

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Part 236**

RIN 0750-AG91

Defense Federal Acquisition Regulation Supplement; Construction and Architect-Engineer Services Performance Evaluation (DFARS Case 2010-D024)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to remove the requirement to use DoD-unique forms to prepare contractor performance evaluations for construction and architect-engineer services.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before June 20, 2011, to be considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2010-D024, using any of the following methods:

Regulations.gov, <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting "DFARS Case 2010-D024" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2010-D024." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2010-D024" on your attached document.

E-mail: dfars@osd.mil. Include DFARS Case 2010-D024 in the subject line of the message.

FAX: 703-602-0350.

Mail: Defense Acquisition Regulations System, Attn: Mr. Manuel Quinones, OUSD (AT&L) DPAP (DARS), Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment, please check <http://www.regulations.gov> approximately two to three days after submission to verify posting, except allow 30 days for posting of comments submitted by mail.

FOR FURTHER INFORMATION CONTACT: Mr. Manuel Quinones, telephone 703-602-8383.

SUPPLEMENTARY INFORMATION:**I. Background**

This case removes the requirement to use DoD-unique forms to document contractor past performance for construction and Architect-Engineer (A&E) services. Historically, the Federal Government collected past performance data for construction and A&E services on specific standard forms (SF 1420 and SF 1421, respectively). DoD collected the data on DD Form 2626, Performance Evaluation (Construction), and DD Form 2631, Performance Evaluation (Architect-Engineer), in lieu of the standard forms. The Federal Acquisition Regulation (FAR) has been updated to remove the standard forms in their entirety, as well as the procedures that accompanied them, and now points solely to the requirements of FAR subpart 42.15 for past-performance reporting for construction and A&E contracts.

Earlier in 2010, consistent with the Office of Federal Procurement Policy memorandum dated July 29, 2008, Improving the Use of Contractor Performance Information, the Contractor Performance Assessment Reporting System (CPARS) was named as the sole system for collecting past-performance information. As such, CPARS will support Governmentwide data collection requirements for contractor past performance reporting, to include construction and A&E contracts, and DFARS is being updated to delete the outdated procedures and references to the obsolete DD forms.

II. Executive Order 12866 and Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. 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 rule is not a major rule under 5 U.S.C. 804.

III. Regulatory Flexibility Act

DoD has prepared an initial regulatory flexibility analysis consistent with 5 U.S.C. 603. A copy of the analysis may be obtained from the point of contact specified herein. The analysis is summarized as follows:

This proposed rule addresses the removal of the procedures for use of and references to DD Forms 2626 and 2631 from DFARS. DFARS part 236 supplemented the language previously included in the Federal Acquisition Regulation (FAR) that specified certain procedures and forms be used to document contractor performance for construction and A&E services. The FAR has been updated to remove those procedures and standard forms; FAR 36.201 and FAR 36.604 now refer to FAR 42.1502(e) for the requirements for preparing past performance evaluations.

The objective of this rule is to remove the requirement to use DD Forms 2626, Performance Evaluation (Construction), and 2631, Performance Evaluation (Architect-Engineer), to evaluate contractor past performance. Since the Contractor Performance Assessment Report System (CPARS) is now the Governmentwide system for electronically collecting past performance data, there is no need to specify separate DoD-unique forms to collect the data.

The number of small entities to be impacted by this proposed rule is unknown, however, due to the low dollar thresholds currently in place for reporting, it is expected that a large number of small entities will require past performance evaluations to be completed by Government personnel. Past performance evaluations are required for each construction contract of \$650,000 or more and for each construction contract terminated for default regardless of contract value. For Architect and Engineer (A&E) services, past performance evaluations are required for contracts of \$30,000 or more, and for each A&E contract that is terminated for default regardless of contract value.

The 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 clarifications proposed require no additional effort by contractors as the changes simply update the DFARS to reflect the current automated process being used. CPARS is already being used by DoD personnel to report construction and A&E services contractor past performance, and the DFARS is merely being updated to

remove references to obsolete forms and procedures and reflect the current process. No start-up costs are expected as only Internet access is required should small entities elect to comment on their past performance rating in CPARS. This rule will not duplicate, overlap, or conflict with any other known Federal rule. There are no known alternatives to this proposed rule.

DoD invites comments from small businesses and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2010–D024), in correspondence.

IV. Paperwork Reduction Act

The proposed rule does not impose additional 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.).

List of Subjects in 48 CFR Part 236

Government procurement.

Mary Overstreet,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 236 is proposed to be amended as follows:

1. The authority citation for 48 CFR part 236 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

236.201 [Removed]

2. Section 236.201 is removed.
3. Revise section 236.604 to read as follows:

236.604 Performance evaluation.

Prepare a separate performance evaluation after actual construction of the project. Ordinarily, the evaluating official should be the person most familiar with the A–E's performance.

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 245

Defense Federal Acquisition Regulation Supplement; Responsibility and Liability for Government Property (DFARS Case 2010–D018)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is issuing a proposed rule to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to extend the Government self-insurance policy to Government property provided under negotiated fixed-price contracts that are awarded on a basis other than submission of certified cost or pricing data.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before June 20, 2011, to be considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2010–D018, using any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inputting “DFARS Case 2010–D018” under the heading “Enter keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “DFARS Case 2010–D018.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “DFARS Case 2010–D018” on your attached document.

- *E-mail:* dfars@osd.mil. Include DFARS Case 2010–D018 in the subject line of the message.
- *FAX:* 703–602–0350.
- *Mail:* Defense Acquisition Regulations System, Attn: Mrs. Jennifer Abi-Najm, OUSD (AT&L) DPAP (DARS), Room 3B855, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment, please check <http://www.regulations.gov> approximately two to three days after submission to verify posting, except allow 30 days for posting of comments submitted by mail.

FOR FURTHER INFORMATION CONTACT: Mrs. Jennifer Abi-Najm, 703–602–1013.

SUPPLEMENTARY INFORMATION:

I. Background

This proposed rule will amend the DFARS to extend the Federal Acquisition Regulation (FAR) Government self-insurance policy for loss of Government property to negotiated fixed-price contracts awarded on a basis other than submission of certified cost or pricing data. FAR 45.104, Responsibility and liability for Government property, provides that contractors are not held liable for loss of Government property occurring under the following types of contracts:

- (1) Cost-reimbursement contracts.
- (2) Time-and-materials contracts.
- (3) Labor-hour contracts.
- (4) Fixed-price contracts awarded on the basis of submission of certified cost or pricing data.

An exception to the FAR 45.104 policy for Government assumption of risk of loss is for negotiated fixed-price contracts awarded on a basis other than submission of certified cost or pricing data. This rule proposes that DoD contractors not be held liable for loss of Government property under such contracts, and eliminates the use of Alternate I of the FAR clause at 52.245–1, Government Property. Use of Alternate I requires contractors to assume the risk and be responsible for loss of Government property.

II. Executive Order 12866 and Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. 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 rule is not a major rule under 5 U.S.C. 804.

III. Regulatory Flexibility Act

DoD has prepared an initial regulatory flexibility analysis consistent with 5 U.S.C. 603. A copy of the analysis may be obtained from the point of contact specified herein. The analysis is summarized as follows: