

ALERT

FAR Council Issues Final Rule on Documenting Contractor Past Performance: Retains Process for Review of Evaluations at Level Above the Contracting Officer

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On August 1, 2013, the Federal Acquisition Regulatory (FAR) Council issued a final rule on documenting contractor past performance. See 78 Fed. Reg. 46783 (Aug. 1, 2013). In its second proposed rule on the topic, 77 Fed. Reg. 54864 (Sept. 6, 2012), the FAR Council had proposed that all agencies adopt uniform past performance ratings and factors based on the ratings and factors used in the Contractor Performance Assessment Reporting System (CPARS). In accordance with the FAR Council's Retrospective Plan and Analysis of Existing Rules, the FAR Council also singled out for comment the process in FAR 42.1503(b) that allows contractors to seek review of disagreements regarding a past performance evaluation at a level above the Contracting Officer (CO). According to the FAR Council, it sought comment on whether modifying the appeal process would improve or weaken the effectiveness of past performance policies and associated principles of impartiality and accountability.

Based on public comment, the FAR Council retained the right for contractors to seek review of past performance evaluations at a level above the CO. The FAR Council stated that it received seven comments on this issue, all of which urged the Council to retain the appeal process, and none of which opined that eliminating the review process would improve either economy or efficiency. The FAR Council noted that commenting parties expressed concern that elimination of the appeals process would reduce contractor competition, increase the likelihood of disruptive and costly litigation, weaken the effectiveness of past performance review procedures,

Authors

Kara M. Sacilotto
Partner
202.719.7107
ksacilotto@wiley.law

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and undermine confidence in the evaluation process. According to responding parties, the availability of an appeal process also ensured that individual government evaluator bias or lack of understanding of the complete program could be raised and addressed. Another commenter noted that review at a level above the CO benefits the Government as well as contractors by ensuring that the most accurate information on performance is available for source selection decisions. Accordingly, the FAR Council retained the appeal process set forth in FAR 42.1503(b), without change, but moved the provision to FAR 42.1503(d) as part of its overall reorganization of the rule.

The FAR Council nevertheless noted that “the existence of an appeal need not delay making a past performance evaluation available to source selection officials.” This may be in response to Section 853 of the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-39 (FY13 NDAA), which provided that contractors should be given 14 days to comment on past performance evaluations and that agencies should post past performance information into the relevant databases within 14 days of notifying the contractor of the availability of the past performance evaluation for comment. Although the FAR Council’s preamble states that the final rule “incorporates agency management accountability requirements from section 853,” the final rule retains the 30-day period for contractors to comment on their initial past performance evaluations.

The final rule makes the following substantive changes to FAR subpart 42.15:

- The FAR Council reorganized FAR subpart 42.15 for clarity and consistency.
- FAR 42.1502 is revised to clarify that past performance evaluations for contracts and orders should be prepared at least annually and at the time the work under a contract or order is completed.
- The FAR Council clarified FAR 42.1503(a) regarding agency procedures and responsibilities for contributing to and conducting past performance evaluations.
- FAR 42.1503(b) now includes the factors (Technical; Cost Control (not applicable for firm-fixed-price contracts); Schedule/Timeliness; Management/Business Relations; Small Business Subcontracting (as applicable; and Other (a catchall)) as well as ratings (Exceptional, Very Good, Satisfactory, Marginal, Unsatisfactory, defined in Tables 42-1 and 42-2), to be applied to past performance evaluations, based on the CPARS ratings and factors. FAR 42.1503(b) also includes a new requirement for past performance evaluations to include a clear, non-technical description of the principal purpose of the contract or order.
- In accordance with statutory direction, FAR 42.1503(c) includes the requirement to enter the award fee and incentive-fee contract performance evaluation into CPARS when applicable.
- The FAR Council expanded requirements for agencies to conduct frequent evaluations of their compliance with past performance evaluation requirements so as to identify delinquent or deficient past performance reports.

Notably, several commenters also advocated for revisions to the FAR to expand public release of past performance evaluations. Noting that the rule was focused on providing Government-wide standardized past performance evaluation factors and rating categories and entry of past performance information into CPARS,

the FAR Council noted that it had not proposed changes to public release of past performance information and, therefore, any such changes would be outside the scope of the final rule. Accordingly, the FAR Council made no changes to this aspect of the FAR, except (as noted above) to move FAR 42.1503(b) to FAR 42.1503 (d).

The final rule puts to rest concern that contractors might be forced to either accept adverse performance evaluations or proceed directly to litigation if the right for review above the CO level were removed. Contractors should take advantage both of the opportunity to comment on their initial past performance evaluations and, if necessary, obtain review at a level above the CO. As one respondent noted, nearly 30% of its initial past performance evaluations had factual inaccuracies; after review, substantial changes were made to its ratings or narratives.

Contractors should be wary, however, of waiting until the last minute to provide comments on their initial evaluations. As noted, Section 853 of the FY13 NDAA provides for a 14-day comment period and instructs agencies to post evaluations within 14 days as well. Although the final rule does not reflect these deadlines, there is an open FAR case on the requirement and a proposed rule in the works; agencies also are under continuing scrutiny regarding efforts to improve the quantity, quality, and timeliness of past performance data and therefore may post evaluations early. Moreover, the FAR Council expressly stated that the right to a review above the level of the CO should not delay agencies posting their final performance evaluations. Although the NDAA does not foreclose a contractor from later commenting on or challenging an evaluation with which it disagrees, once an evaluation is posted, it is available for other agencies to use in source selections. Therefore, contractors should ensure that they have processes in place to respond as quickly as possible when they receive notification that an evaluation is available for comment.