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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 42

[FAR Case 2012-028; Docket 2012-0028; Sequence 1]

RIN: 9000-AM40

**Federal Acquisition Regulation; Contractor Comment Period,
Past Performance Evaluations**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement provisions of law limiting the periods allowed for contractor comments on past performance evaluations and making past performance evaluations available to source selection officials sooner.

DATES: Interested parties should submit written comments to the Regulatory Secretariat at one of the addressees shown below on or before **[Insert 60 days after publication in the FEDERAL REGISTER]** to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2012-028 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2012-028". Select the link "Submit a Comment" that corresponds with "FAR Case 2012-028". Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2012-028" on your attached document.
- Fax: 202-501-4067.
- Mail: General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1800 F Street, N.W., 2nd Floor, Washington, DC 20405-0001.

Instructions: Please submit comments only and cite FAR Case 2012-028, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Curtis E. Glover, Sr., Procurement Analyst, at 202-501-1448, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAR Case 2012-028.

SUPPLEMENTARY INFORMATION:

I. Background.

DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement section 853 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112-239, enacted January 2, 2013) and section 806 of the NDAA for FY 2012 (Pub. L. 112-81, enacted December 31, 2011, 10 U.S.C. 2302 Note). Section 853, entitled "Inclusion of Data on Contractor Performance in Past Performance Databases for Executive Agency Source Selection Decisions", and section 806, entitled "Inclusion of Data on Contractor Performance in Past Performance Databases for Source Selection Decisions", require revisions to the acquisition regulations on past performance evaluations so that contractors are provided "up to 14 calendar days ... from the date of delivery" of past performance evaluations "to submit comments, rebuttals, or additional information pertaining to past performance" for inclusion in the database. In addition, paragraph (c) of both sections 853 and 806 requires that agency evaluations of contractor performance, including any information submitted by contractors, be "included in the relevant past performance database not later than the date that is 14 days after the date of delivery of the information" (section 853(c)) to the contractor.

II. Discussion and Analysis.

The FAR addresses Governmentwide rules for past performance evaluations at FAR subpart 42.15, Contractor Performance Information. The Contractor Performance Assessment Reporting System (CPARS) processes the assessment and provides it to the Past Performance Information Retrieval System (PPIRS), so agency source selection officials can review the reports. CPARS provides an automatic notification to the contractor when a past performance evaluation has been submitted to the system and is available for contractor comment. This is the equivalent of "providing" the past performance evaluation to the contractor, and it starts the suspense period for contractor comment or rebuttal.

It is important for past performance information to be shared with source selection officials immediately, so that award decisions can be better informed and made in a more timely manner. Currently, however, FAR 42.1503(b) provides "a minimum of 30 days" for contractor comments, rebutting statements, or additional information in response to the Government's past performance evaluation, and the past performance evaluation is not made available until after the contractor's comments have been made. This rule proposes a change in contractors' response procedures. The statutes are clear: Contractors will have a maximum of 14 days to provide comments before posting to PPIRS. In

addition, the law now requires that past performance evaluations be available to source selection officials not later than 14 days after the evaluation was provided to the contractor, whether or not contractor comments have been received. This is likely to serve as an impetus to contractors to meet the 14 calendar day's deadline for comments. Having a past performance evaluation, with the contractor's comments and explanations included, available to source selection officials within 14 days will be to the advantage of most contractors. These timely evaluations will allow contractors who are meeting their contractual obligations to be more competitive for future awards.

When a contractor is unable to provide comments within 14 days, however, the proposed changes to CPARS and PPIRS will enable the contractor's comments to be added to the past performance evaluation after the evaluation has been moved into PPIRS. In addition, the planned system changes will allow the Government to revise a past performance evaluation in PPIRS if the Government determines, after the 14-day period has expired, that corrections should be made to the past performance evaluation. This rule proposes to amend FAR 42.1503(d) and (f).

OFPP has issued guidance and is working with agencies to improve their past performance reporting compliance to ensure this valuable performance information is shared with

source selection officials. Timely reporting of this information will be crucial to the successful implementation of this regulation. Expediting the time allotted to contractors to respond to performance evaluations should improve communication between the contractor and the Government, enable current information to be shared quickly throughout the Government, and ultimately ensure the Government does business with high performing contractors. In keeping with the FAR retrospective plan, which promotes public consultation and outreach, the Councils would like to hear your substantive comments on: how the expedient posting of these reports in the system may impact your business; and ways to limit any extra burden, if any, this requirement is having on your business.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 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). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory

action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this proposed rule to 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 contractor comments on their past performance evaluations are already allowed by FAR subpart 42.15. However, an Initial Regulatory Flexibility Analysis (IRFA) has been prepared and is summarized as follows:

The analysis is summarized as follows:

Section 806 of the National Defense Authorization Act (NDAA) for Fiscal Year 2012 (Public Law 112-81, enacted December 31, 2011), is entitled "Inclusion of Data on Contractor Performance in Past Performance Databases for Source Selection Decisions". Paragraph (c) of section 806 mandates DFARS revisions so that contractors are provided "up to 14 calendar days from the date of delivery" to them of past performance evaluations "to submit comments, rebuttals, or additional information pertaining to past performance" for inclusion in the database. In addition, section 806(c) requires that DoD agency evaluations of contractor performance, including any information submitted by contractors, be "included in the relevant past performance database not later than 14 days after the date of delivery of the information" to the contractor.

Section 853 of the NDAA for FY 2013 (Public Law 112-239, enacted January 2, 2013) is entitled "Inclusion of Data on Contractor Performance in Past Performance Databases for Executive Agency Source Selection Decisions", and it extends the requirements of section 806 to all Executive agencies.

The FAR addresses Governmentwide rules for past performance evaluations at FAR subpart 42.15, Contractor Performance Information. The databases selected by the Office of Management and Budget (OMB) for these evaluations are the Contractor Performance Assessment Reporting System (CPARS) and the Past Performance Information Retrieval System (PPIRS). CPARS provides an automatic notification to the contractor when a past performance evaluation has been submitted to the system and is available for contractor comment. This is the equivalent of "providing" the past performance evaluation to the contractor, and it starts the 14 day suspense period for contractor comment or rebuttal. CPARS processes the assessment and provides it to PPIRS.

The rule proposes a change in contractors' response procedures. Instead of allowing "at least 30 days" for a contractor's response to the past performance evaluation, contractors will have a maximum of 14 days to do so. In addition, the statute now requires that past performance evaluations be available to source selection officials not later than 14 days after the evaluation was provided to the contractor, whether or not contractor comments have been received. However, the proposed changes to the systems will enable a contractor's comments to be added to the past performance evaluation after the evaluation has been moved into PPIRS; these changes will also allow the Government to revise a past performance evaluation in PPIRS if the Government determines, after the 14 day period has expired, that it was in error.

The proposed rule would apply to all small businesses for which past performance evaluations are completed. OMB Control Number 9000-0142, renewed in 2012, is the source for the data used in this IRFA. It indicates that an estimated 150,000 respondents submit an average of four responses annually, for a total of 600,000 responses. Data from the Federal Procurement Data System (FPDS) for Fiscal Year 2011 show that approximately 32 percent of the relevant actions of the responses are from small businesses, so this rule would apply to approximately 48,000 small entities.

The requirement to conduct past performance evaluations is not new. The differences between the current FAR past performance evaluation requirements (see FAR subpart 42.15) and this proposed rule are that the law reduces the time allowed for a contractor to submit comments, rebuttals, or additional information pertaining to past performance for inclusion in the past performance database from "a minimum of 30 days" (FAR 42.1503(b)) to "up to 14 calendar days", and the law now requires that past performance evaluations be available to source selection officials not later than 14 days after the

evaluation was provided to the contractor, whether or not contractor comments have been received.

There are no new reporting, recordkeeping, or other compliance requirements created by the proposed rule. The rule does not duplicate, overlap, or conflict with any other Federal rules.

DoD, GSA, and NASA did not identify any alternatives that would comply with the applicable statutes. The laws do not provide for any exemptions for small entities.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in consistent with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR case 2012-028) in correspondence.

V. Paperwork Reduction Act

This rule affects the certification and information collection requirements in the provision at FAR subpart 42.15, currently approved under the OMB Control Number 9000-0142, titled, Past Performance Information; in the amount of 1,200,000 hours, in accordance with the Paperwork Reduction Act (44 U.S.C. chapter 35). This rule would shorten the contractors' response time, but it would not expand the

reporting requirement. The impact, however, is negligible because contractors are already allowed to submit comments, rebutting statements, or additional information regarding agency evaluations of their performance. The number of contractors providing comments will be unaffected by this rule. Further, the type of information provided is not impacted by this proposed rule.

List of Subject in 48 CFR Part 42

Government procurement.

Dated: July 31, 2013.

William Clark,
Acting Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR part 42 as set forth below:

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

1. The authority citation for 48 CFR part 42 is revised to read as follows:

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

2. Amend section 42.1503 by revising the third sentence in paragraph (d); and revising paragraph (f) to read as follows:

42.1503 Procedures.

* * * * *

(d) * * * Contractors shall be afforded up to 14 calendar days from the date of notification of availability of the past performance evaluation to submit comments, rebutting statements, or additional information. * * *

* * * * *

(f) Agencies shall prepare and submit all past performance evaluations electronically in the CPARS at <http://www.cpars.gov>. These evaluations, including any contractor-submitted information (with indication whether agency review is pending), are automatically transmitted to PPIRS at <http://www.ppirs.gov> not later than 14 days after the date on which the contractor is notified of the evaluation's availability for comment. The Government shall

update PPIRS with any contractor comments provided after 14 days, as well as any subsequent agency review of comments received. Past performance evaluations for classified contracts and special access programs shall not be reported in CPARS, but will be reported as stated in this subpart and in accordance with agency procedures. Agencies shall ensure that appropriate management and technical controls are in place to ensure that only authorized personnel have access to the data and the information safeguarded in accordance with 42.1503(d).

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