DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 9, 12, 42, and 52

[FAC 2005–40; FAR Case 2008–027; Docket 2009–030, Sequence 1]

RIN 9000–AL38

Federal Acquisition Regulation; FAR Case 2008–027, Federal Awardee Performance and Integrity Information System

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement the Federal Awardee Performance and Integrity Information System (FAPIIS), as required by section 872 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009. FAPIIS is designed to improve the Government's ability to evaluate the business ethics and expected performance quality of prospective contractors and protect the Government from awarding contracts to contractors that are not responsible sources.

DATES: *Effective Date*: April 22, 2010.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Ms. Millisa Gary, Procurement Analyst, at (202) 501–0699. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–40, FAR case 2008–027.

SUPPLEMENTARY INFORMATION:

A. Background and Overview of Final Rule

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 74 FR 45579, September, 3, 2009. This final rule adopts the proposed rule with a number of clarifying and technical changes.

This rule amends the Federal Acquisition Regulation (FAR) to implement the Federal Awardee Performance and Integrity Information System (FAPIIS). FAPIIS is designed to significantly enhance the Government's ability to evaluate the business ethics and quality of prospective contractors competing for Federal contracts and to protect taxpayers from doing business with contractors that are not responsible sources.

This rulemaking 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. These actions also address requirements set forth in section 872 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. 110–417, for a system containing specific information on the integrity and performance of covered Federal agency contractors. (Consistent with the requirements of section 872, the Office of Management and Budget recently issued proposed guidance on the use of FAPIIS for grants. See 75 FR 7316, February 18, 2010).

Access to readily available Governmentwide information that a contracting officer would routinely consider when making a responsibility determination historically has been limited to debarment and suspension actions, which are maintained in the Excluded Parties List System (EPLS). Since this past summer, agencies have been required to submit electronic records of contractor performance into a single Governmentwide repository, the Past Performance Information Retrieval System (PPIRS), so that the information may be reviewed and considered by contracting officers across the Government. See 74 FR 31557, July 1, 2009. Improved inter-agency access to these assessments will motivate better performance and reduce the likelihood that taxpayer resources will go to contractors with poor track records in meeting the Government's requirements in an efficient and effective manner.

FAPIIS is intended to significantly enhance the scope of information available to contracting officers as they evaluate the integrity and performance of prospective contractors. In addition to providing one-stop access to EPLS and PPIRS, FAPIIS will also include contracting officers' non-responsibility determinations (*i.e.*, agency assessments that prospective contractors do not meet requisite responsibility standards to perform for the Government), contract terminations for default or cause, agency defective pricing determinations, administrative agreements entered into by suspension and debarment officials to resolve a suspension or debarment, and contractor self-reporting of criminal convictions, civil liability, and adverse administrative actions. The system will collect this information, on an ongoing basis, from existing systems within the Government (*i.e.*, EPLS and PPIRS), contracting officers (for determinations of non-responsibility and contract terminations), suspension and debarment officials (for information on administrative agreements), and contractors (for information related to criminal, civil, and administrative proceedings).

Pursuant to this final rule:

- Contracting officers will be required to (i) review the information in FAPIIS in connection with contracts over the simplified acquisition threshold for the purpose of making a responsibility determination, (ii) document the contract file to explain how the information in FAPIIS was considered in any responsibility determination—as well as the action that was taken as a result of the information, and (iii) notify, prior to proceeding with award, the agency official responsible for initiating debarment or suspension, if information is identified in FAPIIS that appears appropriate for that official's consideration.
- Contracting officers must give offerors the opportunity to provide additional information that demonstrates their responsibility before the contracting officer makes a non-responsibility determination based on relevant information from FAPIIS if such information regards the following: criminal, civil, or administrative proceedings in connection with the award of a Government contract, terminations for default or cause, or determinations of non-responsibility because the contractor does not have a satisfactory performance record or a satisfactory record of integrity and business ethics, or comparable information relating to a grant.
- Vendors submitting a proposal on a Federal contract over $500,000 and having more than $10 million in active contracts and grants as of the time of proposal submission, must report in FAPIIS information pertaining to criminal, civil and administrative proceedings through which a requisite determination of fault was made. Under the resultant contract, the information must be updated in FAPIIS by the contractor on a semi-annual basis, through the life of the contract. The FAPIIS system will provide contractors with notification whenever the Government posts new information to the contractor's record. The contractor will have an opportunity to post comments regarding information that has been posted by the Government, including non-responsibility determinations, and such comments will be retained as long as the associated

information is retained (for a total period of six years) and remain part of the record unless the contractor revises them.

Although FAPIIS is designed to be a "one-stop" resource, the rule does not alter contracting officers' obligation, as set forth in FAR 9.105–1, to possess or obtain information sufficient to determine that a prospective contractor meets the applicable standards for establishing responsibility. The Councils will continue to look for additional appropriate sources of information, including relevant Government databases, to support contracting officers in evaluating the integrity of prospective contractors, as well as ways in which to further facilitate the analysis and validation of information collected.

The Councils intend to collect State-level information in connection with the award or performance of a contract or grant with a State government, as anticipated in section 872(c)(7). However, collection of this information has been deferred until a subsequent phase of FAPIIS. The Councils had concerns that the challenges of collecting State government information, such as establishing a reporting format that is consistent across State governments, could not be resolved without delaying this rulemaking. In addition to working out an appropriate plan for collecting State information, the Councils will explore the feasibility of collecting local government information. Further, the Councils and OMB are carefully considering the issuance of a proposed rule to further enhance the utility of FAPIIS by both (1) lowering the threshold for covered actions that trigger FAPIIS reporting from $500,000 to the simplified acquisition threshold, and (2) expanding the current scope of reporting to include other violations of laws, as opposed to violations only in the context of Federal contracts and grants. The public would be provided an opportunity to comment before any proposed changes are finalized.

B. Response to Comments Received on the Notice of Proposed Rulemaking

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 74 FR 45579, September 3, 2009, with a public comment period ending October 5, 2009. On October 5, 2009, the comment period was extended to November 5, 2009 (74 FR 51112). The Councils received public comments from 16 respondents on the proposed rule. Copies of the comments received by the Councils in response to the **Federal Register** notice are available for review at *http://www.regulations.gov*. Comments largely focused on (1) the scope and quality of information to be collected in FAPIIS, (2) use of the database, (3) access to the database, (4) application of the rule to acquisitions for commercial items and commercial-off-the-shelf (COTS) items, and (5) the potential need for obtaining additional public comment. Based on the comments and additional deliberations, the Councils have made a number of refinements and technical changes to the rule. A summary description of the comments and the Councils' responses and changes adopted in the final rule are set forth below.

1. Information in FAPIIS

Many commenters raised issues related to the planned content of FAPIIS. A number of commenters focused on scope questions. Some of these commenters stated that the information collected in FAPIIS should be broadened beyond that stated in the proposed rule while others raised certain concerns with the scope of the proposed rule. Several commenters addressed data quality issues and made recommendations to ensure the accuracy and timeliness of FAPIIS data.

a. *Comments related to broadening the content in FAPIIS*. Examples of recommended expansions included lowering the threshold of covered contracts from $500,000 to all contracts that exceed the simplified acquisition threshold (presently $100,000), and augmenting the type of information collected to include: (i) violations of laws in the performance of any contract, as opposed to just Federal contracts; (ii) violations of labor and employment laws, regardless of whether the reimbursement, restitution, or damages meet the $100,000 threshold identified in section 872(c)(1); (iii) complaints and administrative settlements, including settlements without admission of fault, in order to ascertain information about contractors' performance patterns; (iv) information on debarments and suspensions carried out at the State level; (v) information on all proceedings entered into at any level of government, regardless of outcome; (vi) audit reports from cognizant Federal audit offices, such as the Government Accountability Office or the Defense Contract Audit Agency; and (vii) all information covered in the Online Representations and Certifications Application (ORCA). In addition, one respondent recommended that the archival period for information in FAPIIS be extended so that contracting officers have at their disposal as comprehensive a picture as possible.

Response: The Councils seek to ensure that FAPIIS provides contracting officers with efficient and effective access to the information they need to evaluate the business ethics and quality of prospective contractors competing for Federal contracts. To achieve this goal, the Councils have taken a phased approach to the implementation of FAPIIS, focusing first on the information specifically identified by Congress in section 872(c) of the FY 2009 NDAA. This approach has allowed the Councils to collaborate closely with the FAPIIS Program Manager, who is responsible for the architecture and technological requirements of the system. This approach also is providing an opportunity for agencies to become acclimated with the system and train their contracting officers. Going forward, this approach will allow the Councils to carefully consider policy and procedural issues as new sources of information are identified pursuant to section 872(b) and (c)(6).

For the next phase of FAPIIS, the Councils and OMB are carefully considering a proposed rule that would build on several suggestions made by the public and augment reporting by: (1) lowering the threshold for covered actions that trigger FAPIIS reporting from $500,000 to the simplified acquisition threshold and (2) expanding the current scope of reporting to include other violations of laws, as opposed to violations only in the context of Federal contracts. This information can further enhance the utility of FAPIIS and give contracting officers a fuller picture of a contractor's history of compliance.

However, a number of the other above-described suggestions for expansion raised concerns for the Councils. For example:

- Requiring the collection of information on all proceedings, regardless of outcome, could potentially create instances where negative judgments on contractors' responsibility are made regardless of the outcome of the referenced proceedings. If information regarding yet-to-be-concluded proceedings were allowed, negative perceptions could unfairly influence contracting officers to find a contractor non-responsible, even in situations that later end with the contractor being exonerated. The Councils are strongly committed to helping contracting officials avoid these types of situations.
- Incorporating all the information from ORCA is inappropriate. Much of the information in this system is not designed to support contracting officers in making responsibility determinations.

• Extending the archival period (for retaining information beyond five years) is also inappropriate as this period was created for auditing purposes, not for use by contracting officers in making responsibility determinations.

b. *Comments related to refining the proposed content in FAPIIS.* Examples of concerns voiced with the proposed collection of information included that (i) the collecting of information on administration agreements entered into to resolve a suspension or debarment increases the likelihood of a de facto debarment; and (ii) the definition of "covered person" to include principals is overbroad.

Response: The Councils appreciate the need to ensure that information included in FAPIIS will contribute to the stated purpose of the database and that appropriate training is provided to help contracting officers in their use of this information. The Councils did not agree, however, that significant revisions were warranted based on the requested refinements. In particular, the collection of information on administrative agreements entered into to resolve a suspension or debarment is required by section 872, so it must be included in the system. Regarding the concern raised with the definition of "covered person," the existing requirement at FAR 52.209–5 includes certification regarding both the offeror and the principals. Additionally, since the FAPIIS requirement for information does not relate to all offenses by the principals, but only to those that relate to the performance of a Federal contract or grant, this information should be available to the offeror.

As further clarification, the Councils have removed an inconsistency within the definition of "principal" between the stated meaning (person within the business entity) and one of the examples (head of a subsidiary). A subsidiary is not generally within the business entity, but is a separate and distinct legal entity. Therefore, the Councils have removed "head of a subsidiary" from the list of examples in the definitions of "principal" throughout the FAR, because it can imply a meaning broader than the stated definition. Deletion of this example should not result in any change of meaning, since this is just an example, and the definition clearly states that principals are persons within the business entity.

c. *Comments addressing the accuracy and timeliness of FAPIIS data.* Several commenters cited to recent Government audits that have revealed inaccurate, untimely or missing data associated with several existing databases that contracting officials are required to consult. Reliance on these databases has lead to recurring awards to suspended or debarred individuals and companies, or companies with questionable ethics. The commenters recommend better training of the acquisition workforce as a means to ensure entry of better data into FAPIIS. Another commenter requested enforceable guidelines for submission of accurate and timely data by contracting officers and suspension and debarment officials (SDOs), as well as contractors, with sanctions associated with non-compliance with FAPIIS reporting requirements. This commenter recommended that a single entity should have accountability and authority to ensure that the information submitted to the database is timely, accurate, and complete, and that the database is used effectively.

Response: Pursuant to section 872(d), the Administrator of GSA shall develop policies to require the timely and accurate input of information into the database. To this end, the Councils will work with the FAPIIS Program Manager, the Federal Acquisition Institute (FAI), and the Defense Acquisition University (DAU) to develop guidance for contracting officials and SDOs on proper input, accuracy, and timeliness of data into FAPIIS. In addition, the Councils have added a requirement to the rule similar to that at FAR 4.604 for data entry into the Federal Procurement Data System, stating that the contracting officers and SDOs are responsible for the timely submission and sufficiency of the data. There is no single entity that can be held accountable because the information in FAPIIS comes from various sources. However, each system to which FAPIIS connects has its own guidelines for timeliness and accountability and separate initiatives are being pursued to strengthen these systems. For example, OFPP's memorandum of July 29, 2009, *Improving the Use of Contractor Performance Information*, available at *http://www.whitehouse.gov/omb/assets/procurement/improving__use__of__contractor__perf__info.pdf*, requires the submission of report cards to the Past Performance Information Retrieval System (PPIRS). PPIRS has a standard format for supplying all the report card information collected from the Federal agencies to authorized Government users for use in source selection decisions, and the Government is working to improve compliance by Federal agencies in reporting this data and the quality of the information entered into PPIRS. In improving the compliance and quality of the data, over time, the accuracy of the data should improve. In the meantime, the Councils have added a requirement for timeliness and accountability for the Government personnel who will be entering data directly into the database. With respect to contractors, there are a range of penalties available to the Government for non-compliance with the requirements of a contract, such as determination of non-responsibility, termination for default, or suspension or debarment.

d. *Other comments related to information in FAPIIS.* One commenter sought clarification regarding whether FAPIIS will always display information on active debarments and suspensions and whether FAPIIS will provide access to information on expired debarments and suspensions. Another commenter recommended that the $10,000,000 threshold of open contracts triggering the requirement to submit information to FAPIIS be clarified to include all priced options and modifications.

Response: Regarding debarment and suspension, FAPIIS will provide access to data on active suspensions and debarments, even if the suspension or debarment was imposed more than five years ago. FAPIIS will also provide access to data on expired suspensions and debarments for five years after the expiration date. To access records after this period, agencies would need to utilize the Excluded Parties List System's archives. With respect to the $10 million threshold, the Councils concur that additional clarification is needed to capture the value of modifications when calculating the total value of all current, active contracts and grants. The language in the final rule has been refined to clarify that offerors must consider the total value of the contracts and grants including all priced options and modifications.

2. Use of FAPIIS

A number of commenters raised issues related to how information in FAPIIS will be used—especially in connection with responsibility determinations. Comments largely addressed the need for additional guidance and training and making sure contracting officers understand what information is relevant to their analysis. One comment also raised concern regarding the SDO notification process.

a. *Comments addressing the need for additional guidance and training.* Several commenters recommended that contracting officers be provided with guidance and training on (1) how to use the information in FAPIIS relative to past performance evaluations and non-responsibility determinations, and (2) the type and level of information to be

reported to agency SDOs. Some commenters specifically recommended that the FAR provide more specific parameters on how to evaluate and utilize the information in FAPIIS and when a referral to the SDO would be appropriate.

Response: The Councils appreciate the importance of helping contracting officials obtain the skill and aptitude necessary to discern the relevance and weight to be given the information reviewed. The Councils believe that training, rather than more specific standards in the regulations, is a better way to achieve this goal. The Councils will work with FAI and DAU to develop guidance and training for contracting officials on the proper use of the information contained in FAPIIS, and the type of information that would warrant submission to agency SDOs.

b. *Comments addressing cautions given to contracting officers on the relevance of information in FAPIIS*. Commenters raised concerns regarding the language proposed for FAR 9.104–6(b), which instructs contracting officers to "consider all the information in FAPIIS" but adds a caveat that "some of the information in FAPIIS may not be relevant to a determination of present responsibility" because "FAPIIS may contain information covering a five year period." The provision gives as an example of information that may not be relevant to a determination of present responsibility, a prior administrative action such as a debarment or suspension that has expired or otherwise been resolved. One commenter stated that the caution was confusing because it instructed award officials to consider information but then advised them that it may not be relevant. Another commenter was concerned that the caution imposed an unnecessary restriction on contracting officers' review of responsibility information. A third commenter supported the caution but recommended that it be expanded to also cover past performance.

Response: Section 872 requires retention of the data on suspension and debarment for five years and it requires consideration of all the data in the database. The Councils recognize that some of the data in the database may not be relevant when determining present responsibility and are committed to avoiding situations of unjustified determinations of non-responsibility. Without the language, contracting officers may think they are required to utilize outdated information that has no bearing on a contractor's present responsibility. The statement does not, as one commenter suggested, limit a contracting officer from considering any information that can be appropriately considered and that is relevant. In light of the comments, the Councils have clarified the explanation for the caution by stating that FAPIIS may contain information on any of the offeror's previous contracts and therefore may contain information relating to contractors for products or services that are completely different from those being acquired. The Councils have also added cross references to FAR 15.305(a)(2) as a reminder of relevance requirements in the consideration of past performance.

c. *Comment addressing the need to separate discussion of responsibility determinations and past performance evaluations*. One commenter noted that the proposed rule inappropriately mixes the discussion and handling of past performance evaluations and responsibility determinations.

Response: The Councils concur and have separated these two concepts. In the final rule, FAR section 9.104–6 focuses just on responsibility determinations. For past performance evaluations, the contracting officer is referred to FAR section 15.305(a)(2), which addresses how to evaluate the relevance of data and clearly states that this evaluation is separate from the responsibility determination required under subpart 9.1. The final rule also incorporates use of FAPIIS into the procedures addressing agency evaluations of contractor performance in FAR 42.1503 since there may be information in FAPIIS, such as terminations for default or cause and defective pricing assessments, that is not in PPIRS but still may be appropriately used, along with the information in PPIRS to evaluate an offeror's performance.

d. *Comment pertaining to the requirement for notifying SDOs*. One commenter was concerned that the requirement to notify the SDO may cause needless delay and recommended strengthening the authority of the contracting officer to make a decision that no additional information is necessary. The commenter also expressed concern about due process.

Response: The proposed language, which has been retained without change in the final rule, requires contracting officers to notify, prior to proceeding with award, the agency official responsible for initiating debarment or suspension action in accordance with agency procedures. This notification process closely tracks that already established in FAR 9.104–5 for situations where an offeror provides an affirmative response on its responsibility certification and therefore should not create undue additional delay. In addition, no changes have been made to procedures currently used to ensure an opportunity for the offeror to provide its input where responsibility is in question. The final rule follows the current practice for providing offerors with an opportunity to explain their responsibility if the contracting officer obtains relevant information from FAPIIS that could lead to a non-responsibility determination. Similarly, the rule makes no changes to the due process obligations associated with suspension or debarment actions.

3. Access to FAPIIS

Many commenters recommended that the rule authorize public access to FAPIIS, while other commenters voiced concerns over the security controls in place to protect awardee information.

a. *Comments related to public access*. Commenters favoring public access to FAPIIS stated that taxpayers have a right to know about the responsibility of contractors and that such access is "essential to efficient and effective implementation and oversight of Federal contracting." One commenter noted that by providing this access, the public could help oversee compliance in those instances where information is not fully disclosed, since contracting officers will not have time to check the facts self-reported by contractors. Other suggestions included providing access to inspectors general and Federal law enforcement agencies, and State governments. Comments were split on whether FAPIIS information should be available to the public under the Freedom of Information Act (FOIA) requests.

Response: Section 872(e)(1) provides that the Administrator of GSA shall ensure that the information in the database is available to appropriate acquisition officials of Federal agencies, to such other Government officials as the Administrator determines appropriate, and, upon request, to the Chairman and Ranking Members of the committees of Congress having jurisdiction. Therefore, the Councils do not believe that Congress intended for this database to be accessible by the public. However, Inspectors General and Federal law enforcement agencies could request access under the provision for access to "other Government officials as the Administrator determines appropriate." Whether FAPIIS data is releasable or exempt from disclosure under FOIA would be determined on a case-by-case basis. Public requests for system information will be handled under FOIA.

b. Comments related to security controls. Several commenters voiced concerns over the security controls in place to protect awardee information in FAPIIS. Under the final rule, like the proposed rule, contracting officials, offerors (pre-award) and contractors (post-award) will be required to input data into FAPIIS. The commenters are concerned that this sensitive information could affect the contractor in question if the sensitive information was made public.

Response: The Councils acknowledge the sensitivity of the information collected to future procurement opportunities for contractors. The information collected and viewable through FAPIIS will be considered source selection sensitive and require Government personnel to be given access through their agency focal points on a need-to-know basis for source selection decisions. (The FAPIIS database includes the same access controls as PPIRS.) Information on criminal, civil, and administrative proceedings submitted directly from vendors will be provided solely to the FAPIIS database. In addition, vendors will only be allowed to access information submitted to FAPIIS for their own entity based on their DUNS number and Marketing Partner Identification Number that they assign themselves as is done currently with access to PPIRS. Restrictions on access are set forth in a new contract clause which was added by the final rule and states: "With the exception of the Contractor, only Government personnel and authorized users performing business on behalf of the Government will be able to view the Contractor's record in the system. Public requests for system information will be handled under Freedom of Information Act procedures, including, where appropriate, procedures promulgated under E.O. 12600."

4. Other issues

a. *Comments regarding the application of the rule to commercial items and commercial-off-the-shelf items.* One commenter favored application of the rule to the acquisition of commercial items and COTS items. Another opposed such application, stating that firms providing such items are least likely to have the systems in place to collect and update the requisite information and will be wary and reluctant to provide the information—but still acknowledged that such contractors may already be covered by the reporting requirements because of awards for other than COTS or commercial items.

Response: The Councils disagree with the arguments set forth to oppose application of the rule to commercial item and COTS acquisitions. An exemption for commercial item and COTS acquisitions would exclude a significant portion of Federal contractors, thereby undermining an overarching public policy to achieve greater integrity and performance quality in contracting that this law is intended to further. There also does not appear to be any unique burden that would undermine access to the commercial marketplace. The requirement for contractors to submit information into FAPIIS applies to those contractors with active Federal contracts and grants totaling more than $10 million at the time of proposal submission, and contractors with this level of activity generally should be equipped to collect and update the information in the system. The commenter even acknowledged that there is a reasonable likelihood a contractor offering a commercial item or COTS item may already be covered by the reporting requirement by virtue of past awards for other than commercial items and COTS.

Prior to making this rule applicable to commercial item acquisitions, and pursuant to section 34 of the Office of Federal Procurement Policy Act (OFPP Act), 41 U.S.C. 430, the FAR Council must make a written determination that it would not be in the best interest of the Federal Government to exempt this law from contracts for the procurement of commercial items. Similarly, prior to making this statutory requirement applicable to COTS acquisitions, and pursuant to section 35 of the OFPP Act, 41 U.S.C. 431, the Administrator of OFPP must make a written determination that it would not be in the best interest of the United States to exempt this law from contracts for COTS items. The preamble to the proposed rule stated the intention of the FAR Council and the Administrator to make the requisite best interest determinations for applying this rule to commercial items and COTS items respectively. The required determinations have been made and, consistent with these determinations, the final rule has been promulgated to cover acquisitions of commercial items and COTS.

b. *Comments addressing the business rules for FAPIIS.* One respondent requested that the business rules discussed in the preamble to the proposed rule be incorporated into the regulation. (The preamble outlined principles to ensure timely availability of information and proper use of the information while also protecting against improper disclosure to the public.)

Response: The Councils have incorporated the business rules that impact the contractor into a new clause addressing updates of information regarding responsibility matters: (1) The Contractor will receive notification when the Government posts new information to the Contractor's record. (2) Only Government personnel and authorized users conducting business on behalf of the Government can view system information, with the exception that a Contractor can view its own information. Public requests for information will be handled under the Freedom of Information Act procedures including, where appropriate, procedures promulgated under E.O. 12600. (3) The Contractor will have an opportunity to post comments regarding information that has been posted by the Government. The contractor comments will be retained as long as the associated information is retained, *i.e.*, for a total period of six years. Contractor comments will remain a part of the record unless the Contractor revises them.

c. *Comments regarding potential redundancy of FAPIIS to pre-existing systems.* Several respondents indicated concern that FAPIIS is duplicative of the current past performance systems (*e.g.*, Past Performance Information Retrieval System (PPIRS), Contractor Performance Assessment Reporting System (CPARS), and the Excluded Parties List System (EPLS)); and that the Government should provide a one-stop shop for performance data.

Response: FAPIIS will provide a one-stop shop by providing a central nexus of access to the information stored in various existing systems. FAPIIS has been developed as a module within PPIRS and provides links to the other existing sources of relevant information. The information that will be entered directly into FAPIIS is not duplicated in any of these other sources. The information entered by contracting officers (*e.g.*, terminations for default) will be entered into FAPIIS via CPARS. Information required of the vendor regarding criminal/civil/administrative proceedings through which a requisite determination of fault was made will be entered via the Central Contractor Registration (CCR) system. Vendor past performance information will still be entered into PPIRS, and information regarding suspension or debarment will still be entered into EPLS. FAPIIS will then bring all of this information together for the authorized user's access and review.

d. *Comments addressing standardization of past performance data*. Several respondents made comments regarding the standardization of past performance data in general—*i.e.*, that a standardized collection format should be developed and applied across the agencies and an unrestricted unique identifier for contractors be used. They are concerned about the accuracy of overall past performance data throughout the Federal procurement enterprise on which FAPIIS will be partially relying.

Response: The Councils acknowledge the concern regarding standardization of the collection of all past performance data in general. As mentioned above, the Federal Government is making strides to improve the collection of past performance information required by FAR subpart 42.15. This includes the memorandum issued by the Office of Federal Procurement Policy (OFPP) on July 29, 2009, which required the submission of report cards to the Past Performance Information Retrieval System (PPIRS). PPIRS has a standard format for report card information, and provides that information to all authorized Government users for use in source selection decisions. We are working to improve compliance with the requirement to submit data to this system and to improve the quality of the data submitted. As these efforts proceed, the accuracy of the data should improve.

e. *Comments raising technical issues*. A number of commenters offered technical corrections to the proposed rule.

Response: The Councils have made the following changes to the proposed rule:

• In response to a concern that language in FAR 9.104–6(d) should be modified to ensure consistency with the application of the standards to small business, the Councils deleted the coverage at FAR 9.104–3(d)(1)(ii) as duplicative of the language at FAR 9.105–2(b)(2).

• The cross-reference at FAR 9.105–2(a)(1)(i) has been deleted and the cross-reference at FAR 9.105–2(b)(1) has been added. These paragraphs were rearranged to correctly differentiate between the determination in paragraph (a) and documentation in paragraph (b).

• In response to a concern that the word "may" in FAR 9.105–2(a)(2) suggested that a contracting officer need not necessarily accept the SBA's decision to issue a Certificate of Competency, this word has been changed to "shall" to reflect the conclusive nature of the issuance of such a certificate.

• The language in FAR 9.406–3 and FAR 9.407–3 have been changed for consistency with the existing definitions at FAR 9.403 by changing "debarment official" and "suspension official" to "debarring official" and "suspending official," respectively.

• In response to a concern that the rule asked offerors to account for the accuracy of information submitted by Government officials and others, FAR 52.209–7(c) has been revised to read ". . . by submission of this offer, that the information it has entered in the Federal Awardee. . ." in order to limit the certification to information the contractor itself provided.

• The introductory text of FAR 52.209–7(c)(1) has been reworded to clarify that the provision only applies if the offeror was the subject of a proceeding. Before this change, it was unclear whether, for example, an offeror involved in litigation wherein a different party was found liable would have to report that under this clause.

• The phrase "maximum extent practicable and consistent with all applicable laws and regulations. . ." has been deleted from FAR clause 52.209–7(c)(1)(iv).

• Paragraph (d) of FAR provision 52.209–7 required an ongoing responsibility to update information on a semi-annual basis in FAPIIS. In response to several respondents who pointed out that this is a post-award requirement, this paragraph has been removed from the solicitation provision and incorporated into a new FAR clause, 52.209–8.

• In response to a concern that the phrase "administrative proceeding" could be interpreted to include formal and informal actions such as audit reports, the Councils have clarified the rule to indicate that "administrative proceeding" does not include audit reports.

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

C. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this rule will only impact an offeror that has failed to meet Government performance requirements or standards for integrity and business ethics. The FAR already contains standards for present responsibility of offerors. This information system provides a tool to help contracting officers to comply with existing requirements. Further, the final rule only imposes an information collection requirement on small businesses that have total Government grants and contracts exceeding $10 million, which excludes most small businesses. No comments were received on the impact on small business.

D. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104–13) applies because the final rule contains information collection requirements. Accordingly, the Regulatory Secretariat has received approval of the new information collection requirement concerning Federal Awardee Performance and Integrity Information System from the Office of Management and Budget under 44 U.S.C. Chapter 35, *et seq.* OMB Control number 9000–0174, Information Regarding Responsibility Matters.

Annual Reporting Burden:

The final rule requires that for each solicitation of $500,000 or more, the offeror responds as to whether it has, or has not, current contracts and grants that total greater than $10,000,000. Only if the offeror responds affirmatively is there any further information collection requirement. Given that the amount of current Federal contracts and grants is basic knowledge for any firm, the estimated number of hours for this initial response is 0.1 hours. Using data from the Federal Procurement Data System—Next Generation (FPDS-NG), it is estimated that there will be approximately 12,000 - 14,000 contracts over $500,000 each year. Estimating between five and six responses to each solicitation, there will be 80,000 responses annually to the question regarding contracts/grants exceeding $10 million.

Contractors awarded more than one contract will still only have to input the data two times per year. It is estimated that 5,000 contractors will answer the first question affirmatively and then will have to enter data into the website. We have used an average burden estimate of 0.5 hours to enter the company's data into the website and to do the semi-annual updates. This time estimate does not include the time necessary to maintain the company's information internally. Most large businesses and some small businesses probably have established systems to track compliance. At this time, all or most Government contractors have entered relevant company data in the Central Contractor

Registration (CCR) in accordance with another information collection requirement. Therefore, the estimate includes an average of 100 hours per year for recordkeeping for each of the 5,000 respondents that will be required to provide additional information, for a total of 500,000 annual recordkeeping hours. The total annual reporting burden is estimated as follows:

Public reporting burden for this collection of information is estimated to average 0.15 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden is estimated as follows:

Respondents: 8,000.

Responses per respondent: Approximately 11.

Total annual responses: 90,000.

Preparation hours per response: Approximately 0.15 hours.

Response burden hours: 13,000.

Recordkeeping hours: 500,000.

Total burden hours: 513,000.

Comment: The Councils received several comments on the estimates for the Information Collection requirements associated with the new rule. One respondent considered that the estimate of .15 hours per contractor was very low, considering its experience with computer system access between the Federal Government and its institution. In particular, one respondent thought that the estimates would have to be increased because it did not cover the semi-annual updates to the data-base.

Response: The estimate of .15 hours per response was a weighted average between the respondents that did not have to enter any data except a negative response with regard to having total contracts and grants greater than $10 million (.1 hours), and those that would need to provide further data to FAPIIS (.5 hours).

The estimates that were published with the proposed rule did cover the semi-annual updates. The supporting statement that was submitted to OMB specifically stated that two responses per respondent per year were calculated for those respondents with contracts and grants greater than $10 million, because of the requirement for semi-annual updates.

List of Subjects in 48 CFR Parts 2, 9, 12, 42, and 52

Government procurement.

Dated: March 18, 2010.

Al Matera,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 9, 12, 42, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 9, 12, 42, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

2.101 [Amended]

■ 2. Amend section 2.101 in the definition "Principal" by removing "subsidiary, division, or" and adding "division or" in its place.

PART 9—CONTRACTOR QUALIFICATIONS

■ 3. Amend section 9.101 by revising the section heading and adding, in alphabetical order, the definition "Administrative proceeding" to read as follows:

9.101 Definitions.

Administrative proceeding means a non-judicial process that is adjudicatory in nature in order 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 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.

* * * * *

■ 4. Amend section 9.104–3 by revising paragraph (d)(1) to read as follows:

9.104–3 Application of standards.

* * * * *

(d)(1) *Small business concerns.* Upon making a determination of nonresponsibility with regard to a small business concern, the contracting officer shall refer the matter to the Small Business Administration, which will decide whether to issue a Certificate of Competency (see subpart 19.6).

* * * * *

■ 5. Redesignate section 9.104–6 as 9.104–7, add new section 9.104–6, and revise newly redesignated section 9.104–7 to read as follows:

9.104–6 Federal Awardee Performance and Integrity Information System.

(a) Before awarding a contract in excess of the simplified acquisition threshold, the contracting officer shall review the Federal Awardee Performance and Integrity Information System (FAPIIS), (available at *www.ppirs.gov*, then select FAPIIS).

(b) The contracting officer shall consider all the information in FAPIIS and other past performance information (see subpart 42.15) when making a responsibility determination. For source selection evaluations of past performance, see 15.305(a)(2). Contracting officers shall use sound judgment in determining the weight and relevance of the information contained in FAPIIS and how it relates to the present acquisition. Since FAPIIS may contain information on any of the offeror's previous contracts and information covering a five-year period, some of that information may not 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, or information relating to contracts for completely different products or services.

(c) If the contracting officer obtains relevant information from FAPIIS regarding criminal, civil, or administrative proceedings in connection with the award or performance of a Government contract; terminations for default or cause; determinations of nonresponsibility because the contractor does not have a satisfactory performance record or a satisfactory record of integrity and business ethics; or comparable information relating to a grant, the contracting officer shall, unless the contractor has already been debarred or suspended—

(1) Promptly request such additional information from the offeror as the offeror deems necessary in order to demonstrate the offeror's responsibility to the contracting officer (but see 9.405); and

(2) Notify, prior to proceeding with award,in accordance with agency procedures (see 9.406–3(a) and 9.407–3(a)), the agency official responsible for initiating debarment or suspension action, if the information appears appropriate for the official's consideration.

(d) The contracting officer shall document the contract file for each contract in excess of the simplified acquisition threshold to indicate how the information in FAPIIS was considered in any responsibility determination, as well as the action that

was taken as a result of the information. A contracting officer who makes a nonresponsibility determination is required to document that information in FAPIIS in accordance with 9.105–2 (b)(2).

9.104–7 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the provision at 52.209–5, Certification Regarding Responsibility Matters, in solicitations where the contract value is expected to exceed the simplified acquisition threshold.

(b) The contracting officer shall insert the provision at 52.209–7, Information Regarding Responsibility Matters, in solicitations where the resultant contract value is expected to exceed $500,000.

(c) The contracting officer shall insert the clause at 52.209–8, Updates of Information Regarding Responsibility Matters—

(1) In solicitations where the resultant contract value is expected to exceed $500,000; and

(2) In contracts in which the offeror checked "has" in paragraph (b) of the provision 52.209–7.

■ 6. Amend section 9.105–1 by revising the introductory text of paragraph (c), removing paragraph (c)(1), and redesignating paragraphs (c)(2) through (c)(6) as paragraphs (c)(1) through (c)(5). The revised text reads as follows:

9.105–1 Obtaining information.

* * * * *

(c) In making the determination of responsibility, the contracting officer shall consider information in FAPIIS (see 9.104–6), including information that is linked to FAPIIS such as from the Excluded Parties List System (EPLS) and the Past Performance Information Retrieval System (PPIRS), and any other relevant past performance information (see 9.104–1(c) and subpart 42.15). In addition, the contracting officer should use the following sources of information to support such determinations:

* * * * *

■ 7. Amend section 9.105–2 by revising paragraphs (a)(2) and (b) to read as follows:

9.105–2 Determinations and documentation.

(a) * * *

(2) If the contracting officer determines that a responsive small business lacks certain elements of responsibility, the contracting officer shall comply with the procedures in subpart 19.6. When a Certificate of Competency is issued for a small business concern (see subpart 19.6), the contracting officer shall accept the Small Business Administration's decision to issue a Certificate of Competency and award the contract to the concern.

(b) *Support documentation.* (1) Documents and reports supporting a determination of responsibility or nonresponsibility, including any preaward survey reports, the use of FAPIIS information (see 9.104–6), and any applicable Certificate of Competency, must be included in the contract file.

(2)(i) The contracting officer shall document the determination of nonresponsibility in FAPIIS (available at *www.cpars.csd.disa.mil*, then select FAPIIS) if—

(A) The contract is valued at more than the simplified acquisition threshold;

(B) The determination of nonresponsibility is based on lack of satisfactory performance record or satisfactory record of integrity and business ethics; and

(C) The Small Business Administration does not issue a Certificate of Competency.

(ii) The contracting officer is responsible for the timely submission, within 3 working days, and sufficiency of the documentation regarding the nonresponsibility determination.

9.404 [Amended]

■ 8. Amend section 9.404 by removing from paragraph (c)(3) "5 working" and adding "3 working" in its place.

■ 9. Amend section 9.406–3 by adding paragraph (f) to read as follows:

9.406–3 Procedures.

* * * * *

(f)(1) If the contractor enters into an administrative agreement with the Government in order to resolve a debarment proceeding, the debarring official shall access the website (available at *www.cpars.csd.disa.mil*, then select FAPIIS) and enter the requested information.

(2) The debarring official is responsible for the timely submission, within 3 working days, and accuracy of the documentation regarding the administrative agreement.

■ 10. Amend section 9.407–3 by adding paragraph (e) to read as follows:

9.407–3 Procedures.

* * * * *

(e)(1) If the contractor enters into an administrative agreement with the Government in order to resolve a suspension proceeding, the suspending official shall access the website (available at *www.cpars.csd.disa.mil*, then select FAPIIS) and enter the requested information.

(2) The suspending official is responsible for the timely submission, within 3 working days, and accuracy of the documentation regarding the administrative agreement.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 11. Amend section 12.301 in paragraph (d) by adding paragraphs (d)(3) and (d)(4) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(d) * * *

(3) Insert the provision at 52.209–7, Information Regarding Responsibility Matters, as prescribed in 9.104–7(b).

(4) Insert the clause at 52.209–8, Updates of Information Regarding Responsibility Matters, as prescribed in 9.104–7(c).

* * * * *

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

42.1503 [Amended]

■ 12. Amend section 42.1503 in paragraph (e) by removing "order." and adding "order, and information contained in the Federal Awardee Performance and Integrity Information System (FAPIIS) *e.g.*, terminations for default or cause." in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.203–13 [Amended]

■ 13. Amend section 52.203–13 by removing from the clause heading "(Dec 2008)" and adding "(Apr 2010)" in its place; and removing from the definition "Principal" the words "subsidiary, division, or" and adding "division or" in its place.

52.209–5 [Amended]

■ 14. Amend section 52.209–5 by—

■ a. Removing from the introductory paragraph "9.104–6" and adding "9.104–7(a)" in its place;

■ b. Removing from the clause heading "(Dec 2008)" and adding "(Apr 2010)" in its place;

■ c. Removing from paragraph (a)(1)(i)(B) "state" and adding "State" in its place, wherever it occurs (twice), and removing "property;" and adding "property (if offeror checks "have", the offeror shall also see 52.209–7, if included in this solicitation);" in its place; and

■ d. Removing from paragraph (a)(2) "subsidiary, division, or" and adding "division or" in its place.
■ 15. Add sections 52.209–7 and 52.209–8 to read as follows:

52.209–7 Information Regarding Responsibility Matters.

As prescribed at 9.104–7(b), insert the following provision:

INFORMATION REGARDING RESPONSIBILITY MATTERS (Apr 2010)

(a) *Definitions.* As used in this provision—

Administrative proceeding means a non-judicial process that is adjudicatory in nature in order 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 connection 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.

Federal contracts and grants with total value greater than $10,000,000 means—

(1) The total value of all current, active contracts and grants, including all priced options; and

(2) The total value of all current, active orders including all priced options under indefinite-delivery, indefinite-quantity, 8(a), or requirements contracts (including task and delivery and multiple-award Schedules).

(b) The offeror [ ] has [ ] does not have current active Federal contracts and grants with total value greater than $10,000,000.

(c) If the offeror checked "has" in paragraph (b) of this provision, the offeror represents, by submission of this offer, that the information it has entered in the Federal Awardee Performance and Integrity Information System (FAPIIS) is current, accurate, and complete as of the date of submission of this offer with regard to the following information:

(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.

(2) If the offeror has been involved in the last five years in any of the occurrences listed in (c)(1) of this provision, whether the offeror has provided the requested information with regard to each occurrence.

(d) The offeror shall enter the information in paragraphs (c)(1)(i) through (c)(1)(iv) of this provision in FAPIIS as required through maintaining an active registration in the Central Contractor Registration database at *http://www.ccr.gov* (see 52.204–7).

Principal means an officer, director, owner, partner, or a 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).

(End of provision)

52.209–8 Updates of Information Regarding Responsibility Matters.

As prescribed at 9.104–7(c), insert the following clause:

UPDATES OF INFORMATION REGARDING RESPONSIBILITY MATTERS (Apr 2010)

(a) The Contractor shall update the information in the Federal Awardee Performance and Integrity Information System (FAPIIS) on a semi-annual basis, throughout the life of the contract, by entering the required information in the Central Contractor Registration database at *http://www.ccr.gov* (see 52.204–7).

(b)(1) The Contractor will receive notification when the Government posts new information to the Contractor's record.

(2) The Contractor will have an opportunity to post comments regarding information that has been posted by the Government. The comments will be retained as long as the associated information is retained, *i.e.*, for a total period of 6 years. Contractor comments will remain a part of the record unless the Contractor revises them.

(3) With the exception of the Contractor, only Government personnel and authorized users performing business on behalf of the Government will be able to view the Contractor's record in the system. Public requests for system information will be handled under Freedom of Information Act procedures, including, where appropriate, procedures promulgated under E.O. 12600.

(End of clause)

52.212–5 [Amended]

■ 16. Amend section 52.212–5 by—
■ a. Removing from the clause heading "(Feb 2010)" and adding "(Apr 2010)" in its place;
■ b. Removing from paragraphs (b)(2) and (e)(1)(i) "(Dec 2008)" and adding "(Apr 2010)" in its place;
■ c. Removing from Alternate II "(Dec 2009)" and adding "(Apr 2010)" in its place; and
■ d. Removing from Alternate II paragraph (e)(1)(ii)(A) "(Dec 2008)" and adding "(Apr 2010)" in its place.

52.213–4 [Amended]

■ 17. Amend section 52.213–4 by removing from the clause heading and paragraph (a)(2)(vi) "(Dec 2009)" and adding "(Apr 2010)" in its place.

52.244–6 [Amended]

■ 18. Amend section 52.244–6 by removing from the clause heading "(Dec 2009)" and adding "(Apr 2010)" in its place; and removing from paragraph (c)(1)(i) "(Dec 2008)" and adding "(Apr 2010)" in its place.

[FR Doc. 2010–6329 Filed 3–22–10; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2010–0077, Sequence 2]

Federal Acquisition Regulation; Federal Acquisition Circular 2005–40; Small Entity Compliance Guide

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the