

Efforts to Improve the Gathering and Documentation of Contractor Past Performance Information Continue...and May Raise Significant Issues for Contractors

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Ever since an April 2009 report by the Government Accountability Office (GAO) recommending increased attention by federal agencies to the gathering and use of contractor performance and integrity information, (see GAO Report "Federal Contractors: Better Performance Information Needed to Support Agency Contract Award Decisions" (GAO-09-374)), there have been concerted efforts by the Administration, Congress and agencies to improve documentation of contractor performance, and to make performance and integrity data more easily and more widely available to source selection officials. Some of these efforts have been fairly routine and noncontroversial, such as the Office of Federal Procurement Policy (OFPP) memorandum requiring agencies to use the Past Performance Information Retrieval System (PPIRS) as the main database for past performance information, establishing procedures for collecting and documenting contractor performance, including compliance with the contractor's small-business participation plan in the evaluation of contractor performance, and making agencies accountable for conducting contractor evaluations. See OFPP Memo "Improving the Use of Contractor Performance Information," July 29, 2009.

Congress upped the ante in the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, by mandating a new centralized repository for all contractor integrity and performance information, including performance reviews, suspensions, debarments, non-responsibility determinations, terminations for default, and civil, criminal and administrative

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proceedings related to government contracts and grants. The Federal Acquisition Regulation (FAR) Council's rules implementing this directive provide that this database—the Federal Awardee Performance and Integrity Information System (FAPIS)—must include performance and integrity information from PPIRS, the Contractor Performance Assessment Reporting System (CPARS) and the Excluded Parties List Service (EPLS), as well as information on administrative agreements with agency suspension and debarment officials, for a five-year period and require contractors whose total value of contracts exceeds \$10 million to report semi-annually in FAPIS civil, criminal or administrative findings of “fault” related to performance of federal contracts. *See, e.g.,* 75 Fed. Reg. 14059 (Mar. 23, 2010) (final FAPIS rules); (applies FAPIS requirements to commercial item and commercial off-the-shelf contracts).

Although agency efforts to improve the data that flows into FAPIS continue, a recently proposed FAR rule that appears relatively innocuous on its face creates serious (and possibly unintended) potential issues for contractors and agencies with respect to review and protection of performance evaluations. Prior to September 2010, agencies used a variety of past performance reporting feeder systems, such as the Department of Health and Human Services and National Institutes of Health (DHHS/NIH) Contractor Performance System (CPS), that fed into PPIRS. As of September 2010, DHHS/NIH, OFPP and the Department of Defense (DoD) CPARS program office decided to phase out CPS and transition all agencies to the CPARS system as the single feeder system into PPIRS. To build upon this standardization effort, on June 28, 2011, the FAR Council issued a proposed rule with the intent of standardizing the evaluation factors and scales used by agencies to evaluate contractor performance based upon the CPARS factors. Thus, the proposed rule adds language to FAR 42.1503 to provide for government-wide evaluation factors commonly used in CPARS: (i) Technical or Quality; (ii) Cost Control (as applicable); (iii) Schedule/Timeliness; (iv) Management or Business Relations; and (v) Small Business Subcontracting (as applicable). Likewise, all agencies would use the five-scale rating system and definitions in the CPARS Policy Guide: exceptional, very good, satisfactory, marginal and unsatisfactory. Proposed modifications to FAR 42.1502(b) and (c) and 42.1503 clarify that evaluations of contracts and task orders that exceed the simplified acquisition threshold should be prepared annually. In addition, the proposed rule provides that incentive fee and award fee contract performance ratings also will be entered into CPARS.

Whether intentionally or unintentionally, the proposed rule includes revisions that go beyond this goal of standardizing performance evaluations. In particular, current FAR 42.1503(b) provides that agency evaluations shall be given to the contractor as soon as they are completed. Contractors are then provided 30 days to submit comments that rebut the statements in the evaluation or to provide additional information for the agency's consideration. FAR 42.1503(b) also provides for review at a level above the contracting officer (CO) of any disagreements between the contractor and the agency. The current FAR also indicates that this information will be retained as part of the evaluation, may be used to support future award decisions, and should be marked as “Source Selection Information” that is not released outside of the Government, except to the contractor whose performance is being evaluated. Although the proposed revision to FAR 42.1503(b) retains the statement that agency evaluations shall be provided to the contractor, none of the text regarding contractor comments, agency review of disagreements at a level above the CO, retention of comments as

part of the information that could be used to support an award decision, and protection of contractor responses as "Source Selection Information" appears in the proposed revision to 42.1503(b) or elsewhere in the proposed rule. Thus, if passed as drafted in its proposed form, the new rule would not automatically provide a right to respond to an adverse CPAR or obtain review at a level above the CO, frustrating contractor attempts to correct negative past performance evaluations short of submitting claims to the contracting agency. It may also frustrate the goals of improving past performance information by creating CPARs that, potentially, are based on only half—the Government half—of the story. Furthermore, given that much of the information in FAPIIS is now publicly available as a result of the Supplemental Appropriations Act for Fiscal Year 2010, Pub. L. No. 111-212, that statute states that past performance reviews will not be posted publicly on FAPIIS. Yet, the removal of the admonition to treat evaluations and contractor responses as "Source Selection Information" could lead agencies to believe that such information *should* be posted on FAPIIS or produced under the Freedom of Information Act.

Nothing in the Notice accompanying the proposed rules discusses the elimination of these protections. Indeed, it is possible that the removal was inadvertent, as proposed 42.1503(f) admonishes agencies to ensure that only "authorized personnel have access to the data and information safeguarded in accordance with 42.1503(b)." Nonetheless, if finalized in its current form, contractors may find that their evaluations of performance across contracts and agencies are based on similar factors and scales, but that their ability to correct inaccurate information or challenge an adverse rating short of pursuing litigation is seriously jeopardized.

UPDATE: On August 9, 2011, the FAR Council issued a correction to this proposed rule. In its original form, the proposed rule had omitted text currently in FAR 42.1503(b) that permitted contractors 30 days within which to comment upon performance evaluations and also provided for elevation of disagreements about performance evaluations to a level above the Contracting Officer. The proposed rule also omitted text that provided that performance evaluations and related contractor responses and comments would be treated as "source selection information" that would not be disclosed outside the Government. In addition, the proposed rule included a typographical error that omitted text from proposed 42.1503(h). The correction restores the omitted text from FAR 42.1503(b), with minor revisions, and moves the text from 42.1503(b) to 42.1503(d). The correction also includes the text omitted from proposed 42.1503(h). See our August 9, 2011 client alert for more information.