

Center for American Progress Action Fund



November 4, 2009

ATTN: Hada Flowers
General Services Administration
Regulatory Secretariat (VPR)
1800 F Street, NW Room 4041
Washington, DC 20405

Regarding: FAR Case 2008-027

Dear Ms. Flowers:

The Center for American Progress Action Fund would like to submit comments on the proposed regulations (FAR Case 2008-027) to require the General Services Administration to establish and maintain a contractor responsibility database.

The new Federal Awardee Performance and Integrity Information System is a step in the right direction. Contracting officers have for too long lacked access to important responsibility data, and the federal government thus continues to award new contracts to companies with a track record of legal violations. The new contractor responsibility database can help ensure that the federal government awards contracts to responsible companies.

Yet the draft regulations fall short in key areas that impede a rigorous responsibility review and potentially allow significant and/or repeat violators of workplace and other laws to receive federal contracts. The draft regulations interpret the Duncan Hunter National Defense Authorization Act for fiscal year 2009 in an overly narrow manner and miss important opportunities to significantly improve the database and the responsibility determination process. The regulations therefore seem disconnected from the core purpose of the legislation, which is to ensure that the government only does business with responsible companies by providing essential information about the legal compliance record of federal contractors for use in responsibility determinations and past performance evaluations.

The administration can correct these major shortcomings with the following recommendations:

- The database should do a much better job tracking a company's complete record of legal compliance.
- Contracting officers should receive guidance on how to use the database to assess a company's responsibility.
- The database should be available to the public.

Database should track contractors' complete records

Contracting officers need a complete and accurate account of a contractor's record of complying with the law in order to make accurate responsibility determinations. Yet the proposed draft regulations do a poor job of clarifying what data will be included in the FAPIIS, and appear to restrict data collection and exclude far more records than intended by the database's authorizing legislation. The FAPIIS would not give a full account of the compliance records on federal contracts of potential bidders: Data on legal proceedings would be too dependent on contractor self-reporting rather than official records, and serious violations would be excluded from the database.

The draft regulations appear to leave the database heavily reliant on data self-reported by companies, ignoring numerous records on company compliance that the government already maintains. The regulations do not discuss collecting data from other agencies and departments that maintain data on criminal, civil, and administrative proceedings, such as the Internal Revenue Service, Department of Justice, Environmental Protection Agency, or Department of Labor. In other words, the database will be missing essential government information about a contractor's legal record. It appears, for example, that the database will not include many serious health and safety violations on federal contracts that are currently maintained by the Department of Labor—even those that result in payments that exceed the law's monetary thresholds.

Also, only firms receiving the most lucrative contracts would be required to self-report; and, contrary to legislative intent, there appears to be no tracking of several types of violations for firms receiving contracts of lesser values. The 2009 National Defense Authorization Act included two reporting thresholds: (1) the database is required to include responsibility data, including information on criminal, civil, and administrative proceedings, on any firm receiving a contract or grant over \$500,000; (2) firms with cumulative, active federal contracts and grants valued at over \$10 million are required to self-report on the same information semi-annually, as well.

The database as proposed would omit proactive collection of data on criminal, civil, and administrative proceedings, which means that it will contain very little information about firms with contracts and grants valued at more than \$500,000 but less than the threshold for self-reporting. As a result, the government would be especially likely to award contracts to non-responsible firms of this size.

Self-reported data is important, but the regulations must be revised to take advantage of data that the government already has to ensure a complete record of company compliance and protect FAPIIS data quality.

The regulations should require that the database be populated by proactive collection of compliance records from public enforcement agencies. Doing so would support the data quality goals of the legislation and of this administration. Vivek Kundra, Federal Chief Information Officer and Administrator for Electronic Government and Information Technology at the Office of Management and Budget, concluded in a recent Senate hearing on the "Transparency and Accessibility of Federal Contracting Databases" that, "We must continue to focus on improving data quality, increasing transparency, and enhancing service delivery."¹

Finally, the 2009 National Defense Authorization Act excludes serious violations from the database, and the draft regulations closely adhere to these limitations while ignoring the law's openness to additional data col-

lection. The database will only include the legal violations committed by a company while working on federal contracts or grants, but not information on recipients' private sector compliance history. This means that contracting officers may miss more than half the story about a company's record of compliance.

The database's \$100,000 threshold for reimbursement, restitution, or damages is also too high. This is especially significant in the context of labor and employment law because violations often result in orders for reimbursement of back pay—rather than fines—and they frequently fall below the \$100,000 threshold. Because companies that shortchange their workers often shortchange taxpayers in the quality of work they provide, it is essential that workplace violations be considered in responsibility determinations.²

The 2009 National Defense Authorization Act includes these limitations, but the law also explicitly allows the administration to include “other information” relevant to making an informed responsibility determination—such as violations that occur on non-governmental work or that fall below monetary thresholds.

The database would ideally include all legal violations, including labor and employment settlements that occur post-government-complaint. But the draft regulations should at a minimum include instructions for agency administrative/adjudicatory bodies to report on enforcement data omitted by the responsibility database in a format that is easy for contracting officers to consider when making responsibility determinations, such as with a unique employer identification number. This would help contracting officers comply with the instructions in the 2009 National Defense Authorization Act authorizing language that they “consider other past performance information available with respect to the offeror in making any responsibility determination.” It would also help ensure that other ongoing or future data collection and dissemination efforts planned by the administration are compatible.

Contracting officers should receive guidance

In order to ensure effective use of the FAPIIS, enabling regulations should create a system for contracting officers to receive guidance on how to interpret offerors' responsibility records.

The FAPIIS is supposed to represent a new tool in determining contractor responsibility, but the regulations provide no guidance on how to evaluate whether bidders demonstrate “a satisfactory record of integrity and business ethics.” Without such guidance, contracting officers will undertake the difficult and inefficient process of sifting through millions of compliance records and making decisions about whether past violations are enough to find a contractor not responsible. As a result, the database may not be able to form the basis of rigorous responsibility reviews as Congress intended.

The draft regulations should supplement the compliance data by requiring contracting officers to be provided with narrative analyses of offerors' responsibility records. A centralized body should provide analysis on prospective offerors' record of compliance, the severity of any non-compliance, and any systems that companies have put in place to correct violations and prevent future occurrences to contracting officers or other officials for use in making responsibility determinations and evaluating past performance. This centralized body could also help verify information self-reported by contractors.

Database should be public

It is not expressly called for in the 2009 National Defense Authorization Act, but the administration can and should make the responsibility database publicly available online. The draft regulations currently state that the FAPIIS will only be accessible to federal government personnel and contractors that may view their own information. Yet the public has a right to know about the responsibility records of contractors receiving billions of taxpayer dollars every year, and much of the data is publicly available elsewhere. Sunlight is a powerful force that can expose wasteful and abusive contracts and help ensure that the government only does business with responsible contractors.

Public access fits with existing laws and goals of the administration. The Freedom of Information Act requires agencies to proactively identify government documents falling within its scope that will receive multiple public requests and make them available, which is likely for at least most of the data included in the FAPIIS.³ President Barack Obama also stated at the beginning of his term that, “all agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government.”⁴ And while then-Senator Obama sponsored the “Strengthening Transparency and Accountability in Federal Spending Act of 2008,” that would have made contractor responsibility data publicly available.

Thank you for your consideration of these comments.

Sincerely,

David Madland
Director, American Worker Project
Center for American Progress Action Fund

Endnotes

- 1 Vivek Kundra, Federal Chief Information Officer and Administrator for Electronic Government and Information Technology at the Office of Management and Budget, “Statement before the Senate Homeland Security and Governmental Affairs, Ad Hoc Subcommittee on Contracting Oversight,” September 29, 2009, available at <http://mccaskill.senate.gov/issues/soco/docs.cfm>.
- 2 U.S. Department of Housing and Urban Development, Office of Inspector General, Audit Report on Monitoring and Enforcing Labor Standards (1983), cited in Dale Belman and Paula Voos, “Prevailing Wage Laws in Construction: The Costs of Repeal to Wisconsin” (Madison: University of Wisconsin, January 1996); Moshe Adler, “Prequalification of Contractors: The Importance of Responsible Contracting on Public Works Projects” (New York: Fiscal Policy Institute, May 2003); and David Madland and Michael Paarlberg, “Making Contracting Work for the United States” (Washington: Center for American Progress Action Fund, 2008).
- 3 See 5 U.S.C. § 552 (a) (2).
- 4 President Barack Obama, “Memorandum to the Heads of Executive Departments and Agencies on the Subject of the Freedom of Information Act,” January 21, 2009, available at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/.