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MEMORANDUM

To: Clients and Friends

From: Pamela J. Mazza
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Date: February 2, 2011

Re: **FAPIS GOES PUBLIC**

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The rule implementing the Federal Awardee Performance and Integrity Information System (FAPIS), also known as the “bad boys list,” became effective last April 22, 2010. Last week, an interim rule was issued notifying contractors that the information contained in FAPIS, except for performance reviews, will be made available to the public on April 15, 2011. FAPIS consolidates information from various federal databases such as the Excluded Parties List System (EPLS), the Past Performance Information Retrieval System (PPIRS) and the Contractor Performance Assessment Reporting System (CPARS).

The FAPIS final rule requires Contracting Officers to report in FAPIS non-responsibility determinations, contract terminations for default or cause, agency defective pricing determinations, and administrative agreements executed pursuant to a suspension or debarment proceeding. In addition, contractors who submit a proposal for a contract valued at greater than \$500,000 and have more than \$10 million in active contracts at that time must report information regarding civil, criminal and administrative proceedings involving the contractor or its principals. Specifically, a contractor must report criminal convictions, civil and administrative proceedings that result in a finding of fault or liability and settlements involving an acknowledgement of fault by the contractor. The contractor information should be submitted through CCR, which feeds into FAPIS. Contracting Officers must review FAPIS in making responsibility determinations for every contract award above the Simplified Acquisition Threshold (\$150,000).

Implementation of FAPIIS was a key part of the Administration's efforts "to enhance the Government's ability to evaluate the business ethics and quality of prospective contractors" competing for federal contracts. However, when it was implemented last year, FAPIIS was supposed to be accessible only by federal "acquisition officials," and certain other Government officials and Members of Congress. Indeed, in the preamble to the final rule, the FAR Council stated that it did not believe that "Congress intended this database to be accessible by the public." That changed with an amendment to the Supplemental Appropriations Bill of 2010, enacted July 29, 2010. The amendment requires that FAPIIS data, excluding past performance reviews, be available to the public. The interim rule issued this week implements this legislation.

Other than the reference to the "past performance reviews" exception, the interim rule does not provide any guidance regarding the scope of data available to the public through FAPIIS. In the preamble to the final rule implementing FAPIIS, the Government acknowledged that some information in FAPIIS could be considered "source selection sensitive information" and that access to such information should be controlled. For this reason, under the existing FAPIIS rule, a contractor is permitted to review only its information in the system and not information regarding other contractors. The interim rule, however, does not institute any controls with respect to the information included in FAPIIS and made available to the public. Instead, the interim simply cautions Contracting Officers to "ensure they do not post information in the system *on or after April 15, 2011* that would create a harm protected by a disclosure exemption under FOIA." The interim rule cites, as an example, the potential need to redact "documentation supporting a non-responsibility determination or default termination." No other guidance, to contractors or Contracting Officers, is provided.

This lack of guidance creates a good bit of uncertainty and legitimate concern regarding the nature of contractor information that will be disclosed to the public through FAPIIS. In theory, information in FAPIIS was always available to the public under the Freedom of Information Act (FOIA). In fact, obtaining access to contractor information under FOIA is not that easy. While the Act sets forth a presumption that all agency records should be disclosed to the public, the Act contains many exemptions, including one for contractor proprietary and confidential information. FOIA also requires a public request for release of agency records to identify the specific information sought and permits a contractor to review the request and challenge its release under a FOIA exemption or exception. Determining whether an agency record falls within a FOIA exemption, moreover, is not always a straightforward matter. Typically, agency personnel dedicated to and knowledgeable of FOIA matters make the decision to release information under FOIA. Even so, there are many cases each year in which the scope and application of a FOIA exemption is hotly debated. The suggestion that a Contracting Officer will have the sole discretion to decide the scope of information included in FAPIIS, therefore, is troubling. Having a contracting official unfamiliar with FOIA case law and on his or her own determine the scope of information included in FAPIIS likely will result in inconsistencies in the scope of information included for different contractors. It also likely will result in information being made available to the public through FAPIIS that otherwise might have been protected from release under FOIA (or another federal statute such as the Privacy Act).

Notwithstanding these disclosure issues, the FAR Council implemented the 2010 legislation through an interim rule rather a proposed rule. According to the interim rule, the FAR Council did so because the provision making FAPIIS public was effective upon enactment of the 2010 supplemental appropriations bill last July. Many groups have criticized the Government's delay in issuing the rule. The FAR Council does note that it is still considering "the need for additional regulatory or other guidance" regarding the public's access to FAPIIS and welcomes comments on the issue. Unfortunately, comments are due March 25, 2011, only three weeks before the date on which the public will have access to FAPIIS.

We recommend that contractors not wait for final guidance to be issued before challenging the release of certain FAPIIS information to the public. Contractors should review information currently in FAPIIS and immediately identify the information they believe is protected from release under federal law or regulation. The proprietary nature of the information should be brought to the attention to those Contracting Officers who reported the information, along with a request that the information or parts thereof be removed from the system. The interim rule also serves as a reminder to contractors to be increasingly vigilant in identifying proprietary and confidential information in materials submitted to the Government. The FAR contains specific instructions as to those markings necessary to protect proprietary and confidential information included in proposals submitted to the Government and on data delivered to the Government under a contract. Where no specific instructions are provided for other types of documents or materials, contractors should not only indicate on the cover page of such document the proprietary nature of the information contained in the document, contractors should also stamp as proprietary and confidential each page of the document in which confidential and proprietary information appears.

We are available to discuss any questions or concerns you may have with the interim rule, please do not hesitate to contact us at (202) 857-1000.