

SUPPLEMENTARY INFORMATION: For additional information, please see the immediate final rule published in the "Rules and Regulations" section of this **Federal Register**.

Dated: January 22, 2008.

J.I. Palmer, Jr.,

Regional Administrator, Region 4.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 9, 13, 17, 36, 42, and 53

[FAR Case 2006-022; Docket 2008-0002; Sequence 3]

RIN 9000-AK99

Federal Acquisition Regulation; FAR Case 2006-022, Contractor Performance Information

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

ACTION: Proposed rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to revise the contractor performance information process. The FAR revisions include changes to FAR Parts 2, 9, 13, 17, 36, 42, and 53.

DATES: Interested parties should submit written comments to the FAR Secretariat on or before June 2, 2008 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAR case 2006-022 by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting "FAR Case 2006-022" under the heading "Comment or Submission". Select the link "Send a Comment or Submission" that corresponds with FAR Case 2006-022. Follow the instructions provided to complete the "Public Comment and Submission Form". Please include your name, company name (if any), and "FAR Case 2006-022" on your attached document.

- *Fax:* 202-501-4067.
- *Mail:* General Services

Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4035, ATTN: Diedra Wingate, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR Case 2006-022 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: Ms. Jeritta A. Parnell, Procurement Analyst, at (202) 501-4082 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAR case 2006-022.

SUPPLEMENTARY INFORMATION:

A. Background

The Office of Federal Procurement Policy (OFPP) and the Chief Acquisition Officer's Acquisition Committee for E-GOV (ACE) established a working group to review regulations, policies, and guidance associated with contractor performance information. This working group proposed changes to a number of FAR parts. The Councils have agreed to some, but not all, of these changes. This proposed rule reflects those changes agreed to by the Councils. The changes to the FAR include the following:

(1) Adds a definition in FAR 2.101 for "past performance" to include both active and completed contracts;

(2) Clarifies the use of the governmentwide performance information repository, Past Performance Information Retrieval System (PPIRS) at <http://www.ppirs.gov>;

(3) Requires contracting officers to evaluate past performance for orders that exceed the simplified acquisition threshold placed against Federal Supply Schedule contract, or under a task order contract or a delivery order contract awarded by another agency (i.e. governmentwide acquisition contract or multi-agency contract) and recommends past performance evaluations for orders under single agency contracts;

(4) Consolidates the collection of past performance guidance in Part 42 and deletes the SF 1420 and 1421 from Part 36 and Part 53; and

(5) Clarifies that the agency shall identify the individual responsible for preparing the evaluation of contractor past performance.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and

Review, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this proposed 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 the rule does not impose any additional requirements on small businesses. The collection and reporting of past performance information is an internal process to the Government. The rule merely puts into effect the current practices of prudent contracting officers. In addition, the rule provides clearer instruction to contracting officers by restating in a better format the current language. Past performance evaluations are now made on master contracts based on the performance reported on the individual orders. This rule allows separate rather than consolidated evaluations under these types of contracts. There should be a small positive benefit for small businesses when individual instant reports are made rather than waiting for long-term reports on the master contract. Likewise, when small businesses have negative reports, the small businesses can take corrective action sooner. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 2, 9, 13, 17, 36, 42, and 53 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR Case 2006-022) in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 2, 9, 13, 17, 36, 42, and 53

Government procurement.

Dated: March 28, 2008.

Al Matera,

Director, Office of Acquisition Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 2, 9, 13, 17, 36, 42, and 53 as set forth below:

1. The authority citation for 48 CFR parts 2, 9, 13, 17, 36, 42, and 53 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 2—DEFINITIONS OF WORDS AND TERMS

2. Amend section 2.101 in paragraph (b)(2) by adding the definition “Past Performance” in alphabetical order to read as follows:

2.101 Definitions.

* * * * *

(b) * * *
(2) * * *

Past performance means an offeror’s or contractor’s performance on active and completed contracts.

* * * * *

PART 9—CONTRACTOR QUALIFICATIONS

3. Amend section 9.105–1 by revising the introductory text of paragraph (c) and removing paragraph (c)(7) to read as follows:

9.105–1 Obtaining information.

* * * * *

(c) In making the determination of responsibility (see 9.104–1(c)), the contracting officer shall consider relevant past performance information (see Subpart 42.15). In addition to the Governmentwide performance information repository, Past Performance Information Retrieval System (PPIRS) (at <http://www.ppirs.gov>), the contracting officer should use the following sources of information to support such determinations:

* * * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

4. Amend section 13.106–2 by revising paragraph (b)(3)(ii) to read as follows:

13.106–2 Evaluation of quotations or offers.

* * * * *

(b) * * *
(3) * * *

(ii) May be based on—

(A) The contracting officer’s knowledge of and previous experience with the supply or service being acquired;

(B) Customer surveys, and past performance questionnaire replies;

(C) The Governmentwide Past Performance Information Retrieval System (PPIRS) at <http://www.ppirs.gov>; or

(D) Any other reasonable basis.

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PART 17—SPECIAL CONTRACTING METHODS

5. Amend section 17.207 by:

a. Removing “and” from the end of paragraph (c)(3);

b. Removing from paragraph (c)(4) the “.” and adding “; and” in its place; and

c. Adding paragraph (c)(5) to read as follows.

17.207 Exercise of options.

* * * * *

(c) * * *

(5) The contractor is not listed on the Excluded Parties List System (EPLS) (see FAR 9.405–1).

* * * * *

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

6. Revise section 36.201 to read as follows:

36.201 Evaluation of contractor performance.

See 42.1502(e) for the requirements for preparing past performance evaluations for construction contracts.

7. Revise section 36.604 to read as follows:

36.604 Performance evaluation.

See 42.1502(f) for the requirements for preparing past performance evaluations for architect-engineer contracts.

36.701 [Amended]

8. Amend section 36.701 by removing paragraph (d).

36.702 [Amended]

9. Amend section 36.702 by removing paragraph (c).

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

10. Revise section 42.1502 to read as follows:

42.1502 Policy.

(a) Past performance evaluations should be as specified in paragraphs (b) through (g) of this section at the time the work under the contract or order is completed. In addition, interim evaluations should be prepared as specified by the agencies to provide current information for source selection purposes, for contracts or orders with a period of performance, including options, exceeding one year. These evaluations are generally for the entity, division, or unit that performed the contract or order. The content of the evaluations should be tailored to the size, content, and complexity of the contractual requirements.

(b) Except as provided in paragraphs (e), (f), and (h) of this section, agencies shall prepare an evaluation of contractor performance for each contract that

exceeds the simplified acquisition threshold.

(c) Agencies shall prepare an evaluation of contractor performance for each order that exceeds the simplified acquisition threshold placed against a Federal Supply Schedule contract, or under a task order contract or a delivery order contract awarded by another agency (i.e., Governmentwide acquisition contract or multi-agency contract).

(d) For single-agency task order and delivery order contracts, the contracting officer may require performance evaluations for each order in excess of the simplified acquisition threshold when such evaluations would produce more useful past performance information for source selection officials than that contained in the overall contract evaluation (e.g., when the scope of the basic contract is very broad and the nature of individual orders could be significantly different).

(e) Past performance evaluations shall be prepared for each construction contract of \$550,000 or more, and for each construction contract terminated for default regardless of contract value. Past performance evaluations may also be prepared for construction contracts below \$550,000.

(f) Past performance evaluations shall be prepared for each architect-engineer services contract of \$30,000 or more, and for each architect-engineer services contract that is terminated for default regardless of contract value. Past performance evaluations may also be prepared for architect-engineer services contracts below \$30,000.

(g) Past Performance evaluations shall include an assessment of contractor performance against, and efforts to achieve, the goals identified in the small business subcontracting plan when the contract includes the clause at 52.219–9, Small Business Subcontracting Plan.

(h) Agencies shall not evaluate performance for contracts awarded under Subpart 8.7.

11. Amend section 42.1503 by revising paragraphs (a), (c), (d) and (e) to read as follows:

42.1503 Procedures.

(a) Agency procedures for the past performance evaluation system shall generally provide for input to the evaluations from the technical office, contracting office and, where appropriate, end users of the product or service. These procedures shall identify the individual responsible for preparing interim and final evaluation. This designated individual may obtain information for the evaluation of performance from the program office,

administrative contracting office, end users of the product or service, and any other technical or business advisor, as appropriate. Interim evaluations shall be prepared as required.

* * * * *

(c) Agencies shall submit past performance reports electronically to the Past Performance Information Retrieval System (PPIRS) at *http://www.ppirs.gov* in accordance with agency procedures.

(d) Any past performance information systems used for maintaining contractor performance information and/or evaluations should include appropriate

management and technical controls to ensure that only authorized personnel have access to the data.

(e) For source selection purposes, agencies shall use the past performance information in PPIRS within three years (six for construction and architect-engineer contracts) of the completion of performance of the evaluated contract or order.

PART 53—FORMS

53.236–1 [Amended]

12. Amend section 53.236–1 by removing paragraphs (a) through (c) and

redesignating existing paragraphs (d) through (f) as new paragraphs (a) through (c), respectively.

53.236–2 [Amended]

13. Amend section 53.236–2 by removing paragraph (c).

53.301–1420 and 53.301–1421 [Removed]

14. Remove sections 53.301–1420 and 53.301–1421.

[FR Doc. E8–6795 Filed 4–1–08; 8:45 am]

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