

Government Contractors -- What Can the Public See Now?

January 10, 2012

On January 3, 2012, a final rule went into effect that could cause contractor sensitive information to be made public unless government contractors take appropriate steps. While several groups submitted comments hoping to change the rule, the FAR Council points out in its comments that it had little choice as the rule implements Section 3010 of the Supplemental Appropriations Act of 2010.

Consolidation of Electronic Information About Government Contractors

Contractors have seen a consolidation of databases containing electronic information about them in the last couple of years. The [Online Representations and Certifications Application](#) (ORCA) merged with the [Center Contractor Registration](#) (CCR) a while ago. If you visit these sites today, you will see an announcement of the [System for Award Management](#) (SAM).

A contract was awarded in February 2010 to consolidate eight of the Federal Procurement Systems and the Catalog of Federal Domestic Assistance (CFDA). The contract work includes:

- In October 2011, the Product and Service Codes (PSC) Manual, previously found [here](#) was incorporated into the CCR/ORCA site, allowing easier completion of the code fields.
- While not specifically advertised, the Small Business Administration database has been connected to CCR and overrides the self-certification of entities that have been determined by the SBA to be other than small or not meeting the requirements of other small business categories.
- This winter, "Entity Management" capabilities found in CCR/FedReg and ORCA and the Excluded Parties List System (EPLS) are to be incorporated.
- Public Disclosure of Justification and Approval (J&A) Documents, now found at [FedBizOpps](#)
- Federal Acquisition System Requirements
- Central Contractor Registration (CCR) Extracts
- Contractor Performance Evaluations, or Contractor Performance Assessment Reporting Systems (CPARS) currently found using the [Past Performance Information Retrieval System](#) (PPIRS)

FAPIIS Implementation

On top of this electronic database consolidation is the relatively new [Federal Awardee Performance and Integrity Information System](#) (FAPIIS). As it states on the site's home page:

FAPIIS provides users access to integrity and performance information from the FAPIIS reporting module in the Contractor Performance Assessment Reporting System (CPARS), proceedings information from the Central Contractor Registration (CCR) database, and suspension/disbarment information from the Excluded Parties List system (EPLS).

Contracting officers now must include the following information in FAPIIS within three (3) calendar days after a contracting officer:

- Issues a final determination that a contractor has submitted defective cost or pricing data;
- Makes a subsequent change to the final determination concerning defective cost or pricing data
- Issues a final termination for cause or default notice; or
- Makes a subsequent withdrawal or a conversion of a termination for default to a termination for convenience.

In an attempt to balance contractor concern about release of proprietary information and transparency goals, the new FAR rule states that information posted in the non-public segment of FAPIIS will automatically be transferred to the publicly-available segment after a waiting period of fourteen (14) calendar days.

Contracting officers and government officials are instructed not to include anything in the non-public section of FAPIIS that is exempt from release to the public under the Freedom of Information Act (FOIA). Contractors are to receive a notification when any information is posted in FAPIIS about them. This information will be provided to the person identified in CCR as the contractor's "Past Performance Primary POC." This is a new CCR data field. If there is no Past Performance Primary or Alternate POC, the notification will go to the contractor's Government Business Primary, then Alternate POC.

Contractors have seven (7) calendar days to object to the posting of the information, providing an explanation of the FOIA exemption that prevents its release. The contracting officer or government official must remove the information within seven (7) calendar days if the contractor asserts it should not be released and resolve the issue.

If contractors are not concerned enough that this performance database exists, anxiety levels may greatly increase after seeing the warning that flashes on the screen for the FAPIIS viewer:

Contracting officials should be aware that use of the information in the FAPIIS system should not result in de facto debarment. Current procedures emphasize

that certain past performance in the system may no longer be relevant to a determination of present responsibility.

A current review of information available on the FAPIIS site shows two sets of records. First, Government-entered records are to identify contractors that have Terminations for Default, Terminations for Cause, Terminations for Material Failure to Comply, Non-responsibility Determinations, Recipient Not Qualified Determinations, Defective Pricing Determinations, Administrative Agreements, and DoD Determinations of Contractor Fault reported to FAPIIS by federal government personnel since April 15, 2011.

Secondly, contractor-entered records list contractors that have answered "yes" to the following two 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?
- Within the last five years, has your business or organization (represented by the DUNS number on this specific CCR record) and/or any of its principals, in connection with the award to or performance by your business or organization of a Federal contract or grant, been the subject of a Federal or State (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?

What Should Contractors Do?

- Check your current CCR and ORCA records to be sure you have points of contact identified for past performance.
- Because the response time is only seven (7) days and personnel may be out of touch, we recommend creating a group e-mail address for the POCs listed in CCR so that multiple people receive any CCR or contractor performance notification.
- Check your past performance information at [PPIRS](#) and provide a timely response if it is incorrect or requires explanation. Your PPIRS access will also provide you entry to FAPIIS.
- Check what the public can view in the FAPIIS system.

- Contractors should not only ensure their own information is correct, but may want to know what the Government and public can see about their competitors.
- Review your compliance policies, procedures, and training to help avoid a situation where the contractor has negative performance information to be disclosed publicly.

Should you have any questions about the contents of this alert, please feel free to contact [Holly Emrick Svetz](mailto:HSvetz@wcsr.com) (HSvetz@wcsr.com); 703-394-2261 or any member of our [Government Contracts Team](#).

Womble Carlyle client alerts are intended to provide general information about significant legal developments and should not be construed as legal advice regarding any specific facts and circumstances, nor should they be construed as advertisements for legal services.

IRS CIRCULAR 230 NOTICE: *To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this communication (or in any attachment).*