

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2011-0076, Sequence 1]

Federal Acquisition Regulation; Federal Acquisition Circular 2005-49; Introduction

AGENCY: Department of Defense (DoD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

ACTION: Summary presentation of rules.

SUMMARY: This document summarizes the Federal Acquisition Regulation (FAR) rules agreed to by DOD, GSA, and NASA in this Federal Acquisition Circular (FAC) 2005-49. A companion document, the *Small Entity Compliance Guide* (SECG), follows this FAC. The FAC, including the SECG, is available via the Internet at <http://www.regulations.gov>.

DATES: For effective dates see separate documents, which follow.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below in relation to each FAR case. Please cite FAC 2005-49 and the specific FAR case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755.

LIST OF RULE IN FAC 2005-49

Subject	FAR case	Analyst
Public Access to the Federal Awardee Performance and Integrity Information System (Interim)	2010-016	Loeb.

SUPPLEMENTARY INFORMATION: A summary for the FAR rule follows. For the actual revisions and/or amendments made by this FAR case, refer to FAR Case 2010-016.

FAC 2005-49 amends the FAR as specified below:

Public Access to the Federal Awardee Performance and Integrity Information System (FAR Case 2010-016) (Interim)

This interim rule amends the FAR to implement section 3010 of the Supplemental Appropriations Act, 2010 (Pub. L. 111-212), enacted July 29, 2010. Section 3010 requires that the Administrator of the General Services post all information contained in the Federal Awardee Performance and Integrity Information System (FAPIIS), excluding past performance reviews, on a publicly available Web site.

This interim rule notifies contractors that FAPIIS data, excluding past performance reviews, will be available to the public after a certain date, and creates a new FAR clause to support the posting of information in FAPIIS. Contracting officers are encouraged to the extent feasible to amend existing solicitations in accordance with FAR 1.108(d), in order to include this revised clause in contracts to be awarded on or after the effective date of this rule.

Dated: January 19, 2011.

Michael O. Jackson,

Acting Director, Office of Governmentwide Acquisition Policy.

[FR Doc. 2011-1324 Filed 1-21-11; 8:45 am]

BILLING CODE 6820-EP-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 9, 12, and 52

[FAC 2005-49; FAR Case 2010-016; Docket 2010-0016, Sequence 1]

RIN 9000-AL94

Federal Acquisition Regulation; Public Access to the Federal Awardee Performance and Integrity Information System

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

ACTION: Interim rule.

SUMMARY: DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 3010 of Supplemental Appropriations Act, 2010. Section 3010 requires that the information in the Federal Awardee Performance and Integrity Information System (FAPIIS), excluding past performance reviews, shall be made publicly available. This interim rule notifies contractors of this new statutory requirement for public access to FAPIIS and creates a new FAR clause to support the posting of information in FAPIIS consistent with section 3010. All information posted in FAPIIS on or after April 15, 2011, except for past performance reviews, will be publicly available.

DATES: *Effective Date:* January 24, 2011.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before March 25, 2011 to be considered in the formulation of a final rule.

Applicability Date: This rule applies to solicitations issued on or after January 24, 2011. Contracting officers are encouraged, to the extent feasible, to amend existing solicitations in accordance with FAR 1.108(d), in order to include the clause at FAR 52.209-9 in contracts to be awarded on or after January 24, 2011. Prior to April 15, 2011, contracting officers shall bilaterally modify existing contracts, including indefinite-delivery indefinite-quantity contracts, that contain the clause 52.209-8, Updates of Information Regarding Responsibility Matters, if a six-month update will be due on or after April 15, 2011. The modification shall replace the clause 52.209-8 with a new clause 52.209-9, Updates of Publicly Available Information Regarding Responsibility Matters, Alternate I (JAN 2011). If the contracting officer is unable to negotiate this modification prior to April 15, 2011, the contracting officer shall obtain approval at least one level above the contracting officer to negotiate an alternate resolution.

ADDRESSES: Submit comments identified by FAC 2005-49, FAR Case 2010-016, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting "FAR Case 2010-016" under the heading "Enter Keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds

with “FAR Case 2010–016.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2010–016” on your attached document.

- *Fax:* (202) 501–4067.
- *Mail:* General Services

Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, NE., 7th Floor, Washington, DC 20417.

Instructions: Please submit comments only and cite FAC 2005–49, FAR Case 2010–016, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Loeb, Procurement Analyst, at (202) 501–0650 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–49, FAR Case 2010–016.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a final rule in the **Federal Register** at 75 FR 14059 on March 23, 2010, FAR Case 2008–027, Federal Awardee Performance and Integrity Information System, to implement the requirements of FAPIIS. This rule became effective on April 22, 2010. That rulemaking and the associated launch of FAPIIS in April 2010 are part of an ongoing effort by the Administration to enhance the Government’s ability to evaluate the business ethics and quality of prospective contractors competing for Federal contracts. That rulemaking also addresses requirements set forth in section 872 of the Clean Contracting Act of 2008 (subtitle G of title VIII of Pub. L. 110–417) (41 U.S.C. 417b) for a system containing specific information on the integrity and performance of covered Federal agency contractors. Additional information on FAR Case 2008–027 may be found in the **Federal Register** at 75 FR 14059, March 23, 2010.

With respect to the availability of information in FAPIIS, section 872(e)(1) states, in pertinent part, that the Administrator of General Services “shall ensure that the information in the database is available to appropriate acquisition officials of Federal agencies and to such other government officials as the Administrator determines appropriate.” Section 3010 of the Supplemental Appropriations Act, 2010

(Pub. L. 111–212), enacted July 29, 2010, modifies section 872(e)(1) to require that the Administrator of General Services post all FAPIIS information, excluding past performance reviews, on a publicly available Web site. FAPIIS will now become the publicly available Web site.

To comply with section 3010, this preamble contains instructions to contracting officers on modifying existing contracts to incorporate the new clause. To begin the transition process and lessen the number of contracts that will require modification when the interim rule is published, the Department of Defense’s Director of Defense Procurement and Acquisition Policy issued a Class Deviation for the Department on October 12, 2010 (*see* <http://www.acq.osd.mil/dpap/policy/policyvault/USA005830-10-DPAP.pdf>). On October 14, 2010, the Civilian Agency Acquisition Council (CAAC) Chair issued a Consultation for Class Deviation letter recommending that civilian agencies authorize a class deviation (*see* <https://www.acquisition.gov/comp/caac/caacletters/CAAC-Letter-2011-01.pdf>). Both the DoD deviation and the CAAC letter provide a contract clause that complies with section 3010 and was expected to be included in the interim rule. Agencies were encouraged to take advantage of the deviations until this FAPIIS interim rule became effective. To implement section 3010, the following steps have been, or are being taken:

1. *Enhanced FAPIIS functionality.* The Managers of the FAPIIS system, in consultation with the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils), are making changes to the FAPIIS architecture to support the transparency requirements of section 3010. The current architecture, consistent with the rule effective on April 22, 2010, provides a one-stop information system to help acquisition officials make informed decisions about an offeror’s business integrity, but lacks the functionality to make information immediately available to the public as it is posted in the system. On and after April 15, 2011, when system changes are completed, information posted to FAPIIS by offerors, contractors, and Government personnel will be publicly available in accordance with section 3010.

2. *New FAR clause.* The Councils have developed a new FAR clause 52.209–9, Updates of Publicly Available Information Regarding Responsibility Matters, to replace the current FAR clause 52.209–8, Updates of Information

Regarding Responsibility Matters. The current clause states that only Government personnel and authorized users performing business on behalf of the Government will have access to a contractor’s record in the FAPIIS system. The new clause does not include this statement but instead provides notice to contractors that all information posted in FAPIIS on or after April 15, 2011, except past performance reviews, will be publicly available. The new clause also states that requests to review the information posted in FAPIIS before April 15, 2011, will be subject to the Freedom of Information Act (FOIA) process.

The new FAR clause will be implemented in the following manner:

a. *New contracts.* On or after the effective date of this interim rule, contracting officers will be required to insert the FAR clause 52.209–9, in accordance with the prescription at FAR 9.104–7(c), in solicitations issued on or after the date of this rule and resultant contracts. As explained immediately above in paragraph 2. of this Background, information posted under the new clause on or after April 15, 2011, except for past performance reviews, will be released to the public. Information posted before April 15, 2011, will continue to be handled under FOIA. However, the clause at FAR 52.209–9, Alternate I, requires this information to be reposted if a six-month update will be due on or after April 15, 2011. The reposted information will be made available to the public.

b. *Existing contracts.* Prior to April 15, 2011, contracting officers will be required to bilaterally modify existing contracts (including indefinite-delivery indefinite-quantity contracts) that contain the FAR clause 52.209–8, if a six-month update will be due on or after April 15, 2011. The modification shall replace the FAR clause 52.209–8 with the new FAR clause 52.209–9. If the contracting officer is unable to negotiate this modification prior to April 15, 2011, the contracting officer will be required to obtain approval at least one level above the contracting officer to negotiate an alternate resolution.

3. *FAPIIS and CCR Notice.* A notice has been posted on the FAPIIS Web site, available at <http://www.cpars.csd.disa.mil/FAPIISmain.htm>, as well as on the Central Contractor Registration at <http://www.ccr.gov> through which offerors submit certain information to FAPIIS to alert offerors, contractors, and Government officials to the requirements of section 3010 and the actions they need to take in

implementing this law. For contracting officers, this includes taking appropriate steps to ensure that 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. For example, heightened attention might need to be given to whether documentation supporting a non-responsibility determination or termination for default decision should be redacted before the determination or decision is posted.

The Federal Acquisition Regulatory Council (OFPP, DoD, GSA, and NASA) are continuing to consider the need for additional regulatory or other guidance to address the implementation of section 3010 and welcome public comment on this issue.

Finally, this rule makes several conforming changes and technical corrections:

- FAR 9.104-7 and 12.301—Modifies the clause prescriptions to prescribe the new clause.
- FAR 52.209-7—Relocates the definition of “Principal”, in alphabetical order, in paragraph (a) of the clause.

II. Executive Order 12866

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.

III. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this interim rule to 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 just notifies the contractors that the public will have access to the database. The rule does not impose any new burdens on small entities but just makes editorial changes to 52.209-7 and transfers the information collection requirement of 52.209-8 to new clause 52.209-9.

Therefore, an Initial Regulatory Flexibility Analysis has not been performed. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005-49, FAR Case 2010-016), in correspondence.

IV. Paperwork Reduction Act

The interim rule does not contain any new information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). The existing burden hours for the information collection requirements that will now be in 52.209-7 and 52.209-9 were initially approved under OMB clearance 9000-0174 with regard to FAR Case 2008-027, with a reference only to 52.209-7, because initially all burdens were included in that provision. However, in the final rule under FAR Case 2008-027, the ongoing portion of the reporting to FAPIIS was separated out of the FAR provision 52.209-7 and incorporated into FAR clause 52.209-8. This transfer did not change the number of approved hours. In this case, the burden for 52.209-8 is transferred to 52.209-9, again without any change to the burden hours initially approved under OMB clearance 9000-0174.

V. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the rule implements section 3010 of the Supplemental Appropriations Act, 2010 (Pub. L. 111-212), which was signed on July 29, 2010, and was effective upon enactment. However, pursuant to 41 U.S.C. 418b and FAR 1.501-3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 1, 9, 12, and 52

Government procurement.

Dated: January 19, 2011.

Michael O. Jackson,

Acting Director, Office of Governmentwide Acquisition Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 9, 12, and 52 as set forth below:

- 1. The authority citation for 48 CFR parts 1, 9, 12, 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 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

- 2. Amend section 1.106, in the table following the introductory text, by adding in numerical sequence, FAR segment “52.209-7” and its corresponding OMB Control Number “9000-0174”, and FAR segment “52.209-9” and its corresponding OMB Control Number “9000-0174”.

PART 9—CONTRACTOR QUALIFICATIONS

- 3. Amend section 9.104-7 by revising paragraph (c) to read as follows:

9.104-7 Solicitation provisions and contract clauses.

* * * * *

(c)(1) The contracting officer shall insert the clause at 52.209-9, Updates of Publicly Available Information Regarding Responsibility Matters—

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

(ii) In contracts in which the offeror checked “has” in paragraph (b) of the provision 52.209-7.

(2) For solicitations issued prior to April 15, 2011, and resultant contracts, use the clause with its Alternate I.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

- 4. Amend section 12.301 by revising paragraph (d)(4) to read as follows:

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

* * * * *

(d) * * *

(4)(i) Insert the clause at 52.209-9, Updates of Publicly Available Information Regarding Responsibility Matters, as prescribed in 9.104-7(c).

(ii) Use the clause with its Alternate I as prescribed in 9.104-7(c)(2).

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 5. Amend section 52.209-7 by—
 - a. Revising the date of the provision;
 - b. Adding to paragraph (a), in alphabetical order, the definition “Principal”;
 - c. Removing from paragraph (d) the word “enter” and adding the word “post” in its place; and
 - d. Removing the undesignated paragraph that follows paragraph (d).
The revised and added text reads as follows:

52.209-7 Information Regarding Responsibility Matters.

* * * * *

Information Regarding Responsibility Matters (JAN 2011)

(a) * * *

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).

* * * * *

52.209-8 [Removed and reserved]

- 6. Remove and reserve section 52.209-8.
- 7. Add section 52.209-9 to read as follows:

52.209-9 Updates of Publicly Available Information Regarding Responsibility Matters.

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

Updates of Publicly Available Information Regarding Responsibility Matters (JAN 2011)

(a) The Contractor shall update the information in the Federal Awardee Performance and Integrity Information System (FAPIS) on a semi-annual basis, throughout the life of the contract, by posting the required information in the Central Contractor Registration database at <http://www.ccr.gov>.

(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)(i) Public requests for system information posted prior to April 15, 2011, will be handled under Freedom of Information Act procedures, including, where appropriate, procedures promulgated under E.O. 12600.

(ii) As required by section 3010 of Public Law 111-212, all information posted in FAPIS on or after April 15, 2011, except past performance reviews, will be publicly available.

(End of clause)

Alternate I (JAN 2011). As prescribed in 9.104-7(c)(2), redesignate paragraph (a) of the basic clause as paragraph (a)(1) and add the following paragraph (a)(2):

(2) At the first semi-annual update on or after April 15, 2011, the Contractor shall post again any required information that the Contractor posted prior to April 15, 2011.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

[Docket FAR 2011-0077, Sequence 1]

Federal Acquisition Regulation; Federal Acquisition Circular 2005-49; Small Entity Compliance Guide

AGENCY: Department of Defense (DoD), General Services Administration (GSA),

LIST OF RULE IN FAC 2005-49

Subject	FAR case	Analyst
Public Access to the Federal Awardee Performance and Integrity Information System (Interim)	2010-016	Loeb.

SUPPLEMENTARY INFORMATION: A summary for the FAR rule follows. For the actual revisions and/or amendments made by this FAR case, refer to FAR Case 2010-016.

FAC 2005-49 amends the FAR as specified below:

Public Access to the Federal Awardee Performance and Integrity Information System (FAR Case 2010-016) (Interim)

This interim rule amends the FAR to implement section 3010 of the Supplemental Appropriations Act, 2010

(Pub. L. 111-212), enacted July 29, 2010. Section 3010 requires that the Administrator of the General Services post all information contained in the Federal Awardee Performance and Integrity Information System (FAPIS), excluding past performance reviews, on a publicly available Web site.

This interim rule notifies contractors that FAPIS data, excluding past performance reviews, will be available to the public after a certain date, and creates a new FAR clause to support the posting of information in FAPIS.

and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of DOD, GSA, and NASA. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2005-49, which amend the Federal Acquisition Regulation (FAR). Interested parties may obtain further information regarding these rules by referring to FAC 2005-49, which precedes this document. The documents are also available via the Internet at <http://www.regulations.gov>.

DATES: For effective dates see separate documents, which follow.

FOR FURTHER INFORMATION CONTACT: The analyst whose name appears in the table below. Please cite FAC 2005-49 and the specific FAR case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755.

Contracting officers are encouraged to the extent feasible to amend existing solicitations in accordance with FAR 1.108(d), in order to include this revised clause in contracts to be awarded on or after the effective date of this rule.

Dated: January 19, 2011.

Michael O. Jackson,
Acting Director, Office of Governmentwide Acquisition Policy.

[FR Doc. 2011-1322 Filed 1-21-11; 8:45 am]

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