

# Project On Government Oversight

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March 25, 2011

General Services Administration  
Regulatory Secretariat (MVCB)  
Attn: Hada Flowers  
1275 First Street, NE  
7<sup>th</sup> Floor  
Washington, DC 20417

*Submitted via [www.regulations.gov](http://www.regulations.gov)*

Re: FAR Case 2010-016

Dear Ms. Flowers:

The Project On Government Oversight (POGO) provides the following public comment to FAR Case 2010-016, “Federal Acquisition Regulation; Public Access to the Federal Awardee Performance and Integrity Information System” (76 Fed. Reg. 4188, January 24, 2011). The Department of Defense (DoD), General Services Administration (GSA), and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 3010 of the Supplemental Appropriations Act, 2010 (P.L. 111-212), which requires all information in the Federal Awardee Performance and Integrity Information System (FAPIIS) database, except “past performance reviews,” to be posted on a publicly available website.

POGO has long advocated for the public availability of FAPIIS.<sup>1</sup> While we are glad to see this finally coming to fruition, we find it necessary to elaborate on two matters.

First, Congress did not define the term “past performance reviews” in section 3010. As far as POGO can tell, “past performance review” is not a term of art. The FAR mentions past performance “determinations,” “assessments,” and “evaluations” in the context of the procurement process, but it is unclear whether any of these particular documents would constitute a “past performance review” exempt from public disclosure.

To eliminate this confusion, the term “past performance review” should be defined, but in a way that allows all past performance information, except that which poses a legitimate threat to commercial proprietary or personal privacy interests, to be publicly posted. The Government Accountability Office (GAO) routinely publishes past performance information in bid protest decisions, which the public can freely obtain on

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<sup>1</sup> Project On Government Oversight, “POGO Urges President Obama to Provide Public Access to Contracting and Ethics Databases,” January 29, 2009. <http://www.pogo.org/pogo-files/letters/contract-oversight/co-tic-20090129.html>

GAO's website.<sup>2</sup> Many of these decisions contain past performance "report cards" and other details of specific contractors' performance track records.<sup>3</sup>

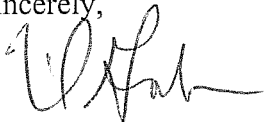
The FAR states that the government will contract with "responsible contractors only" and that "[w]hen selecting contractors to provide products or perform services, the Government will use contractors who have a track record of successful past performance or who demonstrate a current superior ability to perform."<sup>4</sup> Publicly releasing past performance information will strengthen efforts to exclude non-responsible contractors. The government discloses a broad array of past performance information in bid protest decisions, and it should apply the same standard of transparency to FAPIIS.

Second, POGO opposes the new FAR provision regarding information entered into FAPIIS before April 15, 2011. Specifically, FAR 52.209-9 provides that information posted in FAPIIS prior to April 15, 2011, will not be publicly disclosed except by request submitted under the Freedom of Information Act (FOIA). Some pre-April 15 data will eventually be posted on the public FAPIIS site, but only through semi-annual FAPIIS updates required of some, but not all, contractors and grantees.

POGO thinks all information entered into FAPIIS prior to April 15, 2011, should be posted on the public site instead of requiring users to submit a FOIA request. In our three decades of existence, POGO has become quite familiar with the shortcomings of the FOIA process. In fact, POGO submitted a FOIA request for FAPIIS data last year,<sup>5</sup> and we were summarily rejected. After initially submitting our request to GSA, GSA told us to re-submit our request to DoD. A few weeks after doing this, DoD responded that the information contained in FAPIIS is exempt from release in its entirety because it is "source selection sensitive" material covered by exemption (b)(5). POGO made the request before section 3010 was enacted, but we filed an appeal shortly thereafter. We still have not received a final decision.

In conclusion, POGO supports the interim rule but hopes the Civilian Agency Acquisition Council, the Defense Acquisition Regulation Council, and the managers of the FAPIIS system will narrowly define the "past performance reviews" exception and immediately post all information that was entered into the system before April 15, 2011.

Sincerely,



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Investigator  
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<sup>2</sup> Government Accountability Office, "Bid Protest Decisions Posted in the Past Two Months" <http://www.gao.gov/decisions/bidpro/bidpro.htm>. (Downloaded March 25, 2011)

<sup>3</sup> Government Accountability Office, *Northeast Military Sales, Inc.*, B-404153, January 13, 2011. <http://www.gao.gov/decisions/bidpro/404153.htm>. (Downloaded March 25, 2011)

<sup>4</sup> FAR Subparts 1.102-2(a)(3) and 9.103(a).

<sup>5</sup> Project On Government Oversight, "POGO's FOIA Request for Contractor Responsibility Database Information," April 21, 2010. <http://www.pogo.org/pogo-files/letters/contract-oversight/co-fcmd-20100421.html>