

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Parts 2, 8, 9, 13, 17, 36, 42, and  
53**

[FAC 2005–34; FAR Case 2006–022; Item  
I; Docket 2008–0002; Sequence 2]

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:** Final rule.

**SUMMARY:** The Civilian Agency  
Acquisition Council and the Defense  
Acquisition Regulations Council  
(Councils) have agreed on a final rule  
amending the Federal Acquisition  
Regulation (FAR) to revise the  
contractor performance information  
process. This change primarily  
emphasizes the use of a standard  
performance information reporting  
system, the Past Performance  
Information Retrieval System (PPIRS).  
This change aligns with the President's  
March 4, 2009 Memorandum on  
Government Contracting specifically  
with regards to managing the  
Government's risk associated with the  
goods and services being procured and  
ensuring projects are completed  
effectively and efficiently.

**DATES:** *Effective Date:* July 1, 2009.

**FOR FURTHER INFORMATION CONTACT:** For  
clarification of content, contact Ms.  
Jeritta Parnell, Procurement Analyst, at  
(202) 501–4082. For information  
pertaining to status or publication  
schedules, contact the Regulatory  
Secretariat at (202) 501–4755. Please  
cite FAC 2005–34, FAR case 2006–022.

**SUPPLEMENTARY INFORMATION:****A. Background**

Past performance information (PPI)  
can decrease the Government's risk in  
contracting by rating, at a minimum,  
quality of work, timeliness, cost, and  
business relations of contractors for  
projects above a specified threshold. PPI  
incentivizes contractors to perform well  
in order to be rewarded with future  
contracts.

The Office of Federal Procurement  
Policy (OFPP) and the Chief Acquisition  
Officer's Acquisition Council for E-GOV

(ACE) established a working group to  
review regulations, policies, and  
guidance associated with contractor  
performance information. The working  
group proposed changes to a number of  
FAR parts. The Councils have agreed to  
some, but not all the changes under this  
final rule.

The purpose of the final rule is to  
ensure that the FAR clearly reflects the  
use of the Governmentwide  
performance information repository,  
Past Performance Information Retrieval  
System (PPIRS) at <http://www.ppirs.gov>;  
requires the evaluation of past  
performance for orders exceeding the  
simplified acquisition threshold placed  
against Federal Supply Schedule  
contracts, or under a task order or  
delivery order against a contract  
awarded by another Federal agency (i.e.  
Governmentwide acquisition contract or  
multi-agency contract); recommends  
past performance information for orders  
under single agency contracts;  
consolidates the collection of past  
performance guidance in FAR Part 42;  
and, clarifies that the Agency shall  
identify those responsible for preparing  
interim and final evaluations.

The Councils published a proposed  
rule with request for comments in the  
**Federal Register** at 73 FR 17945, April  
2, 2008. Forty comments from ten  
respondents were received.

**B. Discussion of Public Comments**

The comments received were grouped  
under five general topics. A summary of  
these topics and a discussion of the  
comments and the changes made to the  
proposed rule as a result of those  
comments are provided below:

**Miscellaneous Comments**

*Comment:* One Respondent  
recommended adding a definition for  
“completed contracts” under FAR  
2.101.

*Response:* The definition of past  
performance is revised from “completed  
contracts” to “physically completed  
contracts.”

*Comment:* One respondent disagreed  
with the revisions as written in the third  
person.

*Response:* In this particular instance,  
third person is appropriate. There was  
no change made to the final rule as a  
result of this comment.

*Comment:* Two respondents suggested  
adding language to include the FAR  
clause 52.219–8, Utilization of Small  
Business Concerns, as well as the FAR  
clause 52.219–9, Small Business  
Subcontracting Plan, which requires an  
assessment of the other nine elements of  
a subcontracting plan and utilizing  
small businesses.

*Response:* This case addresses goals  
as required by FAR 52.219–9. This case  
continues the current FAR focus on  
compliance with the goals. There was  
no change made to the final rule as a  
result of this comment.

*Comment:* One respondent  
recommended that past performance  
assessments should address small  
business utilization as a whole in  
addition to subcontracting plan  
requirements by referencing FAR  
52.219–8 and 52.219–16.

*Response:* It is not beneficial to  
further reference FAR 52.219–8,  
Utilization of Small Business Concerns,  
as addressed in the preceding comment  
and response. Furthermore, it is not  
beneficial to include a reference to FAR  
52.219–16, Liquidated Damages—  
Subcontracting Plan, since this clause  
establishes procedures for the payment  
of liquidated damages in the event that  
the contractor failed to meet the  
requirements established under FAR  
52.219–9, and does not set forth  
contractual performance requirements  
that may be assessed. There was no  
change made to the final rule as a result  
of this comment.

*Comment:* One respondent suggested  
that the requirement for the inclusion of  
FAR 52.219–9, Small Business  
Subcontracting, be excepted for delivery  
or task orders against Federal Supply  
Schedules or Governmentwide  
contracts.

*Response:* Contractor subcontracting  
plans under Federal Supply Schedules  
and Governmentwide contracts are  
established on a contract level, not task  
order level. The Councils agree that it  
would be inappropriate to require an  
evaluation of contractor performance for  
individual task orders against a small  
business subcontracting plan that has  
been established on a contract level for  
Federal Supply Schedules and  
Governmentwide contracts. Contracting  
officers may include such an assessment  
on single agency task order and delivery  
order contracts when deemed  
appropriate. FAR 42.1502(c) and (d) are  
revised to reflect this change.

*Comment:* One respondent indicated  
support for the proposed rule as written.

*Response:* The Councils have noted  
this comment.

**Past Performance Information Retrieval  
System (PPIRS)**

*Comment:* One respondent  
recommended two changes - changing  
from the “Government wide Past  
Performance Information Retrieval  
System (PPIRS)” to the “Government  
wide past Performance Information  
Retrieval System-Report Card (PPIRS-  
RC),” and adding an additional

paragraph to reference the PPIRS-Report Card.

*Response:* PPIRS is the universally accepted database used by all agencies. The FAR does not preclude the usage of additional systems. There was no change made to the final rule as a result of this comment.

*Comment:* One respondent suggested revising the performance information system to improve access to provide more timely, accurate and detailed performance assessments for acquisition personnel.

*Response:* These kinds of improvements to the past performance system are outside the scope of this case. This rule, however, will improve the contractor performance information process. There was no change made to the final rule as a result of this comment.

*Comment:* Two respondents suggested including a reference to PPIRS in FAR 15.305(a)(2).

*Response:* There was no intent to change the evaluation criteria set forth in FAR 15.305. There was no change made to the final rule as a result of this comment.

*Comment:* One respondent recommended moving the language from FAR 42.1503(e) to FAR Part 15 since this language appears to be information regarding source selection.

*Response:* This language deals with retention of past performance information rather than required procedures to be utilized in a source selection, and is therefore a post award function that is appropriately retained in FAR 42.1503(e). There was no change made to the final rule as a result of this comment.

*Comment:* One respondent recommended clarification for information retention. The respondent suggested the following language: "Agencies shall not retain past performance information longer than three years (six years for construction and architect engineer contracts.)"

*Response:* These documents are part of the official contract file and must be retained. The intent of this language is to ensure that past performance data is current and relevant. The use of the past performance information that may be obtained from PPIRS for acquisition evaluations is limited to the 3-year timeframe (six years for construction and architect engineer contracts). PPIRS archives past performance data three years after the data is input into PPIRS. There was no change made to the final rule as a result of this comment.

*Comment:* One respondent questioned the period of retention of past

performance information for construction.

*Response:* This language was merely consolidated and relocated under FAR Part 42 without change. Due to the nature of construction and A&E contracts, retention of such past performance information is necessarily longer than for contracts for other products/services. There was no change made to the final rule as a result of this comment.

*Comment:* One respondent suggested the wording is unclear in FAR 42.1503(e).

*Response:* The language was revised to delete "For source selection purposes" to clarify that this is a post award function rather than a source selection function.

*Comment:* One respondent suggested adding another paragraph to FAR 42.1503 to address information retention.

*Response:* Previous FAR language regarding retaining records is outdated. Rather than being destroyed, PPIRS electronic records will be retained through archiving beyond the specified 3 and 6 year timeframes. The language was revised at the time of the proposed rule to reflect timeframes for access and use of this information. There was no change made to the final rule as a result of this comment.

#### **Past Performance Reporting**

*Comment:* One respondent recommended changing the term "evaluation" to "assessment" or "report card."

*Response:* The terms "evaluation" and "assessment", as used in FAR Part 42, are synonymous in this context. There was no change made to the final rule as a result of this comment.

*Comment:* One respondent would like a clarification to the language that states that agencies shall submit past performance reports electronically to PPIRS in accordance with agency procedures.

*Response:* The intent of the language is to require submission of past performance evaluations to PPIRS in a method prescribed under agency procedures. The language at FAR 42.1503(c) has been revised to clarify that the process for submitting such reports to PPIRS shall be in accordance with agency procedures.

*Comment:* One respondent recommended additional language in the last sentence of FAR 42.1502(a) as follows: "The content and format of performance evaluations shall be established in accordance with agency procedures and should be tailored to the size, content, and complexity of the requirements."

*Response:* The Councils interpret the intent of the comment was to obtain greater detail in the evaluations. The language is sufficient as proposed. There was no change made to the final rule as a result of this comment.

*Comment:* One respondent suggested expanding the case to cover responsibilities for negative past performance information received from surveys or questionnaires.

*Response:* The FAR already has sufficient provisions allowing contracting officers to discuss negative past performance information with offerors. There was no change made to the final rule as a result of this comment.

*Comment:* One respondent suggested that some form of incentive or other documented means be provided to encourage and ensure that information is timely provided into the system.

*Response:* This is a requirement of agencies in the normal course of duties assigned to their designated personnel as required in FAR 42.1502 and 42.1503. As such, an additional incentive would be inappropriate. There was no change made to the final rule as a result of this comment.

*Comment:* Three respondents suggested that the identification of an "individual" responsible for preparing evaluations is too restrictive and recommended flexibility for each agency to determine the responsible individual or individuals by title or organizational element.

*Response:* The Councils agree with the comment. The language at FAR 42.1503(a) is revised to read "Agency procedures shall identify those responsible for preparing interim and final evaluations."

*Comment:* One respondent recommended that past performance evaluations should be required for all contracts that are terminated for default.

*Response:* The Councils have noted this comment and will consider this issue under a separate rule. There was no change made to the final rule as a result of this comment.

#### **Past Performance Evaluation**

*Comment:* One respondent recommended that evaluations over the simplified acquisition threshold be submitted when "an extraordinary event or occurrence takes place." Furthermore, the respondent questioned the value of performance evaluations on each order over the simplified acquisition threshold.

*Response:* The information is necessary and required. There was no change made to the final rule as a result of this comment.

*Comment:* One respondent suggested a change to the mandatory evaluation of orders over the simplified acquisition threshold from “shall” to “may.”

*Response:* The Councils do not agree with changing “shall” to “may.” It is the intent of this rule to capture the universe of contracts which includes task orders against basic contracts. Likewise, nothing prevents prudent contracting officers from addressing extraordinary circumstances on contracts under the simplified acquisition threshold where a past performance evaluation may be warranted. There was no change made to the final rule as a result of this comment.

*Comment:* Two respondents recommended revising FAR 13.106–2(b)(3)(ii) to read “May be based on one or more of the following:” to encourage contracting officers to use more than one tool in identifying offerors’ past performance information.

*Response:* The Councils agree with this comment. FAR 13.106–2(b)(3)(ii) is revised to read “May be based on one or more of the following:”

*Comment:* One respondent suggested that PPIRS is not a mandatory source of information and that other sources are available.

*Response:* PPIRS is the universally accepted database used by all agencies. PPIRS is not the only source for past performance information that may be utilized in source selection evaluations. However, under this rule, agencies are now required to submit past performance information to PPIRS. Agencies will establish procedures to effect these electronic submissions. There was no change made to the final rule as a result of this comment.

*Comment:* One respondent suggested amending FAR 13.106–2(b)(3)(ii) to include other available sources as previously addressed.

*Response:* FAR 13.106–2(b)(3)(ii) is revised to read “May be based on one or more of the following:”

*Comment:* Two respondents recommended defining “relevant past performance information.”

*Response:* Relevancy is subjective and should be left to the contracting officer’s discretion on a case by case basis. There was no change made to the final rule as a result of this comment.

*Comment:* One respondent suggested providing objective criteria and weights for acquisition officials.

*Response:* This requirement is addressed in FAR 15.305(a)(2)(i). These past performance evaluations are subjective based on the current acquisition. Assigning weighted values to evaluation criteria, including past

performance, is the purview of the Source Selection Authority. There was no change made to the final rule as a result of this comment.

#### **Thresholds**

*Comment:* One respondent recommended that the reference to the Simplified Acquisition Threshold (SAT) should be limited to the lowest dollar value for the SAT in the definition of FAR 2.1.

*Response:* Due to the extraordinary nature of the performance under contracts that qualify for higher simplified acquisition thresholds, it would not be appropriate to require the preparation of evaluations at the lowest SAT for each contract. Agency designated personnel have the discretion to prepare and submit to PPIRS an evaluation of contractor performance at any threshold when they deem it appropriate. There was no change made to the final rule as a result of this comment.

*Comment:* One respondent suggested that the threshold specific to orders placed against an FSS, GWAC, or other multi-agency contract be raised to \$550,000 rather than all orders exceeding the SAT.

*Response:* It is the intent of this rule to capture the universe of contracts that includes task orders against basic contracts. There was no change made to the final rule as a result of this comment.

*Comment:* Two respondents recommended changing the language in FAR 42.1502(c) and 42.1502(d) as follows: “task order contract or a delivery order contract” to “indefinite-delivery contract.”

*Response:* The phrase “task order contract or delivery order contract” is more specific. This change was not intended to cover definite quantity contracts as proposed by the commenter. There was no change made to the final rule as a result of this comment.

#### **Summary of Changes to the Proposed Rule**

The Councils made the following changes to the proposed rule as a result of the public comments and Council deliberations. The final rule reflects the following changes:

##### **FAR 2.101**

The definition of past performance was revised to clarify the term “completed contract” as one that is physically completed in accordance with FAR 4.804–4.

##### **FAR 8.406–7**

The addition of language to advise ordering activities that past performance evaluations required in FAR 42.1502(c) are applicable to orders.

##### **FAR 13.106–2**

Language was revised to encourage contracting officers to utilize more than one tool in identifying offerors’ past performance information.

##### **FAR 42.1502(c) and (d)**

Language was added to clarify the consideration of small business goals in past performance evaluations for Governmentwide acquisition contracts, multi-agency contracts, and single-agency task order and delivery order contracts.

##### **FAR 42.1503(a)**

Language was revised to clarify that agency procedures shall identify those responsible for preparing interim and final evaluations.

##### **FAR 42.1503(c)**

Language was revised to clarify that agencies shall be responsible for establishing procedures for reporting past performance information to PPIRS.

##### **FAR 42.1503(e)**

Language was revised to delete the phrase “For source selection purposes” in order to clarify that this language deals with retention of past performance information rather than required procedures to be utilized in a source selection.

#### **C. Regulatory Analyses**

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.

#### **D. Regulatory Flexibility Act**

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not 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.

#### **E. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the 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. Chapter 35, *et seq.*

**List of Subjects in 48 CFR Parts 2, 8, 9, 13, 17, 36, 42, and 53**

Government procurement.

Dated: June 25, 2009.

Al Matera,

*Director, Office of Acquisition Policy.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 8, 9, 13, 17, 36, 42, and 53 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 8, 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, in alphabetical order, the definition “Past performance” to read as follows:

**2.101 Definitions.**

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

*Past performance* means an offeror's or contractor's performance on active and physically completed contracts (see 4.804–4).

\* \* \* \* \*

**PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES**

■ 3. Add section 8.406–7 to read as follows:

**8.406–7 Contractor Performance Evaluation.**

Ordering activities must prepare an evaluation of contractor performance for each order that exceeds the simplified acquisition threshold in accordance with 42.1502(c).

**PART 9—CONTRACTOR QUALIFICATIONS**

■ 4. Amend section 9.105–1 by revising the second sentence of the introductory text of paragraph (c); and removing paragraph (c)(7). The revised text reads as follows:

**9.105–1 Obtaining information.**

\* \* \* \* \*

(c) \* \* \* In addition to the Governmentwide performance information repository, Past Performance Information Retrieval System (PPIRS) (at [www.ppirs.gov](http://www.ppirs.gov)), the contracting officer should use the following sources of information to support such determinations:

\* \* \* \* \*

**PART 13—SIMPLIFIED ACQUISITION PROCEDURES**

■ 5. 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 one or more of the following:

(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 [www.ppirs.gov](http://www.ppirs.gov); or

(D) Any other reasonable basis.

\* \* \* \* \*

**PART 17—SPECIAL CONTRACTING METHODS**

■ 6. Amend section 17.207 by removing from the end of paragraph (c)(3) the word “and”; removing the period from the end of paragraph (c)(4) and adding “; and” in its place; and 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**

■ 7. 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.

**36.602–3 [Amended]**

■ 8. Amend section 36.602–3 by removing from paragraph (a) “36.604” and adding “36.603” in its place.

■ 9. Amend section 36.603 by revising paragraph (d)(4); and removing from paragraph (d)(5) “36.604(c)” and adding “42.1502(f)” in its place. The revised text reads as follows:

**36.603 Collecting data on and appraising firms qualifications.**

\* \* \* \* \*

(d) \* \* \*

(4) Assuring that the file contains a copy of each pertinent performance evaluation (see 42.1502(f)).

\* \* \* \* \*

■ 10. 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]**

■ 11. Amend section 36.701 by removing paragraph (d).

**36.702 [Amended]**

■ 12. Amend section 36.702 by removing paragraph (c).

**PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES**

■ 13. Revise section 42.1502 to read as follows:

**42.1502 Policy.**

(a) Past performance evaluations shall be prepared 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 shall 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). This evaluation shall not consider the requirements under paragraph (g) of this section.

(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). This evaluation need not consider the requirements under paragraph (g) of this section unless the contracting officer deems it appropriate.

(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.

■ 14. 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. Agency procedures shall identify those responsible for preparing interim and final evaluations. Those individuals identified 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 [www.ppirs.gov](http://www.ppirs.gov). The process for submitting such reports to PPIRS shall be 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) Agencies shall use the past performance information in PPIRS that is 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 Construction.

■ 15. Amend section 53.236-1 by removing and reserving paragraph (a).

■ 16. Amend section 53.236-2 by revising the section heading as set forth below; and removing paragraph (c). The revised text reads as follows:

### 53.236-2 Architect-engineer services (SF's 252 and 330).

\* \* \* \* \*

### 53.301-1420 and 53.301-1421 [Removed]

■ 17. Remove sections 53.301-1420 and 53.301-1421.

[FR Doc. E9-15436 Filed 6-30-09; 8:45 am]

BILLING CODE 6820-EP-S

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

### 48 CFR Parts 4, 9, and 52

[FAC 2005-34; FAR Case 2008-009; Item II; Docket 2009-0020, Sequence 1]

RIN 9000-AL28

### Federal Acquisition Regulation; FAR Case 2008-009, Prohibition on Contracting with Inverted Domestic Corporations

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

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement Section 743 of Division D of the Omnibus Appropriations Act, 2009 (Public Law

111-8). Section 743 of Division D of this Act prohibits the award of contracts using appropriated funds to any foreign incorporated entity that is treated as an inverted domestic corporation or to any subsidiary of one.

The Department of Homeland Security (DHS) has had its own rule prohibiting contracting with inverted domestic corporations since December 2003 (see 48 CFR Subpart 3009.1). The DHS rule implements section 835 of the Homeland Security Act of 2002 (P.L. 107-296, 6 U.S.C. 395).

**DATES:** *Effective Date:* July 1, 2009.

*Comment Date:* Interested parties should submit written comments to the Regulatory Secretariat on or before August 31, 2009 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAR case 2008-009, by any of the following methods:

• Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inputting "FAR Case 2008-009" under the heading "Comment or Submission". Select the link "Send a Comment or Submission" that corresponds with FAR Case 2008-009. Follow the instructions provided to complete the "Public Comment and Submission Form". Please include your name, company name (if any), and "FAR Case 2008-009" on your attached document.

• Fax: 202-501-4067.

• Mail: General Services

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

*Instructions:* Please submit comments only and cite FAC 2005-34, FAR case 2008-009, 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. Meredith Murphy, Procurement Analyst, at (202) 208-6925 for clarification of content. Please cite FAC 2005-34, FAR case 2008-009. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755.

## SUPPLEMENTARY INFORMATION:

### A. Background

This rule implements section 743 of Division D of the Omnibus Appropriations Act, 2009 (Public Law 111-8). Although this is effective for Fiscal Year 2009 funds, the Councils