

ALERT

Update to Proposed FAR Rule on Documenting Contractor Performance: FAR Council Issues Correction To Proposed Rule to Restore FAR Text; Extends Comment Deadlines

August 9, 2011

In our most recent *Government Contracts Issue Update* newsletter, we wrote about a proposed amendment to the Federal Acquisition Regulation (FAR) regarding documenting contractor performance. The purpose of the proposed rule, published at 76 Fed. Reg. 37704 (June 28, 2011), was to standardize performance evaluation factors and rating scales across agencies to conform to the ratings and factors used in the Contractor Performance Assessment System (CPARS). The published proposed rule, however, 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).

On August 9, 2011, the FAR Council issued a correction to the proposed rule that 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 76 Fed. Reg. 48776 (Aug. 9, 2011). According to the FAR Council, the omission of the text from existing FAR 42.1503(b) was inadvertent. Thus, the proposed rule now restores the rights and protections discussed above. As corrected, proposed 42.1503(h), addressing

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"other contractor performance information," reflects the text in the existing version of FAR 42.1503(f) and provides that agencies shall ensure that information is reported in the Federal Awardee Performance and Integrity Information System (FAPIIS) module of CPARS within three working days after a Contracting Officer issues a final determination that a contractor has submitted defective cost or pricing data; makes a subsequent change to the final determination regarding defective cost or pricing data under FAR 15.407-1(d); issues a final termination for cause or default notice; or makes a subsequent withdrawal or a conversion of a termination for default to a termination for convenience.

As a result of the republication of the proposed rule, the comment period was extended 30 days to September 8, 2011.