

Contractors Brace For Fallout From FAPIIS

By Jocelyn Allison

Law360, New York (September 20, 2010) -- As federal contractors prepare for a controversial new database on contractor performance to be made public, they would do well to choose their words carefully when submitting information to the government, attorneys said.

The Federal Awardee Performance and Integrity Information System, which includes information on criminal convictions, civil settlements and a host of other data, will soon be an open book, and experts say it could easily be misused.

No only do contractors need to make sure the information they report into the FAPIIS database is accurate and complete, they will now need to do it in a way that best positions them in the public eye, Pillsbury Winthrop Shaw Pittman LLP partner John Jensen said.

"Contractors have to be very much in the public relations business," said Jensen, head of the firm's government contracts and disputes practice.

"Reporting this information is not an administrative task," he said. "It almost requires a multidisciplinary effort to make sure the right information is presented the right way."

The General Services Administration created FAPIIS earlier this year under the requirements of the National Defense Authorization Act for fiscal year 2009, which called for a database to help contracting officers better assess the business ethics and performance of contractors competing for federal business.

FAPIIS includes information from a number of existing databases, such as the Excluded Parties List System, a public list of all companies or individuals who have been suspended or barred from doing business with the federal government.

But it also requires contractors submitting proposals on contracts or grants worth more than \$500,000 to self-report criminal, civil and administrative proceedings that resulted in a finding of fault against the contractor, as well as certain settlements.

The reporting requirements extend to proceedings from the five years prior to the proposal, and cover disputes surrounding the award or performance of a federal contract, including both federal and state actions against the contractor and its principals.

They also apply to settlements in which the contractor has acknowledged fault in cases that “could have led to” a criminal conviction or a finding of liability in civil or administrative cases resulting in certain fines, damages or restitution.

FAPIS was initially open only to federal acquisition officials and certain members of the U.S. Congress, but the fiscal 2010 Supplemental Appropriations Act that President Barack Obama signed July 29 requires that it be made open to the public.

Past performance reviews will not be included in the public version, but other information, including non-responsibility determinations, will be — even those made based on a contractor's inability to meet a technical requirement of a contract.

“There will be some entries that are not related to the integrity of the contractor, so we're mixing your ability to perform with your integrity, and so some of it is not necessarily bad,” Venable LLP partner Robert Burton said.

While the move to make FAPIS public has been praised by advocates of open government, it has the contractor community worried that inaccurate or misleading information in the database could be used to smear companies or put undue political pressure on the government to deny contracts.

Even if the information is accurate, it can be easily misinterpreted by people not familiar with the intricacies of government contracting or who view a contractor's involvement in a routine business dispute as a negative reflection on its integrity, attorneys said.

“It puts companies that do business with the government in a position where the most routine civil disagreements will be put under a microscope and used as evidence of unethical behavior by people who are not knowledgeable about the facts involved,” Mayer Brown LLP partner Marcia Madsen said.

It's up to contractors to decide how much detail to include about a certain conviction or settlement, and, depending on the situation, they may want to include less or more information to put the matter into an appropriate context, attorneys said.

Contracting officers are required to consult FAPIS when making a determination on a contractor's responsibility, and contractors will have a chance to explain themselves if certain items in the database lead the officer to declare them non-responsible and deny the contract.

Despite this safeguard, concerns remain that the requirement for contracting officers to use FAPIS will result in de facto debarments of contractors based on outdated or inaccurate information that may not be relevant to their present responsibility level.

“This is why I think it's a very high-risk system for contractors and could have unfair results,” Burton said. “Contracting officers are required to look at it before the award of a contract, and you just don't know to what extent it's going to unfairly influence their decision-making.”

While they should word their submissions with an eye to public opinion, contractors must also be careful not to misreport or under-report the information in order to avoid running afoul of the False Claims Act, attorneys said.

“There is the risk of a false statements allegation when the data is anything other than accurate, current and complete,” Jensen said. “I think in most instances mistakes can be explained, but there is certainly the potential for that liability.”

Contractors should also keep a close eye on efforts to expand FAPIIS, including proposals to lower the contract value threshold for reporting below \$500,000 and to require contractors to report violations not related to federal contracts, attorneys said.

“This is a major burden on contractors as far as, they'd better not mess up or make a mistake,” Burton said. “It's a self-reporting requirement, and the burden is on them to disclose.”

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