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FAR Rule Would Standardize Performance Evaluations While Limiting Contractor Input

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On June 28th, a proposed rule was issued that would amend the Federal Acquisition Regulation ("FAR") to provide government-wide standardized past performance evaluation factors and performance ratings, and would require that all past performance information on government contractors be entered into the Contract Performance Assessment Reporting System ("CPARS") as the sole feeder of such information to the government-wide Past Performance Information Retrieval System ("PPIRS").[1] Importantly, the proposed rule would also eliminate several checks and balances that currently protect the interests of contractors in the past performance process.

Exclusive Use of CPARS

Traditionally, federal agencies have had the option of using various past performance reporting feeder systems – including CPARS, the National Institutes of Health's Contractor Performance System ("CPS"), and the National Aeronautics and Space Administration's Past Performance Database ("PPDB") – to report contractor evaluations. To streamline reporting practices and enhance reporting metrics, the government is transitioning to a single past performance feeder system, CPARS. The proposed rule would designate CPARS as *the* government-wide past performance information feeder system into PPIRS and require agencies to enter all contractor past performance information into CPARS. The sole exception would be reports for classified contracts and special access programs, which are to be reported in accordance with individual agency procedures.

Standardization of Evaluation Factors and Ratings

In addition to requiring agencies to enter all information into CPARS, the proposed rule will set forth procedures for evaluating and reporting contractor past performance information. Specifically, the proposed rule would require agencies to use standardized evaluation factors and ratings in their past performance evaluations.

[1] 76 Fed. Reg. 37704 (Jun. 28, 2011).

The proposed rule would revise FAR 42.1503 to include five minimum evaluation factors on which all contractors are to be evaluated: (i) Technical or Quality; (ii) Cost Control (as applicable); (iii) Schedule/Timeliness; (iv) Management or Business Relations; and (v) Small Business Subcontracting (as applicable). The proposal would also require evaluators to use a five-point scale system to rate contractors under each of the five factors, e.g., exceptional, very good, satisfactory, marginal, or unsatisfactory, in accordance with the definitions contained in the CPARS Policy Guide (available at http://www.cpars.gov).

Diminished Contractor Role in Assessments

The proposed revisions to FAR 42.1503 may diminish the contractor's role in the assessment of its past performance. Currently, FAR 42.1503(b) provides that contractors are to receive agency evaluations as soon as practicable and that contractors shall be given a minimum of 30 days to respond to past performance evaluations or to rebut agencies' evaluation determinations. FAR 42.1503(b) also provides that if a dispute between the contractor and agency arises regarding a past performance evaluation, the contractor is entitled to have the evaluation reviewed at a level above the contracting officer. Under FAR 42.1503(b) contractors also are entitled to have their responses to their past performance evaluations included as part of their evaluation. Further, FAR 42.1503(b) protected the confidentiality of past performance evaluations by providing that completed evaluations may only be released to government personnel and the contractor whose performance is being evaluated.

As revised, the only portion of FAR 42.1503(b) that would survive is the requirement that past performance evaluations must be provided to contractors once completed. Nothing in the proposed rule would permit contractors to respond to their past performance evaluations and the proposed rule would not require agencies to consider contractor rebuttals to their past performance evaluations and ratings. Moreover, the proposed revisions fail to address the confidentiality of contractor past performance evaluations.

Requirement for Safeguards

To safeguard contractor past performance information, the proposed rule would require agencies to have appropriate management and technical controls in place to ensure that only authorized personnel have access to contractor past performance data. Yet, as previously noted, the proposed rule would not include any specific provisions discussing what measures an agency must take to protect the confidentiality of contractor past performance evaluations.

In summary, the proposed rule would consolidate contractor past performance information reporting and provides agencies with standardized evaluation factors and rating scales for the evaluation of contractor past performance, leading to a more streamlined process. The proposed process, however, could also significantly impact contractors' ability to respond to and challenge their past performance evaluations.

Interested parties may submit comments on the proposed rule on or before August 29, 2011.

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