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November 5, 2009

Ms. Hada Flowers
General Services Administration
Regulatory Secretariat (VPR)
Room 4041
1800 F Street, N.W.
Washington, D.C.20405

Ref: FAR Case 2008-027: Federal Awardee Performance and Integrity Information System
CODSIA Case 13-09

Dear Ms. Flowers:

On behalf of the Council of Defense and Space Industry Associations (CODSIA),¹ we are pleased to submit the following comments on the proposed rule, published in the Federal Register on September 3, 2009 (74 F.R. 45579), amending the FAR to implement Section 872 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (P.L. 110-417: 10/14/08). The due date for comments on the rule was extended to November 5, 2009.²

Section 872 requires the General Services Administration, under the control and direction of the director of the Office of Management and Budget, to establish and maintain a data system containing specific information on the integrity and performance of covered Federal agency contractors and grantees.³ The new database will be called the Federal Awardee Performance and Integrity Information System (FAPIS). Section 872 also requires awarding officials to review the data system and consider other past performance information when making any past performance evaluation or responsibility determination.

In a directly related matter, on September 2, the FAR Councils published in the Federal Register (74 F.R. 45395) a proposed rule to amend the FAR to establish procedures for contracting officers to provide certain contractor information into the Past Performance Information Retrieval System (PPIRS). This proposed rule expands on the FAR final rule on Contractor Performance

¹ CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues, at the suggestion of the Department of Defense. CODSIA consists of seven associations –the Aerospace Industries Association (AIA), the American Shipbuilding Association (ASA), the National Defense Industrial Association (NDIA), the Professional Services Council (PSC), the American Council of Engineering Companies (ACEC), TechAmerica, and the U.S. Chamber of Commerce. CODSIA’s member associations represent thousands of government contractors nationwide. The Council acts as an institutional focal point for coordination of its members’ positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

² 74 F.R. 51112; October 5, 2009, available at <http://edocket.access.gpo.gov/2009/pdf/E9-23893.pdf>

³ The Supplemental Information accompanying this FAR rule indicates that OMB’s Office of Federal Financial Management will provide separate, but similar, guidance for grantees. See 74 F.R. 45579, September 3, 2009, column 3.

Information published in the Federal Register on July 1, 2009 (74 F.R. 31557); that rule sets forth requirements for contracting officers to report information relating to a determination of a contractor's defective cost or pricing data submission and relating to terminations for cause or default. CODSIA separately submitted extensive comments on this proposed rule.⁴ According to the supplemental information accompanying this case, the FAR Councils state that both cases "will be worked jointly"⁵ and we recommend that both sets of CODSIA comments be considered jointly.

Specific Comments on this Rule

FAR 9.104-3 Application of Standards.

This section revises the existing FAR provision relating to the contracting officer's determination of non-responsibility of a small business concern by instructing the contracting officer to document the determination of non-responsibility of that small business in the FAPIIS if SBA does not issue a Certificate of Competency (CoC) to that small business. We concur that a contracting officer's non-responsibility determination of a small business must be referred to SBA; however, both the prescription and the supplemental information accompanying the rule⁶ provide that if SBA does not issue a CoC and the contracting officer's determination of non-responsibility was based on a lack of satisfactory performance or a lack of integrity and business ethics, then the contracting officer must enter the determination into FAPIIS. It is not clear in the rule or from the supplemental material if the contracting officer would enter information into FAPIIS on a small business non-responsibility for those two matters only (i.e. "that determination") or if the contracting officer must enter information into FAPIIS when a small business is found non-responsible for any reason (i.e. "the determination") and SBA does not issue a CoC. Based on the scope of information the contracting officer obtains pursuant to 9.104-6(c), we believe the intent of the provision is to limit the information in FAPIIS to those two matters only, and any final rule should be clarified accordingly.

FAR 9-104-6 FAPIIS.

The proposed rule adds a new subsection to the FAR to require the contracting officer to review the FAPIIS and consider all of the information in the database, and other past performance information, when making a responsibility determination or past performance evaluation. These are two very different contracting officer decisions and treating them in the same manner may create additional problems for both contracting officers and contractors. For example, in making a responsibility determination, we question how a contracting officer would use the summary information in the database about a contractor without having any context for the information that is in the database or an understanding of the relevance and weight to be given some or all of the information. Do a dozen labor law technical violations on a single contract because of a Service Contract Act wage re-determination have the same effect as two billing errors on a separate contract? Do two unrelated violations on two contracts raise questions about the likelihood of repeating those violations in future contracts or call into question a contractor's present responsibility? The proposed rule states that FAPIIS information shall be used "when "making" a...past performance evaluation." We believe the Councils' intent is that the information be used in "making" source selection-related past performance evaluations called

⁴ Those comments are available at

http://www.pscouncil.org/AM/Template.cfm?Section=Acquisition_Policy1&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=4058

⁵ 74 F.R. 45580, September 3, 2009, column 2

⁶ 74 F.R. 45580, September 3, 2009, column 2

for in 15.305 (a)(2), and not in “making” the periodic contract past performance evaluations called for in 42.1502 (a). The proposed rule should be made clear in this regard.

To aid in dissecting this information, we strongly recommend modifying the first sentence of paragraph (b) by adding the word “relevant” before the phrase “past performance information” to reinforce that concept addressed elsewhere in the paragraph.

Paragraph (b) also properly cautions contracting officers that information already in FAPIIS may not be relevant to a determination of present responsibility. We concur with this cautionary statement and recommend that it be expanded to also include past performance evaluations. Beyond the timeframe highlighted in the rule, it is important that any final rule add other parameters for the contracting officer to assess when evaluating the relevance of the information, such as the magnitude and seriousness of any penalty, the currency of any underlying violation, any intervening corrective action that a contractor may have taken, the contractor’s comments relating to the information, the business units and locations involved, and any pending challenges or appeals.

In addition, paragraph (b) purports to mandate consideration of the new information in the comparative past performance evaluations set forth elsewhere in the FAR, but does not reference FAR 15.305 or provide instructions to the contracting officer regarding the use of such information. FAR 15.305(a)(2)(ii) provides that the Government should consider past performance information on a “comparative” basis as “one indicator” of an offeror’s ability to successfully perform a contract. We strongly recommend that FAR 15.305 be cross-referenced in this section to link that current FAR requirement with the additional information that will be collected and maintained in the FAPIIS.

Paragraph (c) requires the contracting officer who has obtained relevant information from FAPIIS to (1) “promptly request” from the offeror such additional information that the offeror deems necessary in order to demonstrate to the contracting officer the offeror’s responsibility and (2) notify, prior to proceeding with award, the agency suspension and debarment official (SDO) if the information appears appropriate for the official’s consideration. (Emphasis added.) Although this provision may have been intended to address a contractor’s due process concerns and be designed to avoid *de facto* debarments – goals that we support – the provision does not provide any standard for a contracting officer’s referral and may cause contracting officers to needlessly delay awards by seeking additional information or making a referral to the SDO out of caution or risk-averse concerns, even where the contracting officer may not have a need for additional information or find the referral to the SDO necessary. The referral of information to the SDO that does not pertain directly to the causes for suspension and debarment listed in FAR 9.407-2 and 9.406-2 should not delay a contracting officer’s determination of responsibility. We recommend that this provision be modified to strengthen the authority of the contracting officer to make a decision that no additional information is required and no referral is necessary.

In addition, any referral made to the SDO under paragraph (c) must still be subject to the same due process standards for contractors as is applicable under other referrals. In fact, Congress reinforced the importance of these due process protections in the statement of managers accompanying the fiscal year 2010 National Defense Authorization Act.⁷

⁷ See Conference Report to Accompany H.R. 2647, National Defense Authorization Act for fiscal year 2010 at 781, signed into law on October 28, 2009 (P.L. 111-84).

In paragraph (c)(1), we also recommend adding the word “present” before the word “responsibility.”

In paragraph (d), we recommend modifying the second sentence to ensure consistency with the application of the standards to small business by adding after the phrase “a nonresponsibility determination” the parenthetical phrase “(See 9.104-3)”.

In addition, while the supplemental information accompanying the rule discusses business rules that “were developed to ensure timely availability of information and proper use of the information,”⁸ – and we strongly support these business rules – they are not included in this rule. We strongly encourage the FAR Councils to modify this rule to include appropriate business rules and the respective rights and responsibilities of both the government and the contractor regarding the submission of information, the notification to contractors when information about them has been posted, and ensuring that contractors have a fair and timely opportunity to post and revise comments regarding information that has been included in FAPIIS by any Government employee. Such protections are an essential element of fundamental fairness and are already explicitly and appropriately provided for as a component of the Past Performance Information Retrieval System (PPIRS) regulations at 42.1503; they must also be explicitly included (either directly or by cross-reference) in this regulation as well.

FAR 9-105-2 Determinations and documentation.

The proposed text revises existing paragraph (a) of FAR 9.105-2. While we generally concur with the revision, we take issue with the concluding phrase in subdivision (a)(1)(i) “but see 9.104-6(d).” Proposed 9.104-6(d) of this rule requires the contracting officer to document the contract file for covered contracts to indicate the manner in which the FAPIIS information was used; it does not provide an alternative to the contracting officer’s determination of a contractor’s present responsibility. In addition, we believe the documentation requirements in FAR 9.104-6(d) are equally applicable to the contracting officer’s determination made under FAR 9.105-2(a)(1)(ii) where an offeror is found to be non-responsible, beyond the information the contracting officer is already required to document as provided for in (a)(1)(ii). Therefore, we recommend either deleting the cross-reference or adding it at the end of the paragraph.

FAR 9.406-3 Procedures.

Paragraph (f) states: “If the contractor enters into an administrative agreement with the Government in order to resolve a debarment proceeding, the debarment official shall access the website at ____ and enter the requested information.” However, the provision at 52.209-XX, paragraph (c)(1)(iii) and (iv) are much more specific about the types of administrative agreements that must be entered into FAPIIS. 9.406-3 should reflect the more specific language of 52.209-XX.

FAR 12.301 Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items.

A reference to solicitation provision 52.209-XX is proposed for insertion at 12.301(d)(3). In our view, it is more appropriate to include this reference in 52.212-3, Offeror Representations and Certifications – Commercial Items, especially since 52.209-XX is a representation, and subparagraph (b) includes an offeror check box.

FAR Clause 52.209-XX Information Regarding Responsibility Matters.

This clause implements the prescription in FAR 9.104-7(b).

⁸ 74 F.R. 45580, September 3, 2009, column 1

Paragraph (a) defines the term “principal.” However, FAR 52.209-5 already has a definition of the term “principal.” We recommend not duplicating this definition.

Paragraphs (a)(1) and (a)(2) use the term “current, active contracts;” we recommend using only the term “active contracts with continuing performance” to avoid considering contracts that are in the contract closeout process.

Paragraph (b) requires the “offeror” to indicate if it has active contracts with a total value exceeding \$10 million. It is unclear if the “offeror” in this context is the entity (indicated by the DUNS or CAGE) submitting the offer or a broader scope of related corporate entities (separately registered in DUNS or CAGE)? We recommend the “offeror” be defined as the entity (designated by a DUNS or CAGE) submitting the offer to make the representation process more manageable and focused.

Paragraphs (c)(1) and (c)(2) ask whether the offeror or its principals have been “involved” in civil or criminal proceeding. This term is imprecise with no legal definition; its use in the context of information that must be represented as “current, accurate and complete” is inappropriate and must be clarified.

Paragraph (c)(1) includes in its scope “award to or performance by the offeror of a Federal or state contract or grant...” The scope should be limited to the performance of Federal contracts subject to the FAR; state contracts are not specifically covered by the statute or the FAR and grants will be covered in a separate rulemaking.

Paragraph (c)(1)(i) simply uses the term “conviction”. However, recent history demonstrates there are a variety of possible legal outcomes that may not precisely fit the traditional meaning of that term. Recommend revising (i) to read: (i) In a criminal proceeding, a finding of guilt and entry of a formal judgment of conviction.”

Paragraph (c)(1)(i) as currently constructed asks the offeror to represent if it has been “involved...in any of the following dispositions: (i) In a criminal proceeding, a conviction.” From the structure for the (c)(1) and (c)(1)(i), it is unclear if this is referring to involvement in a conviction of the offeror itself, or of another person (perhaps an employee). Similar confusion exists in paragraphs (ii) and (iii). Recommend revising to read as follows: “(i) In a criminal proceeding, a finding of guilt and entry of a formal judgment of conviction of the offeror”; “(ii) In a civil proceeding, a finding of fault and liability of the offeror”; and “(iii) In an administrative proceeding, a finding of fault and liability of the offeror...”

Paragraph (c)(1)(iv) is drafted in very vague and troubling terms. For example, “To the maximum extent practicable and consistent with applicable laws and regulations...”; and “...if the proceedings could have led to any of the outcomes...”. (Emphasis added) The vagueness of the language is particularly troublesome given that offerors are asked to “represent” that the information provided under this vague language is “current, accurate and complete.” This language is unsuitable for representations and should be removed. Only well defined and understood information should appear in FAPIIS and be used for the important and sensitive purposes intended.

Paragraph (c)(2) asks “Whether the offeror has provided the requested information with regard to each occurrence.” It is unclear from this language what information was requested, who requested it and when it was requested.

Paragraph (c) further requires an offeror who has more than \$10 million in current, active, contracts and grants to “represent, by the submission of the proposal,” that its information in FAPIIS is current, accurate and complete as of the date of submission of this proposal with regard to information specified in this paragraph (c). The supplemental information accompanying the rule provides that the offeror must go to the FAPIIS website and provide information on any of the occurrences required to be reported in the information system.⁹ But nothing in the rule or elsewhere provides the guidance and the methodologies for contractors to enter appropriately covered information into FAPIIS; until those mechanisms are finalized and tested, and the design of the database regarding the frequency of the database updates after information is recorded, contractors are unable to execute this element of the requirement. At a minimum, until that guidance and the methodologies have been published, no interim or final rule should be issued.

Furthermore, the use of the term “its information” is ambiguous and must be clarified. Since the information in the FAPIIS is comprised of information that the contractor directly submits to the database, information that government officials directly submit to the database, and comments that a contractor posts addressing information that has been submitted by the government, a contractor can only be held accountable for, and asked to “represent” for accuracy, the “information it has submitted” and the rule should clarify that point and in that manner.

In addition, we recognize that the statute¹⁰ and the provision¹¹ both require that the submission of information called out in subparagraphs (c)(1) and (c)(2) must be “current as of the date of submittal of such information under this subsection.” However, as a practical matter, it is likely impossible for a contractor/offeror to “know” of every covered violation as of the date of submittal. Notwithstanding the government’s unverified presumption that “most large businesses and some small businesses probably have established systems to track compliance,”¹² the fact is that no system of any business, regardless of size, can provide the type of “real time” reporting to be sure that the representation with every solicitation is “current” as of the date of submittal. The rule should recognize a fair interpretation of the requirement by permitting contractors to establish a reasonable cut-off point prior to proposal submission.

In addition, we strongly recommend that the “representation” provided for in this rule be modified to provide for it on the basis of the offeror’s “best knowledge and belief,” and that updates to the information be permitted after submission of the initial representation but before contract award.

52.209-XX is identified in 9.104-7(b) and in the lead-in to 52.209-XX as a “provision”. Provision only appear in solicitations and do not survive as part of any resulting contract. Therefore, it is inappropriate for paragraph (d) of this solicitation provision to establish an on-going post-award contract requirement to semi-annually update the FAPIIS data base. If such a requirement must be established, a separate contract clause and associated paperwork burden analysis must be developed and published for public comment.

Finally, while this proposed clause uses language similar to the Truth in Negotiations Act (i.e. “current, accurate and complete as of the date of submission of this proposal”), there are no

⁹ 74 F.R. 45580, September 3, 2009, column 3

¹⁰ See Section 872(f)(1) of the fiscal year 2009 National Defense Authorization Act (P.L 110-417)

¹¹ Proposed clause at 52.209-XX(c)

¹² 74 F.R. 45581, September 3, 2009, column 2

standards applicable to its use here and we do not believe that the interpretations applicable to TINA are automatically or even appropriately applicable here.

Applicability to Commercial Items and COTS

The Supplemental Information accompanying the rule, but not the rule itself, properly notes that Section 872 does not specifically mention applicability of the provision to commercial items,¹³ but that the FAR Councils expect to determine that the rule should apply to contracts for commercial items. We continue to strongly support the statutory provisions intended to limit the application of government-unique terms and conditions to commercial item procurements. While the value of these contracts should certainly be taken into account when determining whether a single contractor has total contracts and grants in excess of \$10 million, we do not believe contracts for commercial items should include the solicitation provision. It may be that contractors will already be covered by the reporting requirement because of awards for other than commercial items, and a contracting officer is certainly able to check the PPIRS database, the FAPIIS database, and other market research information that the contracting officer can identify, for information about the contractor when making a responsibility determination – even for a commercial item. In fact, we would support including language in the section relating to the contracting officer's responsibilities under proposed FAR 9.104-6(a) to clarify that authority and responsibility in lieu of expanding the application of the solicitation provision to commercial item procurements.

In addition, the Supplemental Information accompanying the rule, but not the rule itself, properly notes that provisions of law do not automatically apply to COTS products unless a law contains criminal penalties or the OFPP Administrator makes a determination that it is not in the best interest of the Government to exempt COTS item contracts.¹⁴ However, the Supplemental Information indicates that the FAR Councils “expect the OFPP Administrator will determine that the rule should apply to COTS item contracts.” We strongly recommend that the FAR Councils not recommend, and that the OFPP Administrator not seek to apply this rule to COTS items. Firms providing these items are least likely to have in place the systems necessary to collect the required information and be able to update the information on a semi-annual basis. Furthermore, suppliers of COTS items for whom the Federal Government is a small percentage of their total sales are likely to be very wary of any requirement to provide information into a government-unique database or to make any broad certification with regard to data being “current, accurate, and complete;” COTS suppliers will correctly see this as a risk of unknown legal consequence not worth pursuing. In our view, any information in the current PPIRS database, or in the FAPIIS database, and other market research information that the contracting officer can identify, is available to assist in making a responsibility determination and the resulting award to firms offering COTS products. It may be that these contractors will already be covered by the reporting requirement because of awards for other than COTS items. In fact, we would support including language relating to the contracting officer's responsibilities under proposed FAR 9.104-6(a) to clarify that authority in lieu of expanding the application of the solicitation provision and resulting contract clause to COTS procurements. However, we should not overlook the fact that there are many contractors that sell only COTS items to the Federal Government, and for whom FAPIIS will be a large, and perhaps unacceptable burden.

¹³ 74 F.R. 45581, September 3, 2009, column 1

¹⁴ 74 F.R. 45581, September 3, 2009, column 1

Paperwork Burden

In our view, the paperwork burden is significantly understated for the limited information that is covered and fails to account for all of the information collection requirements included in the rule.

Offerors and contractors with current contracts and grants with a value of at least \$10 million are required to provide: (1) information directly to the FAPIIS database relating to certain criminal, civil and administrative proceedings (see proposed 52.209-XX(c)); (2) other information as requested by the contracting officer (see proposed 9.104-6(c)(1)) to demonstrate the offeror's (present) responsibility; and (3) updated information in FAPIIS on a semi-annual basis throughout the life of the contract for every covered contractor who is awarded such contract (see proposed 52.209-XX(d)).

As noted above, we strongly disagree with the statement in the background information relating to the Paperwork Burden that most contractors already have systems in place to collect either the breadth of the information required in this statute and rule or have procedures in place to ensure that the information can be available in a timely manner for making the representation required by the clause. The business infrastructure necessary to collect such information is not typically a part of commercial business systems, especially since the representation required by the proposed rule is not a commercial business practice.

Thus, we question the accuracy of the government's burden estimate of 0.5 hours to enter company data into the website; since the FAPIIS database does not yet exist, and no information has been provided to contractors on the procedures for accessing and inputting data into the system, neither the government nor we could have any way of knowledgeably estimating the burden estimate for such actions.

Finally, the second and third reporting requirements identified above are included in the proposed rule but are not addressed in the government's paperwork burden estimate. Both of those additional requirements include significant record keeping and reporting requirements and we believe the burden estimate is erroneous for failing to address them.

Conclusion

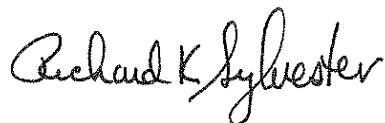
This rule implements a statute and generally follows the statutory requirements, although there are significant issues of interpretation and application that must be addressed and much remains to be done. We have made a number of recommendations to clarify the proposed coverage and to fully implement the law and the inter-relationship between the law and FAR past performance requirements. Finally, we strongly recommend that the FAR Councils not expand the coverage of the rule to commercial item and COTS procurements. In addition, we question the scope of coverage of the paperwork burden and the estimates of its impact.

Thank you for the opportunity to comment. If you have any questions or need any additional information, please do not hesitate to contact Alan Chvotkin of the Professional Services Council, who serves as our project officer on this case, at (703) 875-8059 or at Chvotkin@pscouncil.org, or Bettie McCarthy, CODSIA's administrative officer, at (703) 875-8059 or at codsia@pscouncil.org.

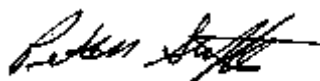
Sincerely,



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Executive Vice President & Counsel
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Richard Sylvester
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Peter Steffes
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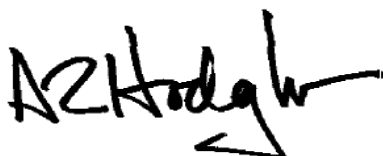
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