

ALERT

Proposed FAR Rule Would Require FAPIIS Reporting and Consideration of Immediate Owners, Predecessor Organizations and Subsidiaries in Making Responsibility Determinations

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On December 4, 2014, the Federal Acquisition Regulation (FAR) Council issued a proposed rule that would require contractors to include in their reporting in the Federal Awardee Performance and Integrity Information System (FAPIIS) information on certain parent and predecessor organizations. 79 Fed. Reg. 71975 (Dec. 4, 2014). The proposed rule is intended to implement Section 852 of the Fiscal Year 2013 National Defense Authorization Act (NDAA), Pub. L. No. 112-239 and provide acquisition professionals a broader view of the responsibility and integrity of organizations as a whole. Thus, the proposed rule requires contracting officers when making responsibility determinations to consider all information available in FAPIIS with regard to the offeror and any immediate owner, subsidiary, and certain predecessors of the offeror.

The FAR Council proposes some limitations on this reporting obligation. For example, the Council noted that “the further the distance between the entities, the less relevant the information is likely to be for establishing the responsibility of the offeror” and that the cost of monitoring and reporting changes in ownership and corporate structure could be burdensome. Accordingly, the Council proposes that contracting officers consider data on the “immediate” owner of an entity and the “direct” subsidiary only. Information on the immediate owner of an entity is also required to be reported and thus available under FAR 52.204-17, Ownership or Control of Offeror,

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which went into effect November 1, 2014.

The FAR Council also noted that although the NDAA requests information on “successors,” because an offeror is necessarily a successor organization, the rule will require information on predecessor organizations that received a federal contract or grant within the prior three years. This information on predecessors will appear in both FAPIIS and the System for Award Management (SAM). The three-year limit is intended to be consistent with the general practice of reviewing three years of past performance information to make responsibility determinations in procurements. The proposed rule includes definitions of the terms “predecessors” and “successors,” which indicate, among other things, that a mere name change does not create a “successor,” nor does the term include new offices or divisions of the same company. The FAR Council noted that with respect to a name change, so long as the CAGE Code for the entity is the same, FAPIIS will have information on the entity.

The FAR Council further determined that separate, additional reporting on subsidiaries is not required (even though consideration of subsidiary past performance is required) as a result of the requirements of FAR 52.204-17, FAR 52.204-18, Commercial and Government Entity Code Maintenance, and the linkage between SAM and FAPIIS: “It is not necessary to request information on subsidiaries from the offeror, because if the subsidiary is in the SAM database, the subsidiary will provide the information on its immediate owner, which would then be shared with FAPIIS. If the subsidiary has not received any Government awards, the subsidiary will have no information available in FAPIIS, making it unnecessary for the owner to identify such a relationship.” The FAR Council also declined to define “subsidiary,” because the identification of an immediate “owner” will, by necessity, indicate that an entity is a subsidiary.

Because of the requirements of Section 3010 of the Supplemental Appropriations Act of 2010, Pub. L. No. 111-212, which required all information in FAPIIS, except for past performance information, to be publicly available, information on immediate owners, subsidiaries, and predecessors will be made available to the public. In addition, just as FAPIIS reporting applies to procurements of commercial and commercial-off-the-shelf items, so too does the proposed owner and predecessor reporting requirement.

The proposed rule is noteworthy for its attempts to reconcile and reduce additional reporting by relying on linkages between FAPIIS and SAM. The more pressing issue for contractors is how agencies use information on predecessor organizations, subsidiaries, or immediate owners in making responsibility determinations. Responsibility determinations can be difficult to challenge. Therefore, contractors who may have blemishes in their records from predecessors or with respect to immediate owners or subsidiaries should be prepared to offer explanations.