPIIS final rule issued March 23, 2010, the preamble indicated that policies and guidance would be developed to ensure the timely and accurate input of information into the FAPIIS database. Further, the Councils would work with the FAPIIS Program Manager, the Federal Acquisition Institute, and the Defense Acquisition University to develop guidance for contracting officials and suspension and debarment officials.

The resulting training, policies and guidance will in effect provide further direction regarding what constitutes proper input, accuracy and timeliness. In essence, it will supplement and clarify FAPIIS data requirements.

As such, consistent with the Administration's commitment to transparency and open communication with all stakeholders, these trainings, policies and guidance should be published in the Federal Register so that all impacted parties may provide input. Public review and comment of this information is vital due to the potential impacts associated with public availability of the FAPIIS database. The possible negative repercussions for contractors are high if information in FAPIIS is not reported accurately or used appropriately.

Further, there are still issues that remain unclear from the final rule released in March 2010 that future policies and guidance can address. We suggest that the FAR Council consider the following issues that could be clarified for both contracting officials and private sector staff involved in FAPIIS data reporting:

#### **a) Reportable Outcomes**

Reportable outcomes covered by FAPIIS have yet to be clearly defined in either training or specific guidance for contractors. We suggest that amicable resolutions of matters with federal agencies where there is no formal adjudication should not require FAPIIS reporting. We believe that the following items are not reportable because they are not the result of an adjudicatory administrative proceeding, and should be excluded from the database:

- audit resolutions
- corrective plans as a result of site visit
- responses to concerns raised during inspections of contract deliverables
- any matter resolved without filing a formal claim under the Contract Disputes Act of 1978, 41 U.S.C. 601-613 (“CDA”)
- any resolution of a voluntary self-disclosure before the filing of a legal action or CDA claim; and
- any resolution of an Office of the Inspector General investigation or inquiry before the filing of any legal action or CDA claim.

Again, it is not certain whether the Government will provide training or guidance with respect to the scope of reportable outcomes.

#### **b) In Connection with Federal Contract Performance**

Contractors have been instructed that only reportable outcomes and reportable settlements in connection with the performance of a federal procurement contract by the responsible company and its agents need to be reported to FAPIIS. The Coalition suggests that the FAR Council should further clarify that only outcomes and settlements that are directly related to the company’s performance of a federal procurement contract should be covered. A broader interpretation would result in excessive burdens for both commercial contractors and contracting officers, as well as an overabundance of information irrelevant to making a determination of present responsibility.

The Coalition further recommends that a reportable outcome or settlement should be directly related to a company's performance of a federal contract through which the Federal Government purchases the company's products/services only when the Government is an original plaintiff or intervenes as a plaintiff, and when it concerns the marketing, sale, or distribution of a product/service to the Federal Government under a federal contract, or some other material aspect of the responsible company's performance of a government contract.

Specifically, the Coalition suggests that examples of proceedings concerning the marketing, sale, or distribution of products/services to the federal government or some other aspect of a company's government contract performance include:

- An administrative proceeding initiated by an agency over allegations the Government was overcharged for certain products/services
- A products liability case regarding a product that is sold to the Federal Government in which the Government is a party in the case
- Criminal charges against a company or any of its personnel for manufacturing processes related to a product that is sold to the Federal Government
- Actions brought by the Federal Government asserting violations of federal statutes (e.g. tax, employment, benefits) in relation to the performance of one or more government contracts

Finally, we recommend that any reportable outcome or reportable settlement as described above that is directly related to a government contract should be disclosed to the FAPIIS database.

### **3. False Claims Act Liability**

FAR 52.209-7(c) as written in the final rule states that "the offeror represents, by submission of this offer, that the information is entered in the Federal Awardee Performance System (FAPIIS) is current,

accurate, and complete as of the date of submission of this offer". The Coalition is concerned that by making FAPIIS public, there is an increased likelihood that contractors could be subject to a False Claims Act litigation on the basis of this certification. Given that both the Government as well as companies will be reliant on the accuracy of information reported in FAPIIS, and the additional False Claims liability, the direction provided through the training and guidance is even more critical. As such, the Coalition strongly encourages that FAPIIS training and guidance be vetted with all stakeholders and that opportunity for public comment also be provided.

The Coalition appreciates the opportunity to submit comments on the Public Access to FAPIIS interim rule. If you have any questions, I may be reached at (202) 331-1053 or [awoolley@thecgp.org](mailto:awoolley@thecgp.org).

Regards,



Aubrey Woolley  
Manager of Policy