

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 9, 15, and 42

[FAC 90-26; FAR Case 93-02]

RIN 9000-AG45

Federal Acquisition Regulation; Past Performance Information

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed to issue Federal Acquisition Circular (FAC) 90-26, a final rule amending the Federal Acquisition Regulation (FAR) to establish requirements for the use of past performance information in the contractor selection process. This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

EFFECTIVE DATE: May 30, 1995.

FOR FURTHER INFORMATION CONTACT: Ms. Linda Klein at (202) 501-3775 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-26, FAR case 93-02.

SUPPLEMENTARY INFORMATION:

A. Background

A proposed FAR rule was published in the **Federal Register** at 59 FR 8108 on February 17, 1994. The proposed rule required evaluation of past performance in all competitively negotiated acquisitions expected to exceed \$100,000, and evaluation of contractor performance on all new contracts exceeding \$100,000.

Thirty-five comments from twenty-five sources were received during the public comment period. All comments were considered in the development of this final rule. The final rule differs from the proposed rule in that it (1) permits agencies to use a phase-in approach for implementation of past performance evaluation requirements; (2) clarifies that firms lacking relevant performance history shall receive a neutral evaluation for past performance;

(3) permits offerors to submit relevant past performance information to the Government; (4) excludes contracts awarded under FAR Subparts 8.6 and 8.7 from the requirement for evaluation of contractor performance; (5) provides that past performance information files shall not be retained to provide source selection information for longer than three years after completion of contract performance; and (6) contains additional guidance to facilitate the collection and use of past performance information.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) applies to this final rule and a Final Regulatory Flexibility Analysis has been performed. A copy of the analysis may be obtained from the FAR Secretariat.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the final rule does not impose recordkeeping or information collection requirements which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 9, 15, and 42

Government procurement.

Dated: March 27, 1995.

C. Allen Olson,

Director, Office of Federal Acquisition Policy.

Federal Acquisition Circular

FAC 90-26

Federal Acquisition Circular (FAC) 90-26 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

All Federal Acquisition Regulation (FAR) and other directive material contained in FAC 90-26 are effective May 30, 1995.

Dated: February 27, 1995.

Eleanor R. Spector,

Director, Defense Procurement.

Dated: February 2, 1995.

Deidre A. Lee,

Associate Administrator for Procurement, NASA.

Ida M. Ustad,

Associate Administrator, Office of Acquisition Policy, GSA.

Therefore, 48 CFR Parts 9, 15, and 42 are amended as set forth below:

1. The authority citation for 48 CFR Parts 9, 15 and 42 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 9—CONTRACTOR QUALIFICATIONS

2. Section 9.104-1(c) is revised to read as follows:

9.104-1 General standards.

* * * * *

(c) Have a satisfactory performance record (see 48 CFR 9.104-3(c) and part 42, subpart 42.15). A prospective contractor shall not be determined responsible or nonresponsible solely on the basis of a lack of relevant performance history, except as provided in 9.104-2;

* * * * *

3. Section 9.105-1(c) is amended by revising the introductory text to read as follows:

9.105-1 Obtaining information.

* * * * *

(c) In making the determination of responsibility (see 9.104-1(c)), the contracting officer shall consider relevant past performance information (see 48 CFR part 42, subpart 42.15). In addition, the contracting officer should use the following sources of information to support such determinations:

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

4. Section 15.406-5(b) is amended by revising the last two sentences to read as follows:

15.406-5 Part IV—Representations and instructions.

* * * * *

(b) * * * The severable parts should provide for separation of cost or pricing data, past performance data and, when needed, technical data. The instructions may specify further organization of proposal or quotation parts, such as (1) administrative, (2) management, (3) technical, (4) past performance, and (5) cost or pricing data.

* * * * *

5. Section 15.604 is amended by revising paragraphs (b) and (c)(3) to read as follows:

15.604 Responsibilities.

* * * * *

(b) The cognizant technical official is responsible for the technical and past performance requirements related to the source selection process.

(c) * * *

(3) Conducting or controlling all negotiations concerning cost or price, technical requirements, past

performance, and other terms and conditions; and

* * * * *

6. Section 15.605 is amended by revising paragraph (b), removing paragraph (c), redesignating (d), (e) and (f) as (c), (d) and (e), respectively, and revising newly-redesignated (d) to read as follows:

15.605 Evaluation factors.

* * * * *

(b)(1) The evaluation factors that apply to an acquisition and the relative importance of those factors are within the broad discretion of agency acquisition officials except that—

(i) Price or cost to the Government shall be included as an evaluation factor in every source selection.

(ii) Past performance shall be evaluated in all competitively negotiated acquisitions expected to exceed \$100,000 not later than January 1, 1999, unless the contracting officer documents in the contract file the reasons why past performance should not be evaluated. Agencies may develop their own phase-in schedule for past performance evaluations which meets or exceeds the following milestones: All solicitations with an estimated value in excess of (A) \$1,000,000 issued on or after July 1, 1995; (B) \$500,000 issued on or after July 1, 1997; and (C) \$100,000 issued on or after January 1, 1999. Past performance may be evaluated in competitively negotiated acquisitions estimated at \$100,000 or less at the discretion of the contracting officer.

(iii) Quality shall be addressed in every source selection through inclusion in one or more of the non-cost evaluation factors, such as past performance, technical excellence, management capability, personnel qualifications, prior experience, and schedule compliance.

(2) Any other relevant factors, such as cost realism, may also be included.

* * * * *

(d) The solicitation should be structured to provide for the selection of the source whose proposal offers the greatest value to the Government in terms of performance, risk management, cost or price, and other factors. The solicitation shall clearly state the evaluation factors, including cost or price, cost or price-related factors, past performance and other non-cost or non-price-related factors, and any significant subfactors, that will be considered in making the source selection, and their relative importance (see 15.406-5(c)). Numerical weights, which may be employed in the evaluation of

proposals, need not be disclosed in solicitations. The solicitation shall inform offerors of minimum requirements that apply to particular evaluation factors and significant subfactors.

* * * * *

7. Section 15.608(a) is amended by revising the introductory text, redesignating paragraph (a)(2) as (a)(3), and adding a new paragraph (a)(2) to read as follows:

15.608 Proposal evaluation.

(a) Proposal evaluation is an assessment of both the proposal and the offeror's ability to successfully accomplish the prospective contract. An agency shall evaluate competitive proposals solely on the factors specified in the solicitation.

* * * * *

(2) *Past performance evaluation.* (i) Past performance information is an indicator of an offeror's ability to perform the contract. The comparative assessment of past performance information is separate from the responsibility determination required under 48 CFR 9.103. The number and severity of an offeror's problems, the effectiveness of corrective actions taken, the offeror's overall work record, and the age and relevance of past performance information should be considered at the time it is used.

(ii) Where past performance is to be evaluated, the solicitation shall afford offerors the opportunity to identify Federal, state and local government, and private contracts performed by the offerors that were similar in nature to the contract being evaluated, so that the Government may verify the offerors' past performance on these contracts. In addition, at the discretion of the contracting officer, the offerors may provide information on problems encountered on the identified contracts and the offerors' corrective actions. Past performance information may also be obtained from other sources known to the Government. The source and type of past performance information to be included in the evaluation is within the broad discretion of agency acquisition officials and should be tailored to the circumstances of each acquisition. Evaluations of contractor performance prepared in accordance with 48 CFR part 42, subpart 42.15 are one source of performance information which may be used.

(iii) Firms lacking relevant past performance history shall receive a neutral evaluation for past performance.

* * * * *

8. Section 15.610 is amended by removing the word "and" at the end of paragraph (c)(4) and the period at the end of (c)(5) and inserting "; and" in its place; and by adding paragraph (c)(6) to read as follows:

15.610 Written or oral discussion.

* * * * *

(c) * * *

(6) Provide the offeror an opportunity to discuss past performance information obtained from references on which the offeror had not had a previous opportunity to comment. Names of individuals providing reference information about an offeror's past performance shall not be disclosed.

* * * * *

9. Section 15.1003(b) is amended by removing the word "and" at the end of paragraph (b)(2) and the period at the end of (b)(3) and inserting "; and" in its place; and by adding paragraph (b)(4) to read as follows:

15.1003 Debriefing of unsuccessful offerors.

* * * * *

(b) * * *

(4) Names of individuals providing reference information about an offeror's past performance.

* * * * *

PART 42—CONTRACT ADMINISTRATION

10. Section 42.302 is amended by adding paragraph (b)(11) to read as follows:

42.302 Contract administration functions.

* * * * *

(b) * * *

(11) Prepare evaluations of contractor performance in accordance with subpart 42.15.

* * * * *

11. Subpart 42.15 is added to read as follows:

Subpart 42.15—Contractor Performance Information

Sec.
42.1500 Scope of subpart.
42.1501 General.
42.1502 Policy.
42.1503 Procedures.

42.1500 Scope of subpart.

This subpart provides policies and establishes responsibilities for recording and maintaining contractor performance information. It implements Office of Federal Procurement Policy Letter 92-5, Past Performance Information. This subpart does not apply to procedures used by agencies in determining fees under award or incentive fee contracts.

However, the fee amount paid to contractors should be reflective of the contractor's performance and the past performance evaluation should closely parallel the fee determinations.

42.1501 General.

Past performance information is relevant information, for future source selection purposes, regarding a contractor's actions under previously awarded contracts. It includes, for example, the contractor's record of conforming to contract requirements and to standards of good workmanship; the contractor's record of forecasting and controlling costs; the contractor's adherence to contract schedules, including the administrative aspects of performance; the contractor's history of reasonable and cooperative behavior and commitment to customer satisfaction; and generally, the contractor's business-like concern for the interest of the customer.

42.1502 Policy.

(a) Except as provided in paragraph (b) of this section, agencies shall prepare an evaluation of contractor performance for each contract in excess of \$1,000,000 beginning July 1, 1995, \$500,000 beginning July 1, 1996, and \$100,000 beginning January 1, 1998, (regardless of the date of contract award) at the time the work under the contract is completed. In addition, interim evaluations should be prepared as specified by the agencies to provide current information for source selection purposes, for contracts with a period of performance, including options, exceeding one year. This evaluation is generally for the entity, division, or unit

that performed the contract. The content and format of performance evaluations shall be established in accordance with agency procedures and should be tailored to the size, content, and complexity of the contractual requirements.

(b) Agencies shall not evaluate performance for contracts awarded under 48 CFR part 8, subparts 8.6 and 8.7. Agencies shall evaluate construction contractor performance and architect/engineer contractor performance in accordance with 48 CFR 36.201 and 36.604, respectively.

42.1503 Procedures.

(a) Agency procedures for the past performance evaluation system shall generally provide for input to the evaluations from the technical office, contracting office and, where appropriate, end users of the product or service.

(b) Agency evaluations of contractor performance prepared under this subpart shall be provided to the contractor as soon as practicable after completion of the evaluation. Contractors shall be given a minimum of 30 days to submit comments, rebutting statements, or additional information. Agencies shall provide for review at a level above the contracting officer to consider disagreements between the parties regarding the evaluation. The ultimate conclusion on the performance evaluation is a decision of the contracting agency. Copies of the evaluation, contractor response, and review comments, if any, shall be retained as part of the evaluation. These evaluations may be used to support future award decisions, and should

therefore be marked "Source Selection Information". The completed evaluation shall not be released to other than Government personnel and the contractor whose performance is being evaluated during the period the information may be used to provide source selection information. Disclosure of such information could cause harm both to the commercial interest of the Government and to the competitive position of the contractor being evaluated as well as impede the efficiency of Government operations. Evaluations used in determining award or incentive fee payments may also be used to satisfy the requirements of this subpart.

(c) Departments and agencies shall share past performance information with other departments and agencies when requested to support future award decisions. The information may be provided through interview and/or by sending the evaluation and comment documents to the requesting source selection official.

(d) Any past performance information systems, including automated systems, used for maintaining contractor performance information and/or evaluations should include appropriate management and technical controls to ensure that only authorized personnel have access to the data.

(e) The past performance information shall not be retained to provide source selection information for longer than three years after completion of contract performance.

[FR Doc. 95-7827 Filed 3-30-95; 8:45 am]

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