

Failure to disclose can cost you a government contract

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Government contractors expend considerable resources identifying business opportunities and preparing winning proposals. Although it was ultimately unsuccessful, a recent Government Accountability Office (GAO) bid protest serves as a useful reminder that contractors must also be diligent with regard to its disclosure obligations in order to not undermine those business acquisition efforts.

Required disclosures regarding criminal, civil, and administrative matters

The government requires that contractors make a host of certifications and representations as part of annual registration obligations and in proposals. Among the most important of those representations are those required by FAR 52.209-7, Information Regarding Responsibility Matters.

For offerors with federal contractors and grants with a total value, including all priced options, greater than \$10 million, that provision requires contractors to disclose information about certain criminal, civil, and administrative proceedings, information that is reported on the Federal Awardee Performance Integrity and Information System (FAPIIS) at fapiis.com, a publicly accessible government website.

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Specifically, FAR 52.209-7 requires that contractors report whether, in the past five years, the business or any of its principals in connection with the award to or performance by the business of a federal contract or grant has been the subject of a federal or state:

- (1) Criminal proceeding resulting in a conviction or other acknowledgment of fault.
- (2) Civil proceeding resulting in a finding of fault with a monetary fine, penalty, reimbursement, restitution, and/or damages greater than \$5,000, or other acknowledgment of fault.
- (3) Administrative proceeding resulting in a finding of fault with either a monetary fine or penalty greater than \$5,000 or reimbursement, restitution, or damages greater than \$100,000, or other acknowledgment of fault.

Principal is defined broadly to include “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).” In other words, every government contractor must ensure that it has policies and procedures in place that enable it to confirm that neither the company *nor its principals* have been subject to criminal, civil, administrative proceedings that resulted in the outcomes listed above.

FAR 52.209-5, Certification Regarding Responsibility Matters, takes a similar approach, requiring contractors to certify that, to the best of their knowledge and belief, neither the company nor any of its “principals” are presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any Federal agency,” among other certifications.

Contracting officers are required to check FAPIIS prior to making an award, but competitors are also able to view information reported on that site. In addition, today information about civil, criminal, and administrative matters is more accessible than ever, enabling government contractors to quickly and cheaply gather information that can be leveraged to gain a competitive advantage.

Challenges to responsibility certifications can threaten awards

The sufficiency of FAR 52.209-5 disclosures was the focus of a recent GAO bid protest (*The Logistics Company, Inc.*, B-419932.3 (May 26, 2022)). In that protest, The Logistics Company (TLC) alleged that an award by the Army to Vanquish Worldwide, LLC, was improper because Vanquish had made false certifications in response to FAR 52.209-5, which was included in the RFP.

This allegation was first made by TLC in an agency-level protest filed with the Army pursuant to FAR 33.103, after which the Army took corrective action to further evaluate the certification issue, gathered additional information from Vanquish, re-evaluated its proposal, and ultimately again made award to Vanquish, the lowest-priced technically acceptable offeror.

In the GAO protest TLC alleged that Vanquish had failed to disclose several judgments against it, including:

- (1) A judgment resulting from divorce litigation involving one of Vanquish’s principals.

- (2) An arbitration award resulting from arbitration of a subcontractor dispute.
- (3) A judgment resulting from a lawsuit alleging breach of a profit-sharing agreement between a Vanquish principal and a subcontractor on a federal logistics services contract in Afghanistan.

The GAO ultimately found that Vanquish was not under any obligation to disclose the matters because the first did not relate to a government contract, the finding of fault or liability in the arbitration was entered more than five years before the date of Vanquish's certification, and while the judgment in the Afghanistan lawsuit found fault and liability, that judgment was vacated after a no-fault settlement was reached. Therefore, no payment was made in connection with the civil finding of fault or liability.

TLC also argued that even if none of the three matters needed to be disclosed in response to FAR 52.209-5, the agency improperly ignored them in its evaluation of whether Vanquish had "a satisfactory record of integrity and business ethics." (FAR 9.104-1(d)). Unfortunately for TLC, the Army's records showed that the

contracting officer was aware of the matters, had evaluated them after gathering additional information from Vanquish, and had reasonably determined the matters did not meaningfully affect Vanquish's responsibility. As a result, the GAO denied TLC's protest.

Confirm your disclosures are accurate and up to date

Although TLC's protest was denied, it shows the potential risk of failing to fully disclose information in response to FAR 52.209-5, among other provisions. Any contractor that believes judgments or settlements by the company or its principals fall within the scope of that provision should carefully evaluate whether they must be disclosed and, if yes, the contractor should develop a strategy to address the matter with any potential government customers.

Failure to make those disclosures can put awards at risk, among other serious consequences. But the protest, although unsuccessful, also demonstrates the potential value of tracking your competitors' legal troubles.

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About the author



Richard Arnholt is a member at **Bass, Berry & Sims PLC** in Washington, D.C. He advises companies on the complex rules applicable to contracting with federal and state governments. He focuses on risk mitigation through implementation and upgrades to ethics and compliance programs as well as response to government allegations of procurement fraud or misconduct. He can be reached at rarnholt@bassberry.com.

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