

FEDERAL CONTRACTS PERSPECTIVE

Federal Acquisition Developments, Guidance, and Opinions

Vol. X, No. 10

October 2009

FEDERAL AWARDEE PERFORMANCE AND INTEGRITY INFORMATION SYSTEM PROPOSED

A proposed change to the Federal Acquisition Regulation (FAR) would require contracting officers to use a data system to be developed by the General Services Administration (GSA) that is to contain specific information on the integrity and performance of federal contractors and grantees. The FAR change would require awarding officials to review the “Federal Awardee Performance and Integrity Information System” (FAPIIS) and consider other past performance information when making any past performance evaluation or responsibility determination.

This FAR change would implement Section 872 of the National Defense Authorization Act of 2009 (Public Law 110-417), which requires that the data system include information on contractors for the most recent five-year period regarding the following:

- Each civil or criminal proceeding, or any administrative proceeding, in connection with the award or performance of a federal contract or grant that results in: (1) a criminal conviction; (2) a finding of fault and liability in a civil proceeding that results in the payment of a monetary fine, penalty, reimbursement, restitution, or damages of \$5,000 or more; (3) a finding of fault and liability in an administrative proceeding that results in the payment of a monetary fine or penalty of \$5,000 or more, or the payment of a reimbursement, restitution, or damages in excess of \$100,000; and (4) a disposition of the matter in a criminal, civil, or administrative proceeding by consent or compromise with an acknowledgment of fault by the contractor if the proceeding could have led to any of the outcomes above.
- Each federal contract and grant awarded to the person that was terminated in such period due to default.
- Each federal suspension and debarment of the contractor in that period.
- Each administrative agreement entered into by the contractor and the federal government in that period to resolve a suspension or debarment proceeding.
- Each final finding by a federal official in that period that the contractor has been determined not responsible.
- Any other information required by the FAR to implement this requirement.

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- Information similar to that above in connection with the award or performance of a contract or grant with a state government.

FAPIIS will draw on several sources of information:

- The Excluded Parties List System (EPLS) (<https://www.epls.gov>) is an adequate source of information on entities that are currently suspended or debarred. However, suspensions or debarments generally last for a maximum of three years. Since the law requires information for the preceding five years, it will be necessary to access the EPLS archives to obtain information on entities that were suspended or debarred within the last five years but are no longer suspended or debarred.
- The Past Performance Information Retrieval System (PPIRS) and Contractor Performance Assessment Reporting System (CPARS) contain past performance reports from all agencies. Some, but not all, federal agencies currently use CPARS to enter information into PPIRS.
- Contracting officers will provide information on determinations of nonresponsibility on contracts and orders in excess of \$100,000 when the determination is based on a lack of satisfactory performance record or satisfactory record of integrity and business ethics, and the Small Business Administration does not issue a certificate of competency (proposed paragraph (a)(3) of FAR 9.105-2, Determinations and Documentation).
- When a Suspension and Debarment Official (SDO) enters into administrative agreement with a contractor instead of suspending or debarring the contractor, the SDO will provide the necessary information to FAPIIS (proposed paragraph (f) of FAR 9.406-3, Procedures [for debarments], and proposed paragraph (e) of FAR 9.407-3, Procedures [for suspensions]).
- Contractors with contracts and grants with a total value exceeding \$10 million (“the value, at the time of their award, of [all] current, active contracts and grants, including all priced options; and, the total value, at the time of their award, of all current, active orders under indefinite-delivery, indefinite-quantity, 8(a), or requirements contracts (including task and delivery and multiple-award schedules”) will be required to provide information relating to criminal, civil, and administrative proceedings directly to FAPIIS (new FAR provision 52.209-XX, Information Regarding Responsibility Matters, which will be required to be included in solicitations where the resultant contract is expected to exceed \$500,000).

Proposed FAR 9.104-6, Federal Awardee Performance and Integrity Information System, will require contracting officers to review the FAPIIS “and other past performance information” before awarding any contract or order in excess of \$100,000. However, paragraph (b) warns “since the FAPIIS may contain information covering a five year period, some of that information may no longer be relevant to a determination of present responsibility, *e.g.*, a prior administrative action such as debarment or suspension that has expired or otherwise been resolved.”

Vivina McVay, Editor-in Chief

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The *Federal Contracts Perspective* is published monthly by Panoptic Enterprises, P.O. Box 11220, Burke, VA 22009-1220. Loose-leaf subscription rates are \$197 a year in the United States and Canada, \$245 a year elsewhere.

Comments on this proposed rule must be submitted no later than October 5, 2009, by any of the following means: (1) <http://www.regulations.gov> (input “FAR Case 2008-027” under the heading “Comment or Submission”; select the link “Send a Comment or Submission” that corresponds with FAR Case 2008-027; follow the instructions provided to complete the “Public Comment and Submission Form”); (2) fax: 202-501-4067; or (3) mail: General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW, Room 4041, ATTN: Hada Flowers, Washington, DC 20405. Cite “FAR Case 2008-027” in all correspondence.

PROPOSAL FOR ENTERING MORE INFORMATION INTO PPIRS

A proposed FAR rule, requested by the Office of Federal Procurement Policy (OFPP), would establish procedures for contracting officers to provide contractor information into the Past Performance Information System (PPIRS) (<https://www.ppirs.gov>), specifically to report defective cost or pricing data and terminations for cause or default.

This proposed rule would supplement the final rule in Federal Acquisition Circular (FAC) 2005-34, Contractor Performance Information, which emphasized the use of PPIRS (see the August 2009 *Federal Contracts Perspective* article “FAC 2005-34 Addresses Past Performance Information”).

This proposed FAR rule would make the following changes:

- New FAR 8.406-8, Reporting, and new paragraph (c)(4) of FAR 12.403, Termination [for commercial items], would require an ordering activity contracting officer to ensure that information related to termination for cause notices are included in PPIRS in accordance with new FAR 42.1503(f) (see below). Also, if the termination for cause is subsequently converted to a termination for convenience or is withdrawn, the contracting officer would be required to ensure that a notice of the conversion or withdrawal is included in PPIRS.
- The following sentence would be added to the end of paragraph (d) of FAR 15.407-1, Defective Cost or Pricing Data: “When the contracting officer determines that the contractor submitted defective cost or pricing data, the contracting officer, in accordance with agency procedures, shall ensure that information relating to the determination is provided for inclusion in PPIRS in accordance with 42.1503(f).”
- New paragraph (f) would be added to FAR 42.1503, Procedures [for contractor performance information], which would require contracting officers enter into PPIRS within 10 days information related to the submission of defective cost or pricing data, or the issuance of a termination for cause or default notice (or any subsequent conversions or withdrawals).
- New FAR 49.402-8, Reporting Information, would require the contracting officer to ensure that information relating to the termination for default notice and any subsequent conversions or withdrawals are provided for inclusion in PPIRS.

Comments on this proposed rule must be submitted no later than November 2, 2009, by any of the following means: (1) <http://www.regulations.gov> (input “FAR Case 2008-016” under the heading “Comment or Submission”; select the link “Send a Comment or Submission” that corresponds with FAR Case 2008-027; follow the instructions provided to complete the “Public Comment and Submission Form”); (2) fax: 202-501-4067; or (3) mail: General Services Administration, Regulatory Secretariat (VPR), 1800 F Street, NW, Room 4041, ATTN: Hada Flowers, Washington, DC 20405. Cite “FAR Case 2008-016” in all correspondence.

SERIES OF DOD ACQUISITION MEMOS ISSUED

The Department of Defense (DOD) (specifically, the Under Secretary of Defense for Acquisition, Technology and Logistics (USD AT&L)) issued three memoranda concerning various aspects of DOD acquisition, and the Navy issued one memorandum.

■ **Class Deviation for Continuation of Essential Contractor Services:** This class deviation authorizes contracting officers to add a clause to solicitations and contracts that are identified as having essential contractor services that support mission essential functions. This clause, “Continuation of Essential Contractor Services,” is needed in case a threat to continuity of operations occurs, such as the H1N1 influenza pandemic.

The clause requires the contractors performing the essential services to develop a plan for continuing the performance of the essential services identified in the clause for up to 30 days. The plan must address, at a minimum: (1) challenges associated with maintaining contractor essential services during an extended event; (2) the time lapse between the initiation of the acquisition of necessary personnel and resources and their actual availability; (3) the requirements for the identification, training, and preparedness of personnel who are capable of relocating to alternate facilities or performing the work from home; (4) any established alert and notification procedures for mobilizing essential contractor service personnel; and (5) the approach for communicating expectations to contractor employees regarding their roles and responsibilities.

If the contractor is not able to perform the essential services, the government reserves the right to use federal employees or other contractors, or enter into new contracts for the essential services.

The clause is to be included in subcontracts for the essential services.

■ **Competition in DOD Acquisition:** To facilitate a commitment to competition from DOD personnel throughout the acquisition process, a standardized training tool has been developed to educate the acquisition workforce the current competition policy and guidance, reiterate the importance and benefits of competition, and highlight opportunities to increase competition. The training tool, available at <http://www.acq.osd.mil/dpap/cpic/cp/docs/training.ppt>, is structured to emphasize key concepts with links to in-depth material.

■ **Requests for Waiver of Controls on Procurements Made by Non-DOD Agencies:** Section 801(b) of the Fiscal Year 2008 National Defense Authorization Act (Public Law 110-181) authorizes acquisition officials to place an order, make a purchase, or otherwise procure property or services for DOD in excess of the simplified acquisition threshold through a non-defense agency *only if* the non-defense agency certifies that it “will comply with defense procurement requirements for the fiscal year.” If the non-defense agency cannot execute this certification, the USD AT&L may waive the limitation.

The memorandum requires that the following information be included in such waiver requests:

- A description of the categories of procurements covered by the request;
- An assessment of why the category of the procurement is necessary in the interest of DOD to obtain through a non-defense agencies that has not certified compliance;
- Confirmation that all affected contracts and supporting documents are on file and available for review or audit by the DOD Inspectors General; and

- A statement by a senior acquisition executive confirming that the agency has completed a thorough review of the contracts and supporting documents and has determined it is necessary to procure property and services through a non-defense agency.

■ **Availability of Navy Services Contract Inventory:** In accordance with Section 2330a of Title 10 of the U. S. Code, as amended by Section 807 of the Fiscal Year 2008 National Defense Authorization Act (Public Law 110-181), the Deputy Assistant Secretary of the Navy (DASN) for Acquisition and Logistics Management (A&LM) and the Office of the Director, Defense Procurement and Acquisition Policy (DPAP) are making available to the public an inventory of activities performed through more than 53,000 service contracts. The inventory is available at <https://acquisition.navy.mil/NDAAsession807>.

RECOVERY ACT REPORTING WEBSITE AVAILABLE

Section 1512 of the American Recovery and Reinvestment Act of 2009 (Public Law 111-5) (“Recovery Act”) requires contractors that receive awards (or modifications to existing awards) funded, in whole or in part, by the Recovery Act to report quarterly on the use of the funds at [FederalReporting.gov](http://www.federalreporting.gov) (<http://www.federalreporting.gov>). Section 1512 is implemented by FAR 52.204-11, American Recovery and Reinvestment Act – Reporting Requirements, which was added by FAC 2005-32 (see the April 2009 *Federal Contracts Perspective* article “FAC 2005-32 Implements Recovery Act”). While the clause requires the first quarterly report by July 10, 2009, the Office of Management and Budget (OMB) posted an announcement on [FederalReporting.gov](http://www.federalreporting.gov) in July notifying contractors that the reporting tool would not be available until October 1, 2009, and that contractors that submit an invoice prior to June 30, 2009, for Recovery Act funded contracts should maintain the data until October 10, 2009, the revised deadline for the first reporting of Recovery Act data.

An announcement was published in the *Federal Register* that [FederalReporting.gov](http://www.federalreporting.gov) will be available for reporting on October 1. However, contractors must first register, so contractors are being encouraged to register early to avoid possible delays.

In a related action, OMB issued a memorandum directing agencies to assist contractors in meeting the Section 1512 reporting requirements, specifically to conduct outreach and provide assistance to recipients of Recovery Act funds. Examples of these efforts include telephone contacts, webinars, listserves, email alerts, or other actions to reach and involve recipients.

RADIO TELEPHONES NONMANUFACTURER WAIVER TERMINATED

The Small Business Administration (SBA) is terminating a waiver of the nonmanufacturer rule for radio telephones (radio and television broadcasting and wireless communications equipment manufacturing, Product Service Code (PSC) 5805, under North American Industry Classification System (NAICS) code 334220) because SBA has discovered a small business manufacturer of such items. This nonmanufacturer rule waiver had been in effect since 1998.

Last month, SBA published in the *Federal Register* a notice of intent to terminate the waiver. SBA did not receive any responses to the notice, nor did it discover any additional small business manufacturers of radio telephones. Therefore, it is terminating the nonmanufacturer rule waiver for radio telephones.

For more on the notice of intent to terminate the waiver, see the September 2009 *Federal Contracts Perspective* article “Retraction of Two Nonmanufacturer Waivers Proposed.”

EPA REVISES GOVERNMENT PROPERTY RULES

The Environmental Protection Agency (EPA) has amended the EPA Acquisition Regulation (EPAAR) Part 1545, Government Property, and the corresponding clauses in EPAAR Part 1552, Solicitation Provisions and Contract Clauses, to update policy and procedures, and to bring it into conformance with the rewritten FAR Part 45, which removed the restriction on providing government property for contract performance, and gave contracting officers more flexibility in their determination to provide property (for more on the FAR Part 45 rewrite, see the June 2007 *Federal Contracts Perspective* article “FAR Coverage on Government Property Simplified, Clarified, Trimmed”).

The most significant change made by this rule is the consolidation of EPAAR 1552.245-70 Decontamination of Government Property, EPAAR 1552.245-72, Fabrication or Acquisition of Nonexpendable Property, and EPAAR 1552.245-73, Government Property, into a single clause – new EPAAR 1552.245-70, Decontamination.

The following are the changes made by the final rule:

- In EPAAR 1545.107, Government Property Clauses (formerly EPAAR 1545.106), the prescriptions for EPAAR 1552.245-72 and 1552.245-73 are removed, and the prescription for EPAAR 1552.245-70 is expanded to state that the clause is to be used when the contractor will use government-furnished or contractor-acquired property in cleanup of hazardous or toxic substances in the environment *as defined in Federal Standard No. 313, Federal Standard Material Safety Data, Transportation Data and Disposal Data for Hazardous Materials Furnished to Government Activities, or the toxic chemicals listed Title 40 of the Code of Federal Regulations, Section 372.65, Chemicals and Chemical Categories to Which This Part Applies.*
- New EPAAR 1552.245-70 combines three clauses: old EPAAR 1552.245-70 (which is now paragraph 9 of the “Contract Property Administration Requirements” in paragraph (b)); EPAAR 1552.245-72 (which is now paragraph (a)); and EPAAR 1552.245-73 (which is now the rest of new EPAAR 1552.245-70).

GSA REVISES SEALED BIDDING RULES

The General Services Administration (GSA) has rewritten GSA Acquisition Regulation (GSAR) Part 514, Sealed Bidding, as part of its GSAR rewrite initiative to maintain consistency with the FAR and to implement streamlined and innovative acquisition procedures that contractors, bidders, and GSA contracting personnel can utilize when entering into and administering contractual relationships.

The following are the most significant changes made to GSAR Part 514:

- In paragraph (a) of GSAR 514.201-2, Part I – The Schedule, adds in the notice to bidders cross-references to the three Prompt Payment clauses are added in the notice to bidders: FAR 52.232-25, Prompt Payment; FAR 52.232-26, Prompt Payment for Fixed-Price Architect-Engineer Contracts; and FAR 52.232-27, Prompt Payment for Construction.
- In paragraph (b) of GSAR 514.201-2, a reference to the Standard Form 1449 as an example or a form that can be used in place of the Standard Form 33 is added.
- Paragraph (b), Examination of Records, of GSAR 514.201-7, Contract Clauses, is deleted because GSAR 552.214-70, Examination of Records by GSA, does not provide basic audit rights that are in addition to those provided by FAR 52.214-26, Audit and Records – Sealed Bidding. In

addition, GSAR 552.214-70 grants to GSA rights to audit subcontractors that are in excess of those granted by the FAR and the statute.

- Paragraph (c), Using Bid Samples, of GSAR 514.202-4, Bid Samples, is deleted because it is redundant to FAR 14.202-4(d).
- GSAR 514.202-5, Descriptive Literature, is added to address the requirements of FAR 14.202-5(c).
- Paragraph (i)(8) of GSAR 514.270-7, Guidelines for Using the Price List Method, is revised to “When the solicitation further groups united prices by trade or business category, multiple percentages may be required”.
- Paragraph (b) of GSAR 514.407-3, Other Mistakes Disclosed Before Award, is deleted because it is redundant to FAR 14.407-3(f).
- In paragraph (a) of GSAR 552.214-70, “All or None” Bids, the following is deleted from the first part of the sentence: “Unless awards in the aggregate are specifically precluded in this solicitation”. The sentence now begins with “The Government...” Also, Alternate I is deleted to match the changes.
- “NOTE: (1)” is deleted from GSAR 552.214-72, Bid Sample Requirements, because it is redundant.

GSA RELEASES FY 2008 FEDERAL REAL PROPERTY REPORT

GSA is announcing the release of the Fiscal Year (FY) 2008 edition of the Federal Real Property Report, which provides an overview of the U.S. government’s owned and leased real property as of September 30, 2008. The FY 2008 Federal Real Property Report is now available at http://www.gsa.gov/graphics/ogp/FY_2008_Real_Property_Report.pdf. A limited number of hard copies of the report can be obtained by contacting the Asset Management Division (MPA), Office of Governmentwide Policy, General Services Administration, 1800 F Street, NW, Washington, DC 20405.

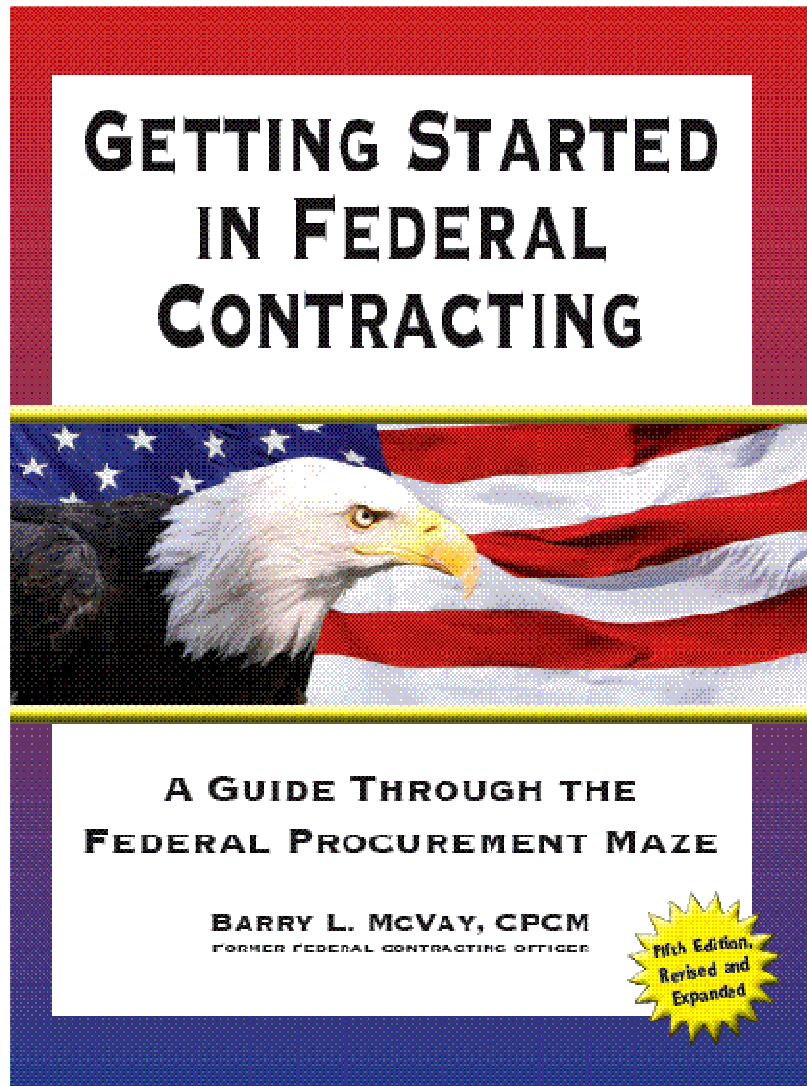
All executive agencies are required to submit constructed asset-level data to the Federal Real Property Report on an annual basis. It is a secure, password-protected web-based database that allows federal real property managers to update real property data online and in real time, perform historical benchmarking, produce ad hoc reports, measure performance of real property assets, and identify unneeded and underutilized assets for disposal. The Federal Real Property Report provides information regarding federal real property holdings.

SAFAVIAN SENTENCED TO PRISON FOR ONE YEAR

David Safavian, former Office of Federal Procurement Policy (OFPP) administrator and former General Services Administration (GSA) chief of staff, was sentenced to one year and one day in prison for obstructing an investigation into a 2002 golf trip to Scotland he took that was paid for by Washington lobbyist Jack Abramoff. Safavian will not have to report to prison until after his second child is born.

For more on Savafian and his case, see the August 2009 *Federal Contracts Perspective* article “Safavian Conviction Upheld.”

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426 pages, 2009, ISBN: 978-1-912481-26-5, \$49.95
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