

Project On Government Oversight

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November 5, 2009

General Services Administration,
Regulatory Secretariat (VPR)
1800 F Street, NW
Room 4041
ATTN: Hada Flowers
Washington, DC 20405

Sent by Facsimile: (202) 501-4067

Subject: FAR Case 2008-027

Dear Ms. Flowers:

The Project On Government Oversight (POGO) provides the following public comment to FAR Case 2008-027—"Federal Awardee Performance and Integrity Information System." (74 Fed. Reg. 45579 (September 3, 2009)), as amended on October 5, 2009 (74 Fed. Reg. 51112). POGO is an independent nonprofit organization that investigates and exposes corruption and other misconduct in order to achieve a more accountable federal government. POGO has a keen interest in government contracting matters, especially matters related to the promulgation or amendment of the Federal Acquisition Regulation (FAR). Additionally, since 2002 POGO has created and maintained a Federal Contractor Misconduct Database, which lists criminal, civil, and administrative instances of misconduct for the top contractors. POGO believes that such data will improve contracting decisions and provide the public insight into how the government spends hundreds of billions of taxpayer dollars each year on goods and services. Currently, there is no benchmark outlined in FAR Subpart 9.104-1(d) or elsewhere that allows a government official to review a contractor's record of integrity or business ethics as required by law. As a result, genuine responsibility determinations cannot be made, thereby increasing the likelihood that taxpayer dollars are being awarded to nonresponsible entities in violation of the law.

The proposed rule by the Federal Acquisition Regulatory (FAR) Councils would amend the FAR to implement Section 872 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. Law 110-417). Section 872 requires the General Services Administration (GSA) to, within one year, establish and maintain a database of information regarding the integrity and performance of persons and companies awarded federal contracts and grants. This planned database has been given the name Federal Awardee Performance and Integrity Information System (FAPIIS). Before awarding a contract, federal officials must review FAPIIS and consider other past performance information with respect to the offeror when making an evaluation of their responsibility and past performance. Contractors with federal agency contracts

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and grants valued in total greater than \$10 million must submit information subject to inclusion in FAPIIS and update such information on a semiannual basis.

POGO is pleased that federal contracting officials will soon have this resource to ensure that contracts are awarded to responsible persons and companies. However, POGO has several concerns about the planned development and operation of FAPIIS as described in the proposed rule. First, the FAR Councils' interpretation of the dollar thresholds established in the law requires clarification. Second, some of the data to be included in FAPIIS will be based on information drawn from existing government databases, some of which are beset with problems that cast doubt on their functionality and reliability. Third, there is uncertainty as to what penalties, if any, apply to contractors who violate the requirements set out in the proposed FAR changes. Fourth, careful consideration should be given to how the system will keep track of contractors' aliases, subsidiaries and/or affiliates. Fifth, the public should be allowed to access certain information in FAPIIS. Sixth, there should be no undue restrictions on the retention and evaluation of information in FAPIIS.

Dollar Threshold Clarification

Section 872 establishes at least two financial thresholds that are important to the operation of FAPIIS – a \$500,000 threshold for persons covered and a \$10 million threshold requiring contractors to file semiannual disclosures of information to be included in the database. However, the FAR Councils' interpretation of the persons covered dollar thresholds is somewhat confusing and requires clarification.

Section 872(b)(1) states that the database shall cover “Any person **awarded** a Federal agency contract or grant in excess of \$500,000, if any information described in subsection (c) exists with respect to such person” (emphasis added). However, the Councils state that “The proposed rule requires that for each **solicitation** of \$500,000 or more, the offeror respond whether it has, or has not, current contracts and grants under performance that total at least \$10,000,000”(emphasis added). This difference in wording (“awarded” versus “solicitation”) makes it unclear as to when and how this particular provision would apply. Such uncertainty could result in a drastic under-reporting of information in FAPIIS and diminish its effectiveness.

POGO is pleased that the Councils included the value of all options in the proposed rule. Given that federal contracts can dramatically increase in value over the months and years after their award, POGO believes the FAR Councils' interpretation is on point. However, additional guidance might have to be provided to ensure that all amendments, modifications, and other orders are added to existing award totals that could trigger inclusion in the database or contractor and grantee disclosures.

FAPIIS Reliance on Existing Government Databases

Section 872 requires federal contracting officials to “consider other past performance information available” before awarding a contract. The FAR Councils note that FAPIIS will draw data from existing systems such as the Excluded Parties List System (EPLS) and the Past Performance Information Retrieval System (PPIRS).

Several recent government audits of EPLS and PPIRS have uncovered many problems with both systems that hamper their functionality, timeliness, and reliability. In February 2009, the Government Accountability Office (GAO) found that federal agencies keep awarding contracts to suspended or debarred individuals and companies because flaws in the EPLS search system cause contracting officials to be thrown off by nicknames, aliases, or corporate name changes.¹ In April, the GAO similarly found PPIRS deficient.² The GAO reported that contracting officials have a deep skepticism about the relevancy and reliability of PPIRS data. It found that only a small percentage of contracts had documented performance assessments, while other useful performance-related data was not being systematically tracked across agencies. Most importantly, the GAO warned that a lack of central oversight and management of PPIRS, combined with a lack of funding, ensures these shortcomings will continue to plague the system.

The problems with EPLS and PPIRS continue to this day. In September, David Drabkin, GSA's deputy associate administrator for acquisition policy, admitted the agencies "have not been as diligent as we possibly could have been in terms of populating those databases with past performance information" and that the "paucity of data in the system has led people not to use the system as much as they might have."³

The proposed rule notes that FAPIIS will not only draw information from these and other existing government database but will also use these systems to store new information on contractor integrity. Unless drastic steps are immediately taken to fix the problems that plague these existing databases – particularly EPLS and PPIRS – FAPIIS will inevitably fall victim to the same problems.

Penalties for Non-Compliance

Neither Section 872 nor the proposed rule refers to what penalties will result from not complying with the requirements set forth in the proposed FAR changes. It is unclear whether and how a contractor who fails to provide information subject to inclusion in FAPIIS, or provides false or misleading information, or fails to update the information in FAPIIS as required can be punished or otherwise held accountable. Without a clearly-defined set of sanctions, it will be difficult to compel contractors to fully comply with their new responsibilities, thereby decreasing the effectiveness of FAPIIS. The authority to impose penalties is granted under Section 872(g), which states that "The Administrator shall promulgate such regulations as may be necessary to carry out this section."

Subsidiaries, Affiliates and Aliases

¹ "Excluded Parties List System: Suspended and Debarred Businesses and Individuals Improperly Receive Federal Funds," United States Government Accountability Office Report to Congressional Requesters, February 2009, GAO-09-174.

² "Federal Contractors: Better Performance Information Needed to Support Agency Contract Award Decisions," United States Government Accountability Office Report to Congressional Requesters, April 2009, GAO-09-374.

³ "Government outlines plan for contractor performance database," Robert Brodsky, *Government Executive*, September 4, 2009.

The FAR Councils predict thousands of contractors – companies and individuals – will be entered into FAPIIS each year. Many of those companies will have subsidiaries and affiliates or will undergo name changes through mergers, acquisitions or ownership changes. Some individuals may have aliases. Contracting officers will be able to make well-informed past performance evaluations and responsibility determinations only if FAPIIS enables them to keep track of this complex and massive array of data. A company or individual should not be able to cheat the system through name games.

As mentioned above, one of the key weaknesses of the EPLS is that companies and individuals listed in the system – and therefore ineligible to receive federal funds – are able to confound the system by using different identities. For example, suspended or debarred companies simply create a “new” company with a different name (but often the same address), or a suspended or debarred individual who owns a company that does business with the government transfers ownership of that company to a spouse who uses a different last name. According to the GAO, the EPLS’s imperfect search engine bears most of the blame, but a contributing factor is the lack of an effective method of assigning contractors a unique identification number.

There are many ways to numerically identify companies and/or individuals: DUNS numbers, Commercial and Government Entity (CAGE) codes, employer identification numbers (EIN), taxpayer identification numbers (TIN) and Social Security numbers. POGO thinks that one (or even several) of these methods should be the preferred way to assign all contractors – and all of their subsidiaries, affiliates and aliases – a unique identification number.

Public Access to FAPIIS Information

Section 872 states that the information in FAPIIS will be available to “appropriate acquisition officials of Federal agencies, to such other government officials as the [Administrator of General Services] determines appropriate, and, upon request, to the Chairman and Ranking Member of the committees of Congress having jurisdiction.” The proposed rule reiterates that only federal government personnel can view the information (except that a contractor can view its own information) but in the same section states that the rules of use are designed to ensure “protecting against improper disclosure to the public.” Whether or not this implies there could be instances when the disclosure of FAPIIS information to the public would be “proper” is not clear.

POGO has long advocated that any databases developed by the government for the purpose of reducing fraud and waste in federal contracting should be accessible to the public.⁴ The public has a right to know the past performance and responsibility backgrounds of the contractors that receive hundreds of billions of taxpayer dollars each year. POGO believes there should be a system by which the public can request certain FAPIIS information, such as through Freedom of Information Act (FOIA) requests.

⁴ This would be in keeping with the Obama Administration’s new policies designed to improve government transparency and public access to government information. See, e.g. “FOIA Post: OIP Guidance – President Obama’s FOIA Memorandum and Attorney General Holder’s FOIA Guidelines: *Creating a ‘New Era of Open Government’*”, U.S. Department of Justice; Office of Information Policy, April 17, 2009, posted at <http://www.justice.gov/oip/foiapost/2009foiapost8.htm>

Restrictions on FAPIIS Data Retention and Review

POGO supports the Councils' plan to archive FAPIIS data for one additional year after an accessibility period of five years. However, POGO believes this archiving period should be lengthened. POGO's Federal Contractor Misconduct Database includes instances dating back to 1995. To make decisions that are in the best interests of the public, we believe that government contracting officials must have at their disposal as comprehensive a picture of prospective contractors' responsibility track records as possible. The Councils should consider extending the archive time period.

In a similar vein, the Councils should consider removing the following provision from the proposed rule:

Since the FAPIIS may contain information covering a five year period, some of that information may no longer be relevant to a determination of present responsibility, e.g., a prior administrative action such as debarment or suspension that has expired or otherwise been resolved.

POGO believes this provision is an inappropriate restriction on Section 872, which does not contain any such limitation on what information a contracting officer reviewing FAPIIS may or may not consider relevant.

Additional Concerns

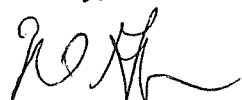
The proposed rule should apply to commercial items and services as well as commercially available off-the-shelf item contracts. Congress provided no carve-out for those contract vehicles as it has in the past.

Finally, the Councils should revisit the three-year requirement for Certification Regarding Responsibility Matters in FAR Subpart 52.209-5. Because FAPIIS will include information dating back at least six years, these provisions should be harmonized.

Conclusion

Due to the critical importance of FAPIIS and the extent to which the proposed rule diverges from the text of Section 872, a second interim rule should be published seeking additional public comments. Thank you for your consideration of this comment. If you have any questions, you may contact us at (202) 347-1122.

Sincerely,



Neil Gordon
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