

# BRIEFING PAPERS<sup>®</sup> WEST<sup>®</sup>

## SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

### THE FEDERAL AWARDEE PERFORMANCE & INTEGRITY INFORMATION SYSTEM

By Joseph D. West, Diana G. Richard, and Owen E. Whitehurst

On October 14, 2008, President Obama signed into law the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009.<sup>1</sup> Section 872 of the FY 2009 NDAA directed the Administrator of General Services, under the direction and control of the Office of Management and Budget,

to establish “a database of information regarding the integrity and performance of certain persons awarded Federal agency contracts and grants.”<sup>2</sup> This database, later named the Federal Awardee Performance and Integrity Information System, was to be “for use by Federal agency officials having authority over contracts and grants.”<sup>3</sup> FAPIIS was to include information on past performance, civil, criminal and administrative judgments and settlements, terminations for default, and non-responsibility determinations.<sup>4</sup>

The subsequent three years have seen a flurry of legislative and regulatory activity that has caused the rapid evolution, or at least expansion, of the

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FAPIIS database. FAPIIS was and has remained controversial, from its statutory origin in § 872 to its current form. Proponents have lauded the development of FAPIIS, pointing to the creation of single, efficient portal for access to past performance and integrity information regarding federal awardees. Supporters of FAPIIS also point to greater transparency regarding the expenditure of taxpayer funds as the large majority of FAPIIS data is now available to the general public.

Although generally in agreement that the Government's system of recording and maintaining integrity and past performance information could benefit from centralization and improved guidance, critics of FAPIIS have raised a number of legitimate concerns regarding the database. Many have noted that the potential for misuse of FAPIIS information by procurement personnel, competitors, the media, and the public is unacceptably high, especially where a more tailored version of the database, such as that originally established in § 872, would have arguably achieved the same goal with less risk. Critics of FAPIIS have also raised concerns over the wide-ranging collateral impact of FAPIIS, from the bid protest context through its effect on securities reporting requirements and the settlement of criminal, administrative, and civil proceedings.

This BRIEFING PAPER provides an in-depth analysis of FAPIIS. The PAPER (a) examines the history of the development of FAPIIS and its emergence, (b) discusses the substantive requirements of FAPIIS as they currently exist, including the original final rule creating FAPIIS and the subsequent expansion, and (c) covers challenges raised by FAPIIS for both the Government and contractors, concerns regarding public access to past performance information, and collateral concerns.

## History & Development Of FAPIIS

### ■ Early History

The federal procurement landscape has seen a wave of legislative and regulatory activity in the past performance arena in the past three years. However, the initial groundswell driving this activity emerged much earlier.

The Federal Acquisition Streamlining Act of 1994<sup>5</sup> paved the way for the present system for collection and use of contractor performance information. Section 1091 of FASA required the Administrator of the Office of Federal Procurement Policy to “establish policies and procedures that encourage the consideration of the offerors’ past performance in the selection of contractors.”<sup>6</sup> It further required the development of the following:<sup>7</sup>

(A) standards for evaluating past performance with respect to cost (when appropriate), schedule, compliance with technical or functional specifications, and other relevant performance factors that facilitate consistent and fair evaluation by all executive agencies;

(B) policies for the collection and maintenance of information on past contract performance that, to the maximum extent practicable, facilitate automated collection, maintenance, and dissemination of information and provide for ease of collection, maintenance, and dissemination of information by other methods, as necessary; [and]

(C) policies for ensuring that—

(i) offerors are afforded an opportunity to submit relevant information on past contract performance, including performance under contracts entered into by the executive agency concerned, contracts entered into by other departments and agencies of the Federal Government, contracts entered into by agencies of State and local governments, and contracts entered into by commercial customers; and

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(ii) such information submitted by offerors is considered;....

Even before FASA, the OFPP and other entities took actions to increase the collection and use of past performance information. For example, in 1993, OFPP Policy Letter No. 92-5 called for the creation of a “Past Performance Information System,” which was defined as “an ongoing effort to collect and record past performance information for subsequent use in determining contractor eligibility and selection.”<sup>8</sup> Two years later, following the endorsement by Congress in FASA of a more robust past performance information collection and maintenance regime, the Federal Acquisition Regulations councils issued Federal Acquisition Circular 90-26, requiring the collection, maintenance, and evaluation of past performance information for covered contracts.<sup>9</sup> In December 1996, implementation of these provisions was temporarily suspended under certain size thresholds to allow agencies more time to develop past performance policies and procedures.<sup>10</sup>

The Government’s focus on collecting and using past performance information continued to grow. The OFPP’s 1995 interim “Guide to Best Practices for Past Performance” provided guidelines for recording and using past performance information.<sup>11</sup> In 1997, FAR Part 15 was substantively rewritten to provide more guidance regarding the use and collection of past performance information.<sup>12</sup> Following this effort, the Department of Defense in 1999 issued an agency-specific guide on the collection and use of past performance information.<sup>13</sup>

All of these early efforts served to root firmly the use and collection of past performance information in the practices and procedures of federal agencies.<sup>14</sup> However, the increased use and collection of past performance information presented new problems, including what information was to be collected, how it was to be used, and how to ensure that past performance information was shared across agencies and used in a uniform manner. After laying the initial groundwork for a past performance information system in the 1990s, the Government set out to address the problems presented by the new system.

## ■ 2002 OFPP Memorandum

Although collection and use of past performance information increased following the passage of FASA and the related early efforts described above, concerns began to mount regarding the uniformity of past performance information collected and barriers to Government-wide access to past performance information. In July 2002, the OFPP published a memorandum mandating that “all federal contractor past performance information (PPI) currently captured through existing past performance information tools will be centrally available on-line for use by all federal agency contracting officials through the Past Performance Information Retrieval System (PPIRS).”<sup>15</sup> The memorandum stressed that centrally locating past performance information in PPIRS would “reduce burden by eliminating collection redundancies” and warned agencies to ensure that “there is no further proliferation of databases or web sites to *collect or retrieve* contractor or grantee PPI.”<sup>16</sup>

According to the OFPP memorandum, PPIRS would “unify & simplify” the collection and use of past performance information by limiting the number of automated past performance information systems in use.<sup>17</sup> Nevertheless, the memorandum expressed no reservations regarding the multitude of existing past performance information collection mechanisms, including the three collection tools used by the DOD,<sup>18</sup> NASA’s separate past performance information system,<sup>19</sup> and the Contractor Performance System maintained for civilian agencies by the National Institutes of Health.

The OFPP’s July 2002 memorandum represented concrete action towards centralizing past performance information. Despite the verbiage used in the memorandum, PPIRS did not, in theory or in practice, create a truly centralized past performance information system.

## ■ 2005 Interagency Working Group

In 2005, an OFPP interagency working group issued a number of recommendations aimed at correcting weakness in the way the Government used and tracked contractor past performance information.<sup>20</sup> These recommendations included

standardizing the ratings used to assess contractor performance, developing a centralized questionnaire system for Government-wide use, providing more meaningful past performance information, including terminations for default, and possibly eliminating the multiple systems that feed performance information into PPIRS.<sup>21</sup>

As was the case with previous efforts at reforming the way contractor information was retained, shared, and used, agency practice had unfortunately not kept pace with legislative and regulatory changes. Indeed, a Government Accountability Office review found that no action had been taken and no funding had been secured to implement the recommendations more than three years after they were issued.<sup>22</sup>

#### ■ 2008 DOD IG Report

On February 29, 2008, the DOD Inspector General issued a highly critical report on DOD's Contractor Performance Assessment Reporting System.<sup>23</sup> CPARS was initially proposed as a past performance information system for the U.S. Air Force in 1988 and was adopted by the U.S. Navy in 1998.<sup>24</sup> CPARS was adopted for use DOD-wide in 2004 to "ensure that data on contractor performance are current, available, and entered into the Past Performance Information Retrieval System where it can be retrieved by Federal Government agencies, including DOD Departments."<sup>25</sup> The DOD IG found significant deficiencies in almost all aspects of CPARS, despite the fact that it had been in existence for almost a decade when the DOD IG commenced its review.

The IG found that CPARS did not contain anywhere near all active system contracts over \$5 million, as was required by the applicable regulations. Moreover, for the system contracts that were reported in CPARS, the IG found that "39 percent were registered more than a year late; 68 percent had performance reports that were overdue, and 82 percent of past performance assessment reports...did not contain detailed, sufficient narratives to establish that ratings were credible and justifiable."<sup>26</sup> In a phrase that is echoed in the rules implementing FAPIIS, the IG concluded that the flaws in CPARS resulted in acquisition officials not having "all past per-

formance information needed to make informed decisions related to market research, contract awards, and other acquisition matters."<sup>27</sup>

#### ■ PPIRS Proposed Rule

In April 2008, the FAR councils proposed revisions to the FAR placing an increased emphasis on the Government-wide use of PPIRS and greatly expanding the scope of contracts for which PPIRS evaluations were required.<sup>28</sup> The rule further sought to alter the definition of "past performance" in FAR Part 2 to include both active and completed contracts and provided additional guidance for recording, maintaining, and using past performance information.<sup>29</sup>

#### ■ 2009 Presidential Memorandum On Government Contracting

Although increased reliance on and centralization of past performance information grew steadily, the change of Administration in 2008 brought with it an expanded and accelerated regulatory agenda for Government contracting reform. President Obama's March 4, 2009 memorandum on Government contracting was a sign of what was to come.<sup>30</sup> The memorandum, among other things, called for a Government-wide review of existing contracts to identify waste and inefficiencies.<sup>31</sup> Although the document never mentioned past performance information or called for anything resembling what was to become FAPIIS, the FAR councils nevertheless specifically cited this memorandum as partial justification for FAPIIS and other past performance information-related changes.<sup>32</sup>

#### ■ 2009 GAO Report

The GAO issued an April 23, 2009 report regarding past performance information in response to questions raised by members of Congress.<sup>33</sup> The GAO's report "(1) assessed agencies' use of information on contractors' past performance in awarding contracts; (2) identified challenges that hinder systematic, governmentwide sharing of past performance information; and (3) described efforts under way or planned to improve the sharing of information on contractor performance."<sup>34</sup>

The GAO found significant weaknesses in the entire past performance information lifecycle at federal agencies. Noting that PPIRS had been established in 2002 to serve as a collection point for past performance information first obtained through various agency-specific systems, the GAO found that agencies were only collecting and transmitting approximately 31% of the performance assessments that they were required to obtain.<sup>35</sup> The GAO also noted that different agencies used different types of rating factors and scales to document contractor performance, effectively limiting the usefulness of the information that was actually reported in PPIRS.<sup>36</sup> Moreover, agency personnel were not systematically collecting information that “could provide key insights into a contractor’s performance,” such as contract terminations and subcontract management.<sup>37</sup> In short, the GAO concluded that agencies were failing to collect past performance information in the first place, not systematically collecting a wide range of data that would be relevant to past performance, and not presenting the data they did collect in a manner that would be easily understandable to Contracting Officers at different agencies.<sup>38</sup>

The GAO also found significant weaknesses in the infrastructure supporting PPIRS. Noting that “less than half of the contracting managers [the GAO] talked with tracked performance assessment completeness,”<sup>39</sup> the GAO identified the lack of central oversight of the PPIRS systems as a systemic flaw.<sup>40</sup> In the GAO’s words, “[n]o one agency oversees, monitors, manages, or funds PPIRS to ensure agency data fed into the system is adequate, complete, and useful for sharing governmentwide.”<sup>41</sup> Similarly, the GAO found a lack of accountability within agencies for managing past performance information. This was caused, in part, by a dearth of system tools and metrics to monitor and manage the process of documenting and maintaining contract performance information and, in part, because this process was simply not a priority for many contracting officials.<sup>42</sup>

The GAO report concluded that the efforts expended, from the passage of FASA in 1994 through 2009 to improve PPIRS and the sharing of past performance information had largely failed. Nevertheless, the GAO’s recommendations for executive action largely resembled the same rec-

ommendations offered by the OFPP interagency working group in 2005.<sup>43</sup> Also notable was the fact that the GAO’s recommendations in 2009, as well as preceding agency regulatory activity, failed to place any burden on the shoulders of contractors to improve PPIRS. Instead, all the burden was placed on contracting agencies to address deficiencies. This approach was soon to change.

#### ■ 2009 PPIRS Final Rule

On July 1, 2009, the FAR councils issued a final version of the PPIRS rule that largely mirrored the earlier 2008 proposed rule.<sup>44</sup> The final rule once again mandated the use of PPIRS evaluations for covered contracts. However, as in the proposed rule, the final rule left to each individual agency development of the procedural framework necessary to facilitate use of PPIRS.<sup>45</sup>

### Emergence Of FAPIIS

#### ■ FY 2009 NDAA

As noted at the beginning of this BRIEFING PAPER, § 872 of the FY 2009 NDAA, signed into law on October 14, 2008, directed the Administrator of General Services, under the direction and control of the Office of Management and Budget, to “establish...and maintain a database of information regarding the integrity and performance of certain persons awarded Federal agency contracts and grants for use by Federal agency officials having authority over contracts and grants.”<sup>46</sup> The initial House and Senate bills both included provisions mandating the creation of a database similar to requirements in the version of the FY 2009 NDAA that was eventually signed into law.<sup>47</sup> As originally contemplated in § 831 of the Senate bill, the database was only to include DOD contracts.<sup>48</sup> In contrast, the House version required the database to contain information regarding all federal agency contracts.<sup>49</sup> Notably, the House version proposed to make the database and all information contained within it, with the exception of information otherwise protected from disclosure under the Freedom of Information Act, available to the public,<sup>50</sup> while the Senate version contemplated extending access only to DOD officials and Congress.<sup>51</sup>

Section 872 of the final bill borrowed from both the House and Senate versions. It required the OMB Director and GSA Administrator to establish, within one year of the date of FY 2009 NDAA's enactment, and to maintain a database containing integrity and performance information regarding federal contracts.<sup>52</sup> The database was to cover (1) “[a]ny 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; and, (2) [a]ny person awarded such other category or categories of Federal agency contract as the Federal Acquisition Regulation may provide, if such information exists with respect to such person.”<sup>53</sup>

Subsection (c) required the database to include, for the most recent five-year period, the following information:<sup>54</sup>

(1) Each civil or criminal proceeding, or any administrative proceeding, in connection with the award or performance of a contract or grant with the Federal Government with respect to the person during the period to the extent that such proceeding results in the following dispositions.

(A) In a criminal proceeding, a conviction.

(B) In a civil proceeding, a finding of fault and liability that results in the payment of a monetary fine, penalty, reimbursement, restitution, or damages of \$5,000 or more.

(C) In an administrative proceeding, a finding of fault and liability that results in—

(i) the payment of a monetary fine or penalty of \$5,000 or more; or

(ii) the payment of a reimbursement, restitution, or damages in excess of \$100,00.

(D) To the maximum extent practicable and consistent with applicable laws and regulations, in a criminal, civil, or administrative proceeding, a disposition of the matter by consent or compromise with an acknowledgement of fault by the person if the proceeding could have led to any of the outcomes specified in subparagraph (A), (B), or (C).

(2) Each Federal contract and grant awarded to the person that was terminated in such period due to default.

(3) Each Federal suspension and debarment of the person in that period.

(4) Each Federal administrative agreement entered into by the person and the Federal Gov-

ernment in that period to resolve a suspension or debarment proceeding.

(5) Each final finding by a Federal official in that period that the person has been determined not to be a responsible source under subparagraph (C) or (D) of section 4(7) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(7)).

(6) Such other information as shall be provided for purposes of this section in the Federal Acquisition Regulation.

(7) To the maximum extent practical, information similar to the information covered by paragraphs (1) through (4) in connection with the award or performance of a contract or grant with a State government.

Section 872 also shifted the burden to contractors with greater than \$10 million in federal contracts and grants to:<sup>55</sup>

(1) submit to the Administrator, in a manner determined appropriate by the Administrator, the information subject to inclusion in the database as listed in subsection (c) current as of the date of submittal of such information under this subsection; and

(2) update such information on a semiannual basis.

Section 872 imposed a number of other requirements regarding the database itself, as well as with respect to the accessibility and accuracy of the data. The database was required to be designed and maintained in a “manner that allows the appropriate Federal agency official to directly input and update information in the database relating to actions such officials have taken with regard to contractors.”<sup>56</sup> Section 872 further required that policies be developed to require the “timely and accurate input of information into the database,” as well as “timely notification of any covered person when information relevant to the person is entered into the database,” and to provide “opportunities for any covered person to submit comments pertaining to the information about such person for inclusion in the database.”<sup>57</sup> Moreover, § 872 required COs to review the database prior to making any responsibility determination or conducting a past performance evaluation of a covered offeror and to “document [in the contract file] the manner in which the material in the database was considered.”<sup>58</sup> Section 872 explicitly restricted access to the information contained in the database to “appropriate acquisition officials of Federal agencies...

other government officials as the Administrator determines appropriate, and, upon request, to the Chairman and Ranking Member of the committees of Congress having jurisdiction.”<sup>59</sup>

In summary, the legislative mandate contained in § 872 contemplated a single electronic database containing a significant amount of information on contractor integrity and performance that would be accessible to those Government officials who required access that information to do their jobs.

### ■ FAPIIS Proposed Rule

On September 3, 2009, a proposed rule was issued under FAR Case 2008-027 revising the FAR to implement § 872 of the FY 2009 NDAA.<sup>60</sup> The proposed rule largely tracked the requirements of § 872.

The proposed rule explicitly recognized the continued relevance of existing Government databases, including the Excluded Parties List system, PPIRS, and CPARS.<sup>61</sup> In this way, the proposed rule seemed to contemplate FAPIIS as more of a portal to existing systems rather than an entirely new database. The preamble to the proposed rule stated that the “system will draw from existing systems where feasible and will also use existing systems as a location to store new information on contractor integrity.”<sup>62</sup> Where FAPIIS required information that was not presently collected in an existing source, the proposed rule gave “preference...to obtaining information from Government sources rather than contractors” and identified COs, Suspension and Debarment Officials and contractors as the three likely sources of additional information in FAPIIS.<sup>63</sup> COs would be required to “provide information on determinations of non-responsibility and terminations for default or cause.”<sup>64</sup> SDOs would be required to “provide the necessary information on administrative agreements,” while contractors with contracts and grants in excess of \$10 million would be required to directly provide information regarding certain criminal, civil and administrative proceedings relating to the contractor or its principals.<sup>65</sup>

The proposed rule sought to amend the FAR in numerous locations to incorporate the new FAPIIS database. FAR 9.105-(2)(a)(3) would be revised

to require a CO to enter into FAPIIS data on contracts, including task or delivery orders, over the simplified acquisition threshold if the CO made a final determination that the otherwise successful offeror was not a responsible source “due to lack of satisfactory performance record or satisfactory record of integrity and business ethics.”<sup>66</sup>

The proposed rule also included amendments to the FAR’s suspension and debarment provisions, located at FAR 9.406-3 and 9.407-3, to require SDOs to enter data regarding administrative agreements resolving proposed suspensions or debarments of federal contractors.<sup>67</sup>

The proposed rule avoided including detail regarding reporting of terminations for default or cause into FAPIIS due to the existence of a distinct rulemaking effort, FAR Case 2008-016, that sought to require Government-wide reporting of contract terminations. The proposed rule noted that “[b]oth FAR cases will be worked jointly.”<sup>68</sup>

The largest compliance burden for contractors emerged in the proposed amendment to FAR 52.209-5, “Certification Regarding Responsibility Matters.” Contractors would be required to make a new certification, certifying whether they have or have not:<sup>69</sup>

within a three year period preceding this offer, been convicted of or had a civil judgment rendered against them for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) contract or subcontract; violation of Federal or State antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property....

The proposed rule also contemplated the addition of a new FAR clause requiring contractors with contracts or grants in excess of \$10 million to input directly, through the FAPIIS website, “information on any of the occurrences required to be reported in the information system.”<sup>70</sup> This clause was to be incorporated into contracts expected to exceed \$500,000.<sup>71</sup>

The proposed rule laid out the procedures by which COs would use FAPIIS, leaving much to the CO’s discretion. According to the preamble

to the proposed rule, some of these procedures were directed towards “avoiding de facto debarments,” or agency action that essentially resulted in a decision to bar a contractor from competing for Government contracts without taking into account the due process concerns reflected in the FAR’s debarment and suspension procedures.<sup>72</sup>

COs would be required to review information in FAPIIS prior to awarding any contract in excess of the simplified acquisition threshold.<sup>73</sup> Although the proposed rule directed COs to “consider all the information in FAPIIS and other past performance information,” it stated in the same paragraph that “some of that information may no longer be relevant to a determination of present responsibility” because information in FAPIIS was to be retained for a five-year period.<sup>74</sup> The proposed rule left the relevancy determination exclusively to the CO’s discretion. The proposed rule also mandated that COs, upon obtaining negative information regarding the contractor from FAPIIS, “[p]romptly request such additional information from the offeror as the offeror deems necessary in order to demonstrate the offeror’s responsibility to the contracting officer.”<sup>75</sup> Moreover, the proposed rule required COs to “[n]otify, prior to proceeding with award...the agency official responsible for initiating debarment or suspension action, if the information appears appropriate for the official’s consideration.”<sup>76</sup> COs would also be required to document the contract file indicating the manner in which information in FAPIIS was considered in any responsibility determination or past performance evaluation.<sup>77</sup>

Finally, the proposed rule echoed § 872 of the FY 2009 NDAA by restricting access to FAPIIS to protect “against improper disclosure to the public.”<sup>78</sup> Access was to be limited to “Federal government personnel,” with the exception that a contractor could view and comment on information posted by the Government.<sup>79</sup> Contractor comments were to be retained as long as the associated information (i.e., five years plus an additional archival year to establish an audit trail).<sup>80</sup>

## FAPIIS Final Rule

After receiving public comment on the proposed rule, the FAR councils issued a final rule

implementing FAPIIS on March 23, 2010.<sup>81</sup> The final rule retained much of the language of the proposed rule, but made certain changes in response to public comments. The final rule became effective on April 22, 2010.<sup>82</sup>

### ■ Policy

While the proposed rule’s policy statement had simply restated the legislative mandate to implement FAPIIS, the final rule brought the policy underlying FAPIIS into a broader context. The preamble to the final rule states that the “rule-making and the associated launch of FAPIIS are part of an ongoing initiative by the Administration to increase consideration of contractor integrity and the quality of a contractor’s performance in awarding Federal contracts.”<sup>83</sup>

And while the final rule’s preamble reflects the role of FAPIIS in the Administration’s focus on Federal Government contracting, the final rule remained rooted in a policy of providing better access to information for COs. FAPIIS should “significantly enhance the scope of information available to [COs] as they evaluate the integrity and performance of prospective contractors” and “protect taxpayers from doing business with contractors that are not responsible sources.”<sup>84</sup>

### ■ Applicability

The final rule establishes three relevant applicability thresholds for FAPIIS: (1) the simplified acquisition threshold, (2) contracts exceeding \$500,000, and (3) total contracts and grants exceeding \$10 million.<sup>85</sup> Despite urging from some public commenters, no exceptions for commercial items or commercial off-the-shelf items were included in the final rule.<sup>86</sup>

For contracts over the simplified acquisition threshold (\$150,000 at time of publishing), COs must (a) review the information in FAPIIS for the purpose of making a responsibility determination, (b) document the contract file explaining how this information was used in determining responsibility, and (c) notify, prior to proceeding with award, the relevant agency SDO if information identified in FAPIIS, and not adequately explained by the contractor, appears appropriate for the SDO’s consideration.<sup>87</sup>



For contracts expected to exceed \$500,000 in value, where the contractor possesses active federal contracts and grants exceeding \$10 million, the final rule requires a contractor certification regarding the accuracy of the information contained in FAPIIS regarding certain criminal, administrative, or civil proceedings involving the contractor or, in some cases, its principals.<sup>88</sup> The same contractors must now update their FAPIIS entries semi-annually, throughout the life of the contract.<sup>89</sup>

### ■ Access

The final rule maintains the proposed rule's approach in limiting access to FAPIIS to "Government personnel and authorized users performing business on behalf of the Government."<sup>90</sup> The FAR councils expressly justified this decision on two grounds. First, the FAR councils interpreted the legislative intent behind § 872 of the FY 2009 NDA, stating that "the Councils do not believe Congress intended this database to be accessible by the public."<sup>91</sup> However, the FAR councils also expressly justified the restrictive access on the content of FAPIIS itself. The preamble to the final rule indicates that the FAR councils considered the information in FAPIIS to be "source selection sensitive" and that Government personnel would be given access "through their agency focal points on a need-to-know basis."<sup>92</sup>

Although the FAR councils limited access to FAPIIS based, in part, on the sensitive contents of the database, the councils refused to consider any express language limiting disclosure of FAPIIS information pursuant to FOIA requests. Instead, the FAR councils stated that requests for access to FAPIIS information through FOIA would be handled on a case-by-case basis.<sup>93</sup> This immediately prompted at least one Government watchdog to file a FOIA request for all documents contained in FAPIIS.<sup>94</sup>

### ■ Infrastructure

The final rule describes FAPIIS as a "one-stop" resource.<sup>95</sup> However, as seemed likely from the proposed rule, the final rule created FAPIIS as a type of portal to existing databases in addition to new information collected pursuant to the

requirements of FAPIIS. Rather than subsuming PPIRS, EPLS and other systems, FAPIIS simply linked to those databases.<sup>96</sup> Indeed, the FAPIIS website itself is accessed through a link on the PPIRS webpage.<sup>97</sup>

### ■ CO's Duties

The final rule imposes a number of requirements on COs and other agency personnel. The newly created FAR 9.104-6 requires COs to review FAPIIS before awarding any contract in excess of the simplified acquisition threshold, and consider "*all information in FAPIIS*," as well as other sources of past performance information prior to making a responsibility determination.<sup>98</sup> In considering this information, however, COs are directed to exercise their discretion in evaluating the relevancy of the information at issue to the present responsibility of the offeror. The new FAR 9.104-6 explicitly references the example of prior administrative action such as a debarment or suspension that has expired or otherwise been resolved as an occasion where information in FAPIIS may not be relevant to present responsibility, but fails to offer more concrete guidance regarding relevancy determinations.<sup>99</sup>

Upon identifying information in FAPIIS regarding criminal, civil, or administrative proceedings in connection with the award or performance of a Government contract, contract terminations, nonresponsibility determinations, or comparable information relating to a grant, unless the contractor has already been debarred or suspended, the CO must request information from the contractor that is sufficient to demonstrate the offeror's responsibility.<sup>100</sup> If the CO determines that the information warrants it, the CO must notify the relevant agency SDO prior to proceeding with award.<sup>101</sup> The CO must also document the contract file to indicate how FAPIIS information was considered in any responsibility determination, and what actions were taken as a result of the information.<sup>102</sup>

The final rule cautions COs to separate their use of FAPIIS for present responsibility determinations from their use of FAPIIS for past performance evaluations in the source selection context.<sup>103</sup> The final rule adds a cross-reference

in the new FAR 9.104-6 to FAR 15.305(a)(2), which addresses how to evaluate the relevance of past performance information and states that this evaluation is separate from the responsibility determination. With regard to determining the responsibility of small business concerns, the final rule clarifies that COs still must refer the matter to the Small Business Administration so that the SBA may determine whether or not to issue a Certificate of Competency.<sup>104</sup>

The final rule's revisions to FAR 9.406 and 9.407 also require agency SDOs to submit information regarding any administrative agreements resolving a suspension or debarment proceedings within three working days of entering the agreement.<sup>105</sup> In April 2010, the DOD issued a class deviation waiving this requirement for DOD SDOs until the requisite template for storing this data was incorporated into FAPIIS.<sup>106</sup> This class deviation was rescinded in November 2010.<sup>107</sup> The final rule did not create any tracking or enforcement mechanisms to ensure that SDOs include data on administrative agreements within the three-working-day deadline.

### ■ Contractor's Duties

The final rule also imposes a number of explicit responsibilities on contractors, as well as additional requirements that are implicit in complying with FAPIIS, and that are discussed in more detail in the guidelines below. Solicitations for contracts and task or delivery orders exceeding \$500,000 now require a wide-ranging certification from contractors with contracts and grants exceeding \$10 million that the information it has entered in FAPIIS is current, accurate, and complete as of the date of submission of its offer with regard to:<sup>108</sup>

(1) Whether the offeror, and/or any of its principals, has or has not, within the last five years, in connection with the award to or performance by the offeror of a Federal contract or grant, been the subject of a proceeding, at the Federal or State level that resulted in any of the following dispositions:

(i) In a criminal proceeding, a conviction.

(ii) In a civil proceeding, a finding of fault and liability that results in the payment of a monetary fine, penalty, reimbursement, restitution, or damages of \$5,000 or more.

(iii) In an administrative proceeding, a finding of fault and liability that results in—

(A) The payment of a monetary fine or penalty of \$5,000 or more; or

(B) The payment of a reimbursement, restitution, or damages in excess of \$100,000.

(iv) In a criminal, civil, or administrative proceeding, a disposition of the matter by consent or compromise with an acknowledgment of fault by the Contractor if the proceeding could have led to any of the outcomes specified in paragraphs (c)(1)(i), (c)(1)(ii), or (c)(1)(iii) of this provision.

This certification applies to both the contractor and its principals.<sup>109</sup> The term "principal" is defined broadly in FAR 2.101 to include "an officer, director, owner, partner, or person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a division or business segment; and similar positions)." Moreover, the FAR councils defined "administrative proceeding" in FAR 9.101 to include any:<sup>110</sup>

[N]on-judicial process that is adjudicatory in nature to make a determination of fault or liability (e.g., Securities and Exchange Commission Administrative Proceedings, Civilian Board of Contract Appeals Proceedings, and Armed Services Board of Contract Appeals Proceedings). This includes administrative proceedings at the Federal and state level but only in connections [sic] with performance of a Federal contract or grant. It does not include agency actions such as contract audits, site visits, corrective plans, or inspection of deliverables.

The final rule also requires a contractor to provide the CO with responses to questions regarding the contractor's present responsibility where questions are raised during the CO's review of FAPIIS.<sup>111</sup> The final rule states that the contractor must provide only so much information as the contractor "deems necessary" to demonstrate its present responsibility.<sup>112</sup> Because COs are the ultimate arbiter of present responsibility, however, in practice this language dictates that the contractor must provide the information requested by the CO or risk a nonresponsibility determination.

Finally, contractors with contracts incorporating FAPIIS and active federal contracts and grants exceeding \$10 million must update their FAPIIS entry semi-annually throughout the life

of any covered contract.<sup>113</sup> The final rule also allows contractors to post comments regarding information posted by the Government on the contractor's FAPIIS entry.<sup>114</sup>

### ■ Plans For Future Expansion

The final rule's preamble makes it clear that the FAR councils expected to expand the scope of information contained in FAPIIS and considered lowering applicable thresholds in future portions of what they described as a "phased approach to implementation of FAPIIS."<sup>115</sup> For example, the FAR councils stated that they "intend to collect State-level information in connection with the award or performance of a contract or grant with a State government," but have deferred the effort to a later time.<sup>116</sup> However, the FAR councils expressed concern regarding some of the expansions proposed in public comments, including expanding FAPIIS to include information on all civil, criminal, and administrative proceedings regardless of their outcomes.<sup>117</sup>

## Expansion Of FAPIIS

### ■ Cost & Pricing Information & Contract Terminations

The FAR councils issued a final rule on September 29, 2010, expanding FAPIIS to include information regarding defective cost or pricing data and contract terminations for cause or default.<sup>118</sup> This final rule, which became effective on October 29, 2010, followed a proposed rule issued on September 2, 2009.<sup>119</sup>

The final rule requires agencies to record in FAPIIS any final determinations that the contractor submitted defective cost or pricing data, as well as any subsequent changes regarding such a determination, within three working days.<sup>120</sup> Additionally, agencies must post notice in FAPIIS of any terminations for default or cause, as well as subsequent withdrawals or conversions of such terminations.<sup>121</sup>

### ■ Public Access

Although some had requested that the information in FAPIIS be made public during the numerous FAPIIS-related rulemakings in 2009 and

early 2010, FAPIIS had, to that point, evolved in a manner consistent with the stated purpose of the database as envisioned by the 110th Congress in § 872 of the FY 2009 NDAA, which was to provide the Government with better access to past performance information and related information to enable better decisionmaking. As noted above, this evolution was not only influenced by the intent of Congress, but also by the nature of the information contained in FAPIIS.

Congress apparently reconsidered its earlier judgment approximately three months after FAPIIS became effective and, in a single sentence, opened the majority of data in FAPIIS to the public. Section 3010 of the 2010 Supplemental Appropriations Act, signed into law on July 29, 2010, contained an amendment offered by Senator Bernard Sanders (I-Vt.) that revised § 872 to state that "the Administrator shall post all such information [in the database], excluding past performance reviews, on a publicly available Internet website."<sup>122</sup>

### ■ Interim Rule

The FAR councils issued an interim rule on January 24, 2011, implementing § 3010 of the 2010 Supplemental Appropriations Act.<sup>123</sup> The interim rule stated that all information posted in FAPIIS on or after April 15, 2011, except for past performance reviews, would be publicly available.<sup>124</sup> In addition, COs were required to attempt to modify existing contracts containing FAR 52.209-8, "Updates of Information Regarding Responsibility Matters," with a newly created FAR 52.209-9, "Updates of Publicly Available Information Regarding Responsibility Matters, Alternate 1."<sup>125</sup>

With the exception of citing the 2010 Supplemental Appropriations Act,<sup>126</sup> the interim rule did not provide any detailed justification for publicizing the majority of the information contained in FAPIIS. The FAR councils also failed to explain the distinction between past performance reviews and other information contained in FAPIIS.

## Challenges Raised By FAPIIS

FAPIIS has arguably been pitched as a novel solution to well-documented problems regarding

the collection, use, and maintenance of past performance information. However, as described in detail above, FAPIIS could also be viewed as simply an additional step in past performance information-related reforms that have been ongoing since the early 1990s. As the GAO found, these pre-FAPIIS initiatives largely failed to produce their intended results.<sup>127</sup>

FAPIIS certainly addresses some of the problems raised by the GAO and other interested parties with the use of past performance information during the pre-FAPIIS era. For example, FAPIIS requires the Government to record systematically information regarding contract terminations and administrative agreements resolving suspension or debarment proceedings, two arguably important categories of information that were not previously collected in a systematic fashion. Similarly, although COs still must check multiple databases to determine the present responsibility of an offeror, FAPIIS at least consolidated access to these databases in a central location.

However, a number of the previous problems with the collection, use, and maintenance of past performance information remain unaddressed by FAPIIS. FAPIIS also raises a number of new challenges for contractors.

#### ■ Lack Of Centralization & Accountability

As discussed above, one of the primary drivers for FAPIIS was the less than stellar performance of agencies in punctually collecting and documenting past performance information and other relevant contractor information. Although federal agencies may now devote more resources to collecting and documenting contractor past performance information, it is likely that these efforts will be motivated just as much by the Administration's generally increased focus on past performance information issues as they will by FAPIIS itself. As one commenter on the proposed rule noted, FAPIIS does little to change the lack of centralization or accountability within federal agencies for producing the quantity and quality of information necessary to allow the goals underlying FAPIIS to be achieved.<sup>128</sup>

FAPIIS largely relies on existing databases and, as noted by the FAR councils, agency-specific

internal guidance regarding the scope and quality of information to be submitted, as well as the timeframe for submitting it. Even where FAPIIS imposes deadlines on agency personnel, such as the three-working-day deadline for SDOs to post information regarding administrative agreements,<sup>129</sup> FAPIIS offers no apparent enforcement mechanisms or consequences associated with failing to meet these deadlines. In fact, an OFPP memorandum issued on January 21, 2011, found that both the quality and quantity of information in FAPIIS was still significantly lacking, including information submitted by agencies that have instituted tracking and compliance programs designed to ensure that past performance information is recorded and submitted.<sup>130</sup>

The one way that FAPIIS does address the quantity and timeliness of information posted in the database is by shifting the burden to the contractor in the form of semi-annual self-reporting requirements and a certification that a subset of the information contained in FAPIIS is current, accurate, and complete.<sup>131</sup> While this burden shifting may produce better results, it does not address the root cause of the problems identified by the GAO and others before the implementation of FAPIIS—namely that agency personnel lack some combination of the time, resources, training, or interest to document contractor past performance information in a prompt and proper manner.

#### ■ De Facto Debarment

One of the primary concerns raised by FAPIIS, as well as predecessor past performance information systems, is its potential role as an enabler for de facto debarments. De facto debarment occurs where an agency or multiple agencies repeatedly find a prospective contractor to be nonresponsible, thereby preventing the contractor from receiving federal contracts, without going through the procedures required to expressly suspend or debar an entity.<sup>132</sup>

The risk of de facto debarment arguably increases with the amount of information available to COs and the discretion granted to them in interpreting that information. In this sense, FAPIIS seems to increase significantly the potential risk.

COs are granted broad discretion in interpreting the information in FAPIIS and in determining whether information is relevant to any given responsibility determination.<sup>133</sup> The addition of information regarding administrative agreements settling previous potential suspensions or debarments is especially troubling. By definition, this information will cover past actions and events that led to the contractor being proposed for suspension or debarment. In theory, the contractor has already settled the matter with the Government by entering into an administrative agreement that will allow the contractor to continue to receive federal contracts. Nevertheless, COs may interpret the facts differently than the SDO who negotiated the agreement or may have a hard time differentiating between past actions and present responsibility.

The FAR councils recognized the increased risk of de facto debarments posed by FAPIIS, but argued that increased training for COs would be sufficient to address the risk.<sup>134</sup> Additionally, the FAPIIS website has been designed to launch a pop-up window upon searching for contractor entries that contains a somewhat tautological warning:

Contracting officials should be aware that the 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.

It remains to be seen what impact the potential for increased CO training and the warning notice quoted above might have on the risk of de facto debarment raised by FAPIIS. Contractors should be aware of the issue and should take proactive efforts to address any perceived situation that resembles a de facto debarment.

#### ■ Misuse Of FAPIIS Information In Source Selection Decisions

In addition to the concern over de facto debarment, FAPIIS also presents a risk that information may be misused in evaluating past performance during the source selection process. The FAR dictates that past performance evaluations be entirely separate from present responsibility determinations.<sup>135</sup> Nevertheless, source selection

officials could theoretically create the effect of a de facto debarment by continuously providing low ratings to a contractor due to past performance information contained in FAPIIS that may no longer be relevant. Just as in the context of present responsibility decisions, source selection officials are granted broad discretion to determine the weight given to contractor past performance information contained in FAPIIS.<sup>136</sup> The risk that information in FAPIIS will be misused in the source selection context is likely to grow in direct proportion to the growth in the quantity and scope of information contained in FAPIIS.

### Public Access Concerns

As described above, FAPIIS was created with the express purpose of providing contracting officials with ready access to information concerning contractor performance. It is not readily apparent what role public access to information in FAPIIS will play in meeting this goal. Although the argument can be made that increased transparency regarding contractor information may produce better procurement decisions, one can also reach the opposite conclusion.

The FAR grants COs the discretion, based on their training and experience with federal procurement, to determine what past performance information contained in FAPIIS is relevant to any given acquisition. The public generally lacks this understanding of federal procurement. Moreover, with past performance reviews not being publicly available, the public will lack a complete picture of any given contractor's past performance information. The result is that federal agencies and COs may face public pressure and scrutiny regarding acquisition decisions based upon incomplete information and a lack of context. This dynamic has the potential to produce a flawed acquisition decisionmaking process. Indeed, the FAR councils seemed to have adopted this logic throughout the development of FAPIIS up until the 2010 Supplemental Appropriations Act, expressly noting that information in FAPIIS should be considered "source selection sensitive" and restricting access to FAPIIS to authorized procurement officials and members of Congress.<sup>137</sup> Although it appears that the information publicly accessible in FAPIIS has

yet to reach a critical mass,<sup>138</sup> both contractors and federal agencies may soon be forced to deal with many unintended consequences related to the public's access to FAPIIS, which is discussed below.

### ■ State & Local Contracting Performance Information

The FAR councils have stated that FAPIIS will eventually expand to include information regarding state and local government contracts.<sup>139</sup> The inclusion of state- and local-level information in FAPIIS raises a host of concerns for contractors. Federal agencies have only recently begun the process of standardizing the format of information submitted to FAPIIS. This process will likely need to be repeated, on a much larger scale, to make information regarding performance on state and local contracts meaningful. Moreover, federalism concerns will severely restrict the Federal Government's ability to implement these changes.

Similarly, although there are differences in procurement practices between federal agencies, federal procurements are generally subject to the same laws and regulations across all agencies. This is not the case with state and local procurements, which are conducted pursuant to a wide range of laws, regulations, and guidance that are largely foreign to federal COs. It is unclear how federal contracting officials will be able to assess accurately past performance information regarding state and local government contracts without this background.

Finally, the inclusion of state and local government contract past performance information assumes that states and local governments are collecting this information, and that an electronic infrastructure exists to allow transmission of this information into FAPIIS. Both assumptions may prove to be overly optimistic. In reality, it is likely to take a significant expenditure of resources, as well as a high level of cooperation from state and local governments, to collect state and local level information in FAPIIS.

### ■ Publicizing Past Performance Reviews

Calls for the public release of past performance reviews, the only category of information in FAPIIS

currently protected from public disclosure, began immediately after the FAR councils promulgated the interim rule publicizing FAPIIS information.<sup>140</sup> Transparency advocates have argued that there is no distinction between past performance reviews and the other information contained in FAPIIS, especially where past performance reviews have been disclosed in other contexts.<sup>141</sup> The lack of any justification in the FAR Council's interim rule, with the exception of a reference to the requirements of the 2010 Supplemental Appropriations Act, certainly lends credence to this argument. Although publicly disclosing past performance reviews is likely to produce a number of negative consequences, including a significant increase in bid protest litigation and a resulting delay in the award of contracts, it seems that the stage is set for such an expansion.

### ■ Lowering Of Applicable Thresholds

In addition to expanding the scope of information contained in FAPIIS, the OFPP and the FAR councils are considering lowering the current FAPIIS applicability thresholds.<sup>142</sup> Thus, contractors currently not subject to the FAPIIS self-reporting requirements may soon face the same compliance requirements imposed on contractors possessing an excess of \$10 million in federal contracts and grants.

## Collateral Concerns

### ■ Bid Protests

One of the major collateral issues raised by public disclosure of FAPIIS information is the use of such information in federal bid protests. Federal bid protests allow unsuccessful offerors to protest the award of a federal contract to their competitors for a variety of reasons. A major limiting factor in bid protest litigation is the amount of information available to the protester. FAPIIS is likely to increase greatly the arguments available to potential protesters. This, in turn, may lead to a significant increase in bid protest litigation. Although serving an important function, bid protest litigation is also costly for litigants and can introduce significant delays in acquisitions, as the Government must often delay award pending the outcome of a protest. Moreover,

COs are likely to face increased second-guessing of their responsibility determinations and past performance evaluations as more data becomes available to unsuccessful offerors.

### ■ Litigation

The public availability of information in FAPIIS is also likely to be useful to litigants outside of the bid protest context. For example, plaintiffs in securities litigation may rely on information

in FAPIIS to argue that corporate officers misled shareholders, while private qui tam relators may use information from FAPIIS to support False Claims Act suits. Employment class action plaintiffs may benefit from information in FAPIIS showing that the employer was threatened with debarment due to a failure to follow federal labor laws. In short, the public availability of information in FAPIIS means that contractors must consider the effect of past performance information outside the confines of federal procurement.

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## GUIDELINES

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These *Guidelines* are intended to assist you in understanding the requirements of FAPIIS. They are not, however, a substitute for professional representation in any specific situation.

1. Proactively address past performance information concerns. Although FAPIIS allows contractors to post comments on Government entries, contractors should be proactive about discussing concerns regarding past performance information and other information submitted to FAPIIS with relevant Government officials before that information will be submitted. As a practical matter, COs are unlikely to revise their FAPIIS entries barring an extreme error. Moreover, the constant reassignment of Government personnel may make it hard or impossible to locate the relevant CO in the future.

2. Monitor FAPIIS entries. Contractors covered by FAPIIS should assign responsibility for monitoring their FAPIIS entries at a senior level. This individual or group of individuals should ensure that the information included in FAPIIS by the Government is accurate and complete, and they should task relevant contractor personnel with commenting on Government entries where comments are warranted. Contractors can lessen the risk posed by FAPIIS by proactive monitoring and promptly responding.

3. Develop a comprehensive information collection system to ensure accurate self-reporting. Contractors that must update their FAPIIS entries semi-annually should implement a comprehensive information system to ensure that all relevant information is entered into FAPIIS. This system should track information from both

the contractor as an entity and its principals. Additionally, this system should be designed to estimate accurately the total annual dollar value of a contractor's contracts to ensure accurate certifications regarding whether the contractor has \$10 million or more in active contracts and grants. Responsibility for this information collection system should be assigned at a sufficiently high level to ensure that the system is effective.

4. Remember that the information in FAPIIS can and will be used against you. Contractors have long been concerned about the use of past performance information by the Government in future procurements. However, the public availability of the majority of information in FAPIIS greatly increases the number ways in which past performance information may be used against a contractor and the number of parties that may use it. Contractors should update their compliance programs, public relations strategies, and litigation risk analyses to reflect the consequences of the public availability of previously protected information.

5. Remember that FAPIIS can be used offensively. Although contractors should rightly focus on how to protect themselves from the risks posed by FAPIIS, they should not forget that the information in FAPIIS can, under certain circumstances, provide competitive benefits. For example, FAPIIS information can provide valuable arguments for use in bid protests. Additionally, information regarding administrative agreements could theoretically provide contractors facing suspension or debarment with a better idea of the options available when negotiating terms with the Government. FAPIIS may also provide

insights into competitors' business strategies that were not previously available.

6. Anticipate future expansions of FAPIIS. Many contractors were caught by surprise when the 2010 Supplemental Appropriations Act required the majority of information in FAPIIS to be posted on a public website. It is clear that the FAR councils anticipate expanding FAPIIS

further and have indicated some areas where that expansion might take place, including the addition of information regarding state and local procurements and the lowering of applicable thresholds. As much as possible, contractors should attempt to structure their compliance systems in manner that will allow for flexibility in responding to future expansions of the FAPIIS database.

## ★ REFERENCES ★

- 1/ Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, 122 Stat. 4356 (Oct. 14, 2008).
- 2/ Pub. L. No. 110-417, § 872(a) (formerly codified at 41 U.S.C.A. § 417b(a) and now codified at 41 U.S.C.A. § 2313(a)).
- 3/ Pub. L. No. 110-417, § 872(a) (formerly codified at 41 U.S.C.A. § 417b(a) and now codified at 41 U.S.C.A. § 2313(a)).
- 4/ Pub. L. No. 110-417, § 872(c) (formerly codified at 41 U.S.C.A. § 417b(c) and now codified at 41 U.S.C.A. § 2313(c)). See generally Sacilotto, "Challenging Contractor Performance Evaluations: FAR Processes and Claims Before the Court of Federal Claims and the Boards of Contract Appeals," Briefing Papers No. 11-10 (Sept. 2011).
- 5/ Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (Oct. 13, 1994).
- 6/ Pub. L. No. 103-355, § 1091(a).
- 7/ Pub. L. No. 103-355, § 1091(b)(2) (adding 41 U.S.C.A. § 41 U.S.C.A. § 405(j)(1), now codified at 41 U.S.C.A. § 1126(a)).
- 8/ OFPP Policy Letter 92-5, 58 Fed. Reg. 3573 (1993). The preamble notes the complaints of "many Federal agencies" that implementation of a past performance system would be too burdensome. The OFPP took this criticism into account by focusing on the size and contracting complexity of any given agency or sub-agency to determine whether a past performance system requiring automated systems or data banks would be required. See 58 Fed. Reg. at 3574.
- 9/ 60 Fed. Reg. 16718 (Mar. 31, 1995).
- 10/ See 39 GC ¶ 8.
- 11/ OFPP, A Guide to Best Practices for Past Performance (Interim ed. May 1995).
- 12/ FAC 97-02, 62 Fed. Reg. 51224 (Sept. 30, 1997) (revising FAR pt. 15).
- 13/ DOD, A Guide to Collection and Use of Past Performance Information (May 1999).
- 14/ See generally West & Wagman, "Past Performance Information," Briefing Papers No. 99-10 (Sept. 1999).
- 15/ OFPP, Memorandum for Agency Senior Procurement Executives, Roll-Out of the Past Performance Information Retrieval System (July 3, 2002), available at [http://georgewbush-whitehouse.archives.gov/omb/procurement/index\\_contract\\_perf.html](http://georgewbush-whitehouse.archives.gov/omb/procurement/index_contract_perf.html).
- 16/ OFPP, Memorandum for Agency Senior Procurement Executives, Roll-Out of the Past Performance Information Retrieval System (July 3, 2002), available at [http://georgewbush-whitehouse.archives.gov/omb/procurement/index\\_contract\\_perf.html](http://georgewbush-whitehouse.archives.gov/omb/procurement/index_contract_perf.html) (emphasis in original).
- 17/ OFPP, Memorandum for Agency Senior Procurement Executives, Roll-Out of the Past Performance Information Retrieval System (July 3, 2002), available at [http://georgewbush-whitehouse.archives.gov/omb/procurement/index\\_contract\\_perf.html](http://georgewbush-whitehouse.archives.gov/omb/procurement/index_contract_perf.html).
- 18/ These tools include the Architect-Engineer Contract Administration Support System (ACASS), the Construction Contractor Appraisal Support System (CCASS), and the Contractor Performance Assessment Reporting System (CPARS).
- 19/ NASA's system was called the Past Performance Database (PPDB).
- 20/ See GAO, Federal Contractors: Better Performance Information Needed To Support Agency Contract Award Decisions (GAO-09-374, Apr. 23, 2009).
- 21/ See GAO, Federal Contractors: Better Performance Information Needed To Support Agency Contract Award Decisions 19-20 (GAO-09-374, Apr. 23, 2009).



- 22/ GAO, Federal Contractors: Better Performance Information Needed To Support Agency Contract Award Decisions 19–20 (GAO-09-374, Apr. 23, 2009).
- 23/ DODIG, Report on Contractor Past Performance Information, Report. No. D-2008-057 (Feb. 29, 2008).
- 24/ See Goodrich, “Past Performance as an Evaluation Factor in Public Contract Source Selection,” 47 Am. U. L. Rev. 1539, 1559 (1998).
- 25/ DODIG, Report on Contractor Past Performance Information, Report. No. D-2008-057, at i (Feb. 29, 2008).
- 26/ DODIG, Report on Contractor Past Performance Information, Report. No. D-2008-057, at 4 (Feb. 29, 2008).
- 27/ DODIG, Report on Contractor Past Performance Information, Report. No. D-2008-057, at 4 (Feb. 29, 2008).
- 28/ 73 Fed. Reg. 17945 (Apr. 2, 2008).
- 29/ 73 Fed. Reg. 17945.
- 30/ Presidential Memorandum for the Heads of Executive Departments and Agencies, Government Contracting (Mar. 4, 2009), 74 Fed. Reg. 9755 (Mar. 6, 2009). See 51 GC ¶ 77.
- 31/ 74 Fed. Reg. at 9756.
- 32/ 74 Fed. Reg. 45579 (Sept. 3, 2009).
- 33/ GAO, Federal Contractors: Better Performance Information Needed To Support Agency Contract Award Decisions (GAO-09-374, Apr. 23, 2009).
- 34/ GAO, Federal Contractors: Better Performance Information Needed To Support Agency Contract Award Decisions 1 (GAO-09-374, Apr. 23, 2009).
- 35/ GAO, Federal Contractors: Better Performance Information Needed To Support Agency Contract Award Decisions 11 (GAO-09-374, Apr. 23, 2009).
- 36/ GAO, Federal Contractors: Better Performance Information Needed To Support Agency Contract Award Decisions 17 (GAO-09-374, Apr. 23, 2009).
- 37/ GAO, Federal Contractors: Better Performance Information Needed To Support Agency Contract Award Decisions 10 (GAO-09-374, Apr. 23, 2009).
- 38/ GAO, Federal Contractors: Better Performance Information Needed To Support Agency Contract Award Decisions 3 (GAO-09-374, Apr. 23, 2009).
- 39/ GAO, Federal Contractors: Better Performance Information Needed To Support Agency Contract Award Decisions 15 (GAO-09-374, Apr. 23, 2009).
- 40/ GAO, Federal Contractors: Better Performance Information Needed To Support Agency Contract Award Decisions 18 (GAO-09-374, Apr. 23, 2009).
- 41/ GAO, Federal Contractors: Better Performance Information Needed To Support Agency Contract Award Decisions 18 (GAO-09-374, Apr. 23, 2009).
- 42/ GAO, Federal Contractors: Better Performance Information Needed To Support Agency Contract Award Decisions 15 (GAO-09-374, Apr. 23, 2009).
- 43/ GAO, Federal Contractors: Better Performance Information Needed To Support Agency Contract Award Decisions 21 (GAO-09-374, Apr. 23, 2009).
- 44/ 74 Fed. Reg. 31557 (July 1, 2009).
- 45/ 74 Fed. Reg. 31557.
- 46/ Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 872(a), 122 Stat. 4356, 4555 (Oct. 14, 2008) (formerly codified at 41 U.S.C.A. § 417b(a) and now codified at 41 U.S.C.A. § 2313(a)).
- 47/ See Joint Explanatory Statement To Accompany S. 3001, the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, at 116.
- 48/ S. 3001, § 831, 110th Cong. (2008).
- 49/ H.R. 5658, § 4502(a)–(b), 110th Cong. (2008).
- 50/ H.R. 5658, § 4502(e)(2)–(3), 110th Cong. (2008).
- 51/ S. 3001, § 831(e), 110th Cong. (2008).
- 52/ Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 872(a), 122 Stat. 4356, 4555 (Oct. 14, 2008) (formerly codified at 41 U.S.C.A. § 417b(a) and now codified at 41 U.S.C.A. § 2313(a)).
- 53/ Pub. L. No. 110-417, § 872(b) (formerly codified at 41 U.S.C.A. § 417b(b) and now codified at 41 U.S.C.A. § 2313(b)).

- 54/ Pub. L. No. 110-417, § 872(c) (formerly codified at 41 U.S.C.A. § 417b(c) and now codified at 41 U.S.C.A. § 2313(c)).
- 55/ Pub. L. No. 110-417, § 872(f) (formerly codified at 41 U.S.C.A. § 417b(f) and now codified at 41 U.S.C.A. § 2313(f)).
- 56/ Pub.L.No.110-417, § 872(d)(1) (formerly codified at 41 U.S.C.A. § 417b(d)(1) and now codified at 41 U.S.C.A. § 2313(d)(1)).
- 57/ Pub.L.No.110-417, § 872(c) (formerly codified at 41 U.S.C.A. § 417b(d)(2) and now codified at 41 U.S.C.A. § 2313(d)(2)).
- 58/ Pub.L.No.110-417, § 872(e)(2) (formerly codified at 41 U.S.C.A. § 417b(e)(2) and now codified at 41 U.S.C.A. § 2313(e)(2)).
- 59/ Pub.L.No.110-417, § 872(e)(1) (formerly codified at 41 U.S.C.A. § 417b(e)(1) and now codified at 41 U.S.C.A. § 2313(e)(1)).
- 60/ 74 Fed. Reg. 45579 (Sept. 3, 2009).
- 61/ 74 Fed. Reg. at 45580.
- 62/ 74 Fed. Reg. at 45580.
- 63/ 74 Fed. Reg. at 45580.
- 64/ 74 Fed. Reg. at 45580.
- 65/ 74 Fed. Reg. at 45580.
- 66/ 74 Fed. Reg. at 45580.
- 67/ 74 Fed. Reg. at 45580.
- 68/ 74 Fed. Reg. at 45580.
- 69/ 74 Fed. Reg. at 45583.
- 70/ 74 Fed. Reg. at 45580.
- 71/ 74 Fed. Reg. at 45580.
- 72/ 74 Fed. Reg. at 45580.
- 73/ 74 Fed. Reg. at 45582.
- 74/ 74 Fed. Reg. at 45582.
- 75/ 74 Fed. Reg. at 45582.
- 76/ 74 Fed. Reg. at 45582.
- 77/ 74 Fed. Reg. at 45582.
- 78/ 74 Fed. Reg. at 45580.
- 79/ 74 Fed. Reg. at 45580.
- 80/ 74 Fed. Reg. at 45580.
- 81/ 75 Fed. Reg. 14059 (Mar. 23, 2010).
- 82/ 75 Fed. Reg. 14059.
- 83/ 75 Fed. Reg. 14059.
- 84/ 75 Fed. Reg. 14059.
- 85/ 75 Fed. Reg. 14059.
- 86/ 75 Fed. Reg. at 14063.
- 87/ 75 Fed. Reg. 14059.
- 88/ 75 Fed. Reg. at 14067.
- 89/ 75 Fed. Reg. at 14067.
- 90/ 75 Fed. Reg. at 14063.
- 91/ 75 Fed. Reg. at 14062.
- 92/ 75 Fed. Reg. at 14063.
- 93/ 75 Fed. Reg. at 14062.
- 94/ Project on Government Oversight, POGO Requests Concealed Contractor Information (Apr. 21, 2010), <http://www.pogo.org/pogo-files/alerts/contract-oversight/co-fcmd-20100421.html>.
- 95/ 75 Fed. Reg. at 14060.
- 96/ 75 Fed. Reg. 14059.
- 97/ See Past Performance Information Retrieval Systems, <http://www.ppirs.gov>.
- 98/ FAR 9.104-6(a)–(b) (emphasis added).
- 99/ FAR 9.104-6(b).
- 100/ FAR 9.104-6(c).
- 101/ FAR 9.104-6(c).
- 102/ FAR 9.104-6(d).
- 103/ 75 Fed. Reg. 14059, 14062 (Mar. 23, 2010).

- 104/ FAR 9.104-3(d)(1).
- 105/ FAR 9.406-3(f), 9.407-3(e).
- 106/ Memorandum from the Office of the Undersecretary of Defense, Acquisition, Technology and Logistics, Class Deviation—Temporary Postponement of the Requirement for Debarring and Suspending Officials To Enter Data on an Administrative Agreement in the Federal Awardee Performance and Integrity Information System (Apr. 15, 2010), available at <http://www.acq.osd.mil/dpap/policy/policyvault/USA001944-10-DPAP.pdf>.
- 107/ Memorandum from the Office of the Undersecretary of Defense, Acquisition, Technology and Logistics, Rescission of Class Deviation—Temporary Postponement of the Requirement for Debarring and Suspending Officials To Enter Data on an Administrative Agreement in the Federal Awardee Performance and Integrity Information System (Nov. 8, 2010), available at <http://www.acq.osd.mil/dpap/policy/policyvault/USA006284-10-DPAP.pdf>.
- 108/ FAR 52.209-7, para. (c).
- 109/ FAR 52.209-7, para. (c)(1).
- 110/ FAR 9.101.
- 111/ FAR 9.104-6(c)(1).
- 112/ FAR 9.104-6(c)(1).
- 113/ FAR 52.209-9, para. (a).
- 114/ FAR 52.209-9, para. (b)(2).
- 115/ 75 Fed. Reg. 14059, 14060 (Mar. 23, 2010).
- 116/ 75 Fed. Reg. at 14060.
- 117/ 75 Fed. Reg. at 14060.
- 118/ 75 Fed. Reg. 60258 (Sept. 29, 2010).
- 119/ See 74 Fed. Reg. 45394 (Sept. 2, 2009).
- 120/ FAR 42.1503(f).
- 121/ FAR 42.1503(f).
- 122/ Supplemental Appropriations Act, 2010, Pub. L. No. 111-212, § 3010, 124 Stat. 2302, 2340 (July 29, 2010) (41 U.S.C.A. § 417b(e)(1)).
- 123/ 76 Fed. Reg. 4188 (Jan. 24, 2011).
- 124/ 76 Fed. Reg. 4188.
- 125/ 76 Fed. Reg. 4188.
- 126/ 76 Fed. Reg. 4188.
- 127/ See GAO, Federal Contractors: Better Performance Information Needed To Support Agency Contract Award Decisions (GAO-09-374, Apr. 23, 2009).
- 128/ 75 Fed. Reg. 14059, 14061 (Mar. 23, 2010).
- 129/ See FAR 9.406-3(f), 9.407-3(e).
- 130/ OFPP, Memorandum for Chief Acquisition Officers & Senior Procurement Executives, Improving Contractor Past Performance Assessments: Summary of the Office of Federal Procurement Policy's Review, and Strategies for Improvement (Jan. 21, 2011), available at [http://www.whitehouse.gov/sites/default/files/omb/procurement/contract\\_perf/PastPerformanceMemo-21-Jan-2011.pdf](http://www.whitehouse.gov/sites/default/files/omb/procurement/contract_perf/PastPerformanceMemo-21-Jan-2011.pdf).
- 131/ See FAR 52.209-7, para. (c), 52.209-9, para. (a).
- 132/ See generally West et al., Suspension & Debarment, Briefing Papers No. 06-9, at 7 (Aug. 2006).
- 133/ FAR 9.104-6.
- 134/ 75 Fed. Reg. at 14061.
- 135/ FAR 15.305.
- 136/ FAR 15.305(a)(2).
- 137/ 75 Fed. Reg. at 14063.
- 138/ See Therkildsen, "FAPIS Is a Steaming Pile," OMB Watch, Apr. 25, 2011, <http://www.ombwatch.org/node/11628>.
- 139/ 75 Fed. Reg. at 14060.
- 140/ Weigelt, "POGO Argues for Release of Past-Performance Information," Fed. Computer Wk., Jan. 28, 2011, [http://fcw.com/articles/2011/01/28/pogo-gao-fapiis-performance-evaluations.aspx?s=fcwdaily\\_310111](http://fcw.com/articles/2011/01/28/pogo-gao-fapiis-performance-evaluations.aspx?s=fcwdaily_310111).
- 141/ Weigelt, "POGO Argues for Release of Past-Performance Information," Fed. Computer Wk., Jan. 28, 2011, [http://fcw.com/articles/2011/01/28/pogo-gao-fapiis-performance-evaluations.aspx?s=fcwdaily\\_310111](http://fcw.com/articles/2011/01/28/pogo-gao-fapiis-performance-evaluations.aspx?s=fcwdaily_310111).
- 142/ 75 Fed. Reg. at 14060.

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