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#### SUPPLEMENTARY INFORMATION:

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#### I. Why is EPA using this proposed rule?

This document proposes a number of revisions to 40 Code of Federal Regulations (CFR) part 761 of the PCB regulations. In the “Rules and Regulations” section of this **Federal Register**, EPA is making these changes as a direct final rule without a prior proposed rule because we view this as a noncontroversial action and anticipate no adverse comment. We have explained our reasons for this action, including our reasons to all of the specific amendments, in the preamble to the direct final rule. Additionally, the amendments to the regulatory text for this proposed rule can also be found in the direct final rule. If we receive no adverse comment on any of the changes we are promulgating today, we will not take further action on this proposed rule. If, however, we receive such comment, we will publish a timely withdrawal in the **Federal Register** informing the public that these amendments will not take effect, and the reason for such withdrawals. We do not intend to institute a second comment period on this action. Any parties interested in commenting must do so at this time. EPA will address public comments in any subsequent final rule. For further information, please see the information provided in the **ADDRESSES** section of this document.

#### II. Does this action apply to me?

The discussion of the potentially affected entities by this proposed rule can be found in the preamble to the direct final rule.

#### III. Statutory and Executive Order Reviews

For a complete discussion of all the administrative requirements applicable to this action, see the direct final rule in the “Rules and Regulations” section of this **Federal Register**.

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies

that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today’s rule on small entities, small entity is defined as: (1) A small business that is primarily engaged in hazardous waste treatment and disposal as defined by NAICS code 562211, with annual receipts of less than 12.5 million dollars (based on Small Business Administration size standards); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today’s proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This rule merely updates the existing regulations for manifesting PCB wastes to match the existing Uniform Hazardous Waste Manifest form. Once updated, the regulations will match what is currently being conducted by industry.

#### List of Subjects in 40 CFR Part 761

Environmental protection, Hazardous substances, Manifest, Polychlorinated biphenyls, Reporting and recordkeeping requirements.

Dated: August 17, 2012.

**Lisa Feldt,**

*Acting Assistant Administrator, Office of Solid Waste and Emergency Response.*

[FR Doc. 2012–21675 Filed 9–5–12; 8:45 am]

**BILLING CODE 6560–50–P**

#### DEPARTMENT OF DEFENSE

#### GENERAL SERVICES ADMINISTRATION

#### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 8, 12, 15, 17, 42, and 49

[**FAR Case 2012–009; Docket 2012–0009; Sequence 1**]

**RIN 9000–AM34**

#### Federal Acquisition Regulation; Documenting Contractor Performance

**AGENCY:** 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 provide Governmentwide standardized past performance evaluation factors and performance rating categories and require that past performance information be entered into the Contractor Performance Assessment Reporting System (CPARS).

**DATES:** Interested parties should submit written comments to the Regulatory Secretariat on or before November 5, 2012 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAR Case 2012–009 by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by searching for “FAR Case 2012–009”. Select the link “Send a Comment or Submission” that corresponds with FAR Case 2012–009. Follow the instructions provided to complete the “Public Comment and Submission Form”. Please include your name, company name (if any), and “FAR Case 2012–009” on your attached document.

- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street NE., 7th Floor, Washington, DC 20417.

*Instructions:* Please submit comments only and cite FAR Case 2012–009 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 2012–009.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 76 FR 37704 on June 28, 2011, under FAR Case 2009–042, to implement recommendations from Government Accountability Office (GAO) Report GAO–09–374, entitled “Better Performance Information Needed to

Support Agency Contract Award Decisions,” and Office of Federal Procurement Policy (OFPP) memorandum entitled “Improving the Use of Contractor Performance Information” (dated July 29, 2009). Two amendments to the **Federal Register** notice were published (76 FR 48776, dated August 9, 2011, and 76 FR 50714, dated August 16, 2011). The due date for receipt of public comments was extended twice and was ultimately set at September 29, 2011. Twentythree respondents submitted comments on the proposed rule. This proposed rule addresses all comments received in response to the proposed rule published in the **Federal Register** at 76 FR 37704 on June 28, 2011. This proposed rule also implements paragraphs (a), (b), and (d) of section 806 of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112–81) which requires, at a minimum—

(1) Establishment of standards for the timeliness and completeness of past performance submissions for purposes of databases;

(2) Assignment of responsibility and management accountability for the completeness of past performance submissions for such purposes; and

(3) Assurance that past performance submissions are consistent with award fee evaluations in cases where such evaluations have been conducted.

The FAR Council is soliciting public comments on a proposal to remove the appeal language at FAR 42.1503(d) to improve economy and efficiency. This proposal was included in and consistent with the FAR Council’s Retrospective Plan and Analysis of Existing Rules as required by Executive Order 13563. The FAR currently requires agencies to provide for review of agency evaluations at a level above the contracting officer to consider disagreements between the parties regarding the evaluation. The Government is considering the merits of modifying the FAR requirements governing the appeal process to evaluate if this would improve or weaken the effectiveness of past performance policies and associated principles of impartiality and accountability.

## II. Discussion and Analysis of the Public Comments

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of this proposed rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

### A. Summary of Significant Changes

1. The Councils amended FAR 42.1503 language in this proposed rule to require the past performance report to include a clear, non-technical description of the principal purpose of the contract;

2. FAR 42.1503(b)(4) is revised by adding two tables:

- Table 42–1—Evaluation Ratings Definitions; and
- Table 42–2—Evaluation Ratings Definitions (for the Small Business Subcontracting Evaluation factor when the clause at 52.219–9 is used).

3. The Evaluation Ratings Definitions included in the Tables are based upon guidance provided in the Department of Defense CPARS Policy Guide currently available on the Web site. The U.S. Small Business Administration provided recommendations to Table 42–2, and the revised text is included in this proposed rule.

4. Evaluation descriptions are revised under FAR 42.1503(b)(2) to the following:

Evaluation factors for each assessment shall include, at a minimum, the following:

(i) Technical (quality of product or service.)

(ii) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements).

(iii) Schedule/Timeliness.

(iv) Management or Business Relations.

(v) Small Business Subcontracting (as applicable, see Table 42–2).

(vi) Other (as applicable) (e.g., late or nonpayment to subcontractors, trafficking violations, tax delinquency, failure to report in accordance with contract terms and conditions, defective cost and pricing data, terminations, suspension and debarments, etc.)

5. Architect-Engineer Contract Administration Support System (ACASS) and Construction Contractor Appraisal Support System (CCASS) are not changed at this time. There is an effort that will combine all three systems into one, namely CPARS, and all evaluation rating scales will be the same at that point. This issue will be resolved when the systems are merged.

### B. Support for the Rule

*Comments:* Seven respondents expressed support for the rule’s purpose of standardizing the collection and evaluation of past performance information. One of these respondents deemed the proposed rule a positive implementation of the Government Accountability Office (GAO) recommendation.

*Response:* Noted.

### C. OFPP Act Requirements

*Comments:* Two respondents expressed concern that including the past performance categories and definitions in the CPARS Guide rather than in the text of the FAR was effectively a violation of the Office of Federal Procurement Policy Act (41 U.S.C. 1707 (formerly 41 U.S.C. 418b)) and the FAR 1.501–2 requirement to publish significant revisions that affect the public for comment. The CPARS Guide has not been published for public comment at this time. Both respondents recommended that the proposed FAR rule be revised to include the past performance ratings definitions in the FAR text and that the revised FAR rule be published for public comment.

*Response:* The respondents’ concerns have been addressed in FAR 42.1503(b)(4) and by this second proposed rule by adding Table 42–1 and Table 42–2.

### D. Alleged Weaknesses in CPARS System

*Comments:* Four comments were received alleging weaknesses in the current CPARS system. One respondent noted the lack of standard, reliable past performance ratings. Other issues raised concerned the current high overdue rates Governmentwide for submission of past performance ratings, the failure of the Government’s “chain of command” to ensure timely completion of past performance ratings, and the need to make the CPARS system even simpler and less time consuming.

*Response:* The comment on the reliable past performance ratings definitions is addressed under category C of this rule. The comments on overdue rates and timely completion reflect issues related to administration, which can be addressed by the respective contracting officers. The comments related to the CPARS system have been provided to the appropriate office for consideration.

### E. Public Availability of Information/FAPIIS

*Comments:* Four comments were submitted. One respondent recommended that the background section of the final rule explain how the Federal Awardee Performance and Integrity Information System (FAPIIS) is affected by the CPARS requirements and what role it will play in the process. Another respondent recommended increased clarity for FAR 42.1503(d) because it could be read to allow release of past performance information to third parties once the periods in FAR

42.1503(g) have expired. A third respondent advocated the wide release of past performance evaluations, *i.e.*, not requiring the marking of such information “Source Selection Information” and releasing past performance evaluation information in FAPIIS.

*Response:* The publication of past performance reviews in the public version of FAPIIS is currently prohibited by law (section 3010 of Pub. L. 111–212, enacted July 29, 2010). The relationship between FAPIIS and CPARS is explained at the FAPIIS Web site as follows:

“FAPIIS is a distinct application that is accessed through the Past Performance Information System (PPIRS) and is available to federal acquisition professionals for their use in award and responsibility determinations. FAPIIS provides users access to integrity and performance information from the FAPIIS reporting module in the Contractor Performance Assessment Reporting System (CPARS), proceedings information from the Central Contractor Registration (CCR) database, and suspension/disbarment information from the Excluded Parties List system (EPLS).”

Regarding the release of past performance information, FAR 42.1503(d) reads as follows:

“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.”

These sentences, which were not in any way limited by the time periods in FAR 42.1503(g), were not changed by this proposed rule.

#### F. Exceptions/Applicability

*Comment:* One respondent recommended exempting all science and technology contracts from the requirement to evaluate past performance.

*Response:* The Councils have determined that it is not in the Government’s best interest to exempt science and technology contracts from past performance assessments.

*Comment:* Respondent asked that the final rule clarify (1) whether past performance evaluations are required for individual task orders and delivery orders or only for the base indefinite-delivery contract; and (2) who is the responsible party for completing these evaluations.

*Response:* The requirement for past performance assessments for individual

task and delivery orders, and the parties responsible, are addressed in FAR 42.1502(c) and (d) as follows:

(c) *Multiple-agency orders.* Agencies shall prepare an evaluation of contractor performance for each order that exceeds the simplified acquisition threshold placed against a Federal Supply Schedule contract, or under a task-order contract or a delivery-order contract awarded by another agency (*i.e.*, Governmentwide acquisition contract or multi-agency contract). This evaluation shall not consider the requirements under paragraph (g) of this section. Agencies are required to prepare an evaluation if a modification to the order causes the dollar amount to exceed the simplified acquisition threshold.

(d) *Single-Agency orders.* For single-agency task-order and delivery-order contracts, the contracting officer may require performance evaluations for each order in excess of the simplified acquisition threshold when such evaluations would produce more useful past performance for source selection officials than that contained in the overall contract evaluation (*e.g.*, when the scope of the basic contract is very broad and the nature of individual orders could be significantly different). This evaluation need not consider the requirements under paragraph (g) of this section unless the contracting officer deems it appropriate.

#### G. Rating Factors

*Comments:* One respondent suggested that a sixth rating category, entitled “Other,” be added to the current five categories. Another respondent recommended that each past performance evaluation should be required to include an evaluation of the contractor’s small business subcontracting instead of the current requirement to do so only “when applicable.”

*Response:* The Councils agree that adding the evaluation factor “Other” at FAR 42.1503(b)(2) allows the Government to consider contingencies not contemplated by factors (i) through (v) that are unique to each contract award and are relevant to the contractor’s evaluation. FAR 42.1503(b)(2) is changed to add evaluation factor “(vi) Other (as applicable) (*e.g.*; late or nonpayment to subcontractors, trafficking violations, tax delinquency, failure to report in accordance with contract terms and conditions, defective cost and pricing data, terminations, suspension and debarments, etc.)”. “Small Business Subcontracting” may be included as a past-performance factor “as applicable.” The Councils did not change this language because there are instances where “Small Business Subcontracting” may require a past performance assessment.

#### H. Interim Ratings and Frequency of Ratings

*Comments:* One respondent recommended revising FAR 42.1502(b) to require more than one past performance evaluation a year for on-going contracts. However, another respondent strongly urged a prohibition against including interim ratings in final past performance evaluations. The same respondent stated that problems can arise with performance evaluations when the Government rater for an interim evaluation is transferred before the contract is completed. This respondent also noted that it has observed evaluation disparities among various contracting entities.

*Response:* FAR 42.1502(a) requires a minimum of one evaluation a year; however, agencies are not precluded from assessing past performance on a more frequent basis. The comments regarding interim evaluations and changes in Government personnel (rater) reflect issues of administration, and can be discussed with the respective contracting officer. The comment on observed evaluation disparities among various contracting entities is noted but this, too, is not a policy issue.

#### I. Other Comments

*Comments:* One respondent submitted a draft for a new past performance evaluation form. The respondent also asked whether additional items could be added to the CPARS past performance evaluation for comments from (1) Government quality assurance personnel, (2) contractor quality control personnel, and (3) the contracting officer’s representative. Another respondent expressed concern that allowing contractors to “report to the CPARS system” would have a negative impact on future competitiveness because all contractors would give themselves a positive performance rating. A third respondent stated its concern that the proposed rule was “essentially a creation of several memorandums and not a direct result of the traditional rulemaking process.”

*Response:* CPARS has a pre-established, electronic format for assessment of past performance; therefore, a new form is not needed at this time. FAR 42.1503(a) provides agencies the flexibility of requesting and obtaining input from other Government representatives as the contracting officer considers necessary. It may not be appropriate to require past performance input from (1) Government quality assurance personnel, (2) contractor quality control personnel, and (3) the

contracting officer's representative in every case. These individuals, when requested by the Government past performance official, can provide input under the "Assessing Official Representative" field. Contractors have the opportunity to respond to the Government's past performance assessment in every case. This material is in addition to, not in lieu of, the Government's assessment. Therefore, a contractor's tendency to give itself a positive performance rating in every case will not have a negative impact on future competitiveness, the concern expressed by one respondent. The Councils complied with all of the drafting and approval requirements applicable to every FAR Case.

*Comment:* One respondent commented on the proposed FAR 42.1503(a) statement that, if contracting officers' representatives and program managers are not specifically tasked with preparing interim and final past performance evaluations, then the contracting officer "will remain responsible" for their preparation. The respondent asked where past performance duties are assigned in the FAR as the responsibility of the contracting officer.

*Response:* The Councils agree that FAR 42.1503 was not sufficiently clear. FAR 42.1503(a) is changed to reflect that the contracting officer "is" responsible for this function if agency procedures do not specify a different responsible individual.

*Comment:* One respondent recommended that the duties of the CPARS Focal Point, at FAR 42.1503(h)(3), would be more accurate if the paragraph were revised to read as follows: "The primary duties of the CPARS Focal Point include administering CPARS and FAPIIS access, monitoring CPARS compliance, and providing assistance, guidance, and training to CPARS and FAPIIS users."

*Response:* FAR 42.1503(h)(2) clarifies that only a CPARS Focal Point has the authority to grant access to the information in the system. FAR 42.1503(h)(3) merely listed some of the Focal Point's key duties. Upon reflection, the Councils decided that this information is not pertinent to an acquisition regulation and belongs, rather, in a position description. FAR 42.1503(h)(3) currently references the disclosure exemption under the Freedom of Information Act.

*Comment:* One respondent proposed that FAR 42.1503 should be revised to include "ACASS/CCASS" and requiring that the standardized five ratings must be used in source selections.

*Response:* The second proposed rule already requires agencies to use the standardized five ratings, with certain exceptions that were listed at FAR 42.1502. These exceptions are retained in the second proposed rule, e.g., for construction and architect-engineering contracts; language is added to 42.1502(b) on reporting into ACASS and CCASS.

*Comment:* A respondent stated that FAR 42.1503(h)(1) was missing the "vertical list that currently resides at FAR 42.1503(f)."

*Response:* The vertical list referred to by the respondent was added to the previous proposed rule by the **Federal Register** notice correction, published August 9, 2011, at 76 FR 48776. The respondent submitted this comment prior to issuance of the correction.

*Comment:* One respondent asked that the word "generally," at FAR 42.1503(a), be removed because it allows for exceptions to the broad policy.

*Response:* The term "generally" is in the current FAR and was not proposed for change in the previous proposed rule. The input of the technical office, contracting office, and end-users of the products or services is not always required in every case. Therefore, the requested change is not made.

*Comment:* One respondent recommended revising FAR 42.1503(b)(1) to read as follows:

"The report should include a clear description of the principal purpose of the contract in plain English, a description of the contractor's performance based on objective facts supported by program, project, and contract performance data, and any unusual circumstances affecting contractor performance, e.g., hazardous location of performance. Ensure tailoring of each report to the contract dollar value, visibility, complexity, and value."

The respondent suggested that the revisions were needed because the terms "size" and "content" were unclear.

*Response:* The Councils agree that the CPARS ratings will be more useful to those using the system during source selection if the report were to include a requirement to "include a clear, non-technical description of the principal purpose of the contract." This language is added at FAR 42.1503(b)(1) in the second proposed rule.

The balance of the respondent's comment was not adopted because the language proposed to be included at FAR 42.1503(b)(1) is considered to be appropriately clear and descriptive.

*Comment:* At FAR 42.1503(b)(4), the respondent recommended revising the paragraph as follows in order to increase

clarity: "Each evaluation factor at paragraph (b)(2) of this section requires narrative that clearly supports the rating assigned using the rating definitions in the CPARS Policy Guide, <http://www.cpars.gov/>."

*Response:* Given that the CPARS rating categories and definitions are proposed to be added in this same paragraph by this proposed rule (see section II.C. above), the respondent's intent has been addressed.

*Comment:* At FAR 42.1503(f), the respondent recommended that additional clarity could be achieved by changing the wording to read: "Agencies shall prepare all past performance reports electronically in CPARS at <http://www.cpars.gov/>. All completed reports in CPARS transmit to the Past Performance Information Retrieval System (PIIRS) at <http://www.ppirs.gov> for viewing by Government source selection officials."

*Response:* Most of the material in the respondent's recommendation is now in this proposed rule; the part of the recommendation that is new is the addition of the phrase "for viewing by Government source selection officials". However, this is not adopted because, while access to the information in CPARS is limited, it is not limited in every case only to source selection officials.

### 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 not a significant regulatory action and, therefore, was not 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 this rule codifies in the FAR existing guidelines and practices. The evaluation factors and rating system language proposed are currently used by Federal

agencies. There are no new requirements placed on small entities. Therefore, an initial regulatory flexibility analysis was not performed, and no comments on the expected impact of this rule on small entities were received in response to the request for comments in the **Federal Register** notice for the prior proposed rule. 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 the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2012-009), in correspondence.

#### V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). No public comments were received on the information collection requirements in response to the request in the proposed rule.

#### List of Subjects in 48 CFR parts 8, 12, 15, 17, 42, and 49

Government procurement.

Dated: August 31, 2012.

#### Laura Auletta,

*Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.*

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 8, 12, 15, 17, 42, and 49 as set forth below:

1. The authority citation for 48 CFR parts 8, 12, 15, 17, 42, and 49 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.

#### PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

##### 8.406-4 [Amended]

2. Amend section 8.406-4 by removing from paragraph (e) “42.1503(f)” and adding “42.1503(h)” in its place.

3. Revise section 8.406-7 to read as follows:

##### 8.406-7 Contractor Performance Evaluation.

Ordering activities must prepare at least annually and at the time the work under the order is completed, an evaluation of contractor performance for each order that exceeds the simplified

acquisition threshold in accordance with 42.1502(c).

#### PART 12—ACQUISITION OF COMMERCIAL ITEMS

##### 12.403 [Amended]

4. Amend section 12.403 by removing from paragraph (c)(4) “42.1503(f)” and adding “42.1503(h)” in its place.

#### PART 15—CONTRACTING BY NEGOTIATION

##### 15.407-1 [Amended]

5. Amend section 15.407-1 by removing from paragraph (d) “42.1503(f)” and adding “42.1503(h)” in its place.

#### PART 17—SPECIAL CONTRACTING METHODS

6. Amend section 17.207 by adding paragraph (c)(6) to read as follows:

##### 17.207 Exercise of options.

\* \* \* \* \*

(c) \* \* \*

(6) The contractor’s past performance evaluations have been reviewed and the contractor’s performance rated.

\* \* \* \* \*

#### PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

7. Revise sections 42.1500 and 42.1501 to read as follows:

##### 42.1500 Scope of subpart.

This subpart provides policies and establishes responsibilities for recording and maintaining contractor performance information. This subpart does not apply to procedures used by agencies in determining fees under award or incentive fee contracts. See subpart 16.4. However, the fee amount paid to contractors should be reflective of the contractor’s performance and the past performance evaluation should closely parallel and be consistent with the fee determinations.

##### 42.1501 General.

(a) Past performance information (including the ratings and supporting narratives) 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—

(1) Conforming to contract requirements and to standards of good workmanship;

(2) Forecasting and controlling costs;

(3) Adherence to contract schedules, including the administrative aspects of performance;

(4) Reasonable and cooperative behavior and commitment to customer satisfaction;

(5) Reporting into databases (see subparts 4.14 and 4.15, and reporting requirements in the solicitation provisions and clauses referenced in 9.104-7);

(6) Integrity and business ethics; and

(7) Business-like concern for the interest of the customer.

(b) Agencies shall monitor their compliance with the past performance evaluation requirements (see 42.1502), and use the CPARS and PPIRS metric tools to measure the quality and timely reporting of past performance information.

8. Amend section 42.1502 by revising paragraphs (a) through (d) and (i) to read as follows:

##### 42.1502 Policy.

(a) *General.* Past performance evaluations shall be prepared at least annually and at the time the work under the contract or order is completed. Past performance evaluations are required for contracts and orders for supplies, services, and research and development, including contracts and orders performed inside and outside the United States, with the exception of architect-engineer and construction contracts or orders, which will still be reported into ACAAS and CCASS databases. Past performance information shall be entered into the Contractor Performance Assessment Reporting System (CPARS), the Governmentwide evaluation reporting tool for all past performance reports. Instructions for submitting evaluations into CPARS are available at <http://www.cpars.gov/>.

(b) *Contracts.* Except as provided in paragraphs (e), (f) and (h) of this section, agencies shall prepare evaluations of contractor performance for each contract or order that exceeds the simplified acquisition threshold. Agencies are required to prepare an evaluation if a modification to the contract causes the dollar amount to exceed the simplified acquisition threshold.

(c) *Multiple-agency orders.* Agencies shall prepare an evaluation of contractor performance for each order that exceeds the simplified acquisition threshold placed against a Federal Supply Schedule contract, or under a task-order contract or a delivery-order contract awarded by another agency (*i.e.*, Governmentwide acquisition contract or multi-agency contract). This evaluation shall not consider the requirements under paragraph (g) of this section. Agencies are required to prepare an evaluation if a modification to the order

causes the dollar amount to exceed the simplified acquisition threshold.

(d) *Single-Agency orders.* For single-agency task-order and delivery-order contracts, the contracting officer may require performance evaluations for each order in excess of the simplified acquisition threshold when such evaluations would produce more useful past performance for source selection officials than that contained in the overall contract evaluation (e.g., when the scope of the basic contract is very broad and the nature of individual orders could be significantly different). This evaluation need not consider the requirements under paragraph (g) of this section unless the contracting officer deems it appropriate.

\* \* \* \* \*

(i) Agencies shall promptly report other contractor information in accordance with 42.1503(h).

9. Revise section 42.1503 to read as follows:

**42.1503 Procedures.**

(a) Agency procedures for the past performance evaluation system shall—

(1) Generally provide for input to the evaluations from the technical office, contracting office and, where appropriate, end users of the product or service;

(2) Identify and assign past performance evaluation roles and

responsibilities to those individuals responsible for preparing and reviewing interim evaluation, if prepared, and final evaluations (e.g., contracting officers, contracting officer representatives and program managers); and

(3) Address management controls and appropriate management reviews of past performance evaluations, to include accountability, for documenting past performance on PPIRS. If agency procedures do not specify the individuals responsible for past performance evaluation duties, the contracting officer is responsible for this function. Those individuals identified may obtain information for the evaluation of performance from the program office, administrative contracting office, audit office, end users of the product or service, and any other technical or business advisor, as appropriate.

(b)(1) The evaluation should include a clear, non-technical description of the principal purpose of the contract. The evaluation should reflect how the contractor performed. The evaluation should include clear relevant information that accurately depicts the contractor's performance, and be based on objective facts supported by program and contract performance data. The evaluations should be tailored to the

contract type, size, content, and complexity of the contractual requirements.

(2) Evaluation factors for each assessment shall include, at a minimum, the following:

(i) Technical (quality of product or service.)

(ii) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements).

(iii) Schedule/Timeliness.

(iv) Management or Business Relations.

(v) Small Business Subcontracting (as applicable see Table 42-2).

(vi) Other (as applicable) (e.g., late or nonpayment to subcontractors, trafficking violations, tax delinquency, failure to report in accordance with contract terms and conditions, defective cost and pricing data, terminations, suspension and debarments, etc.)

(3) Evaluation factors may include subfactors. Each factor and subfactor used shall be evaluated and a supporting narrative provided.

(4) Each evaluation factor, as listed in paragraph (b)(2) of this section, shall be rated in accordance with a five scale rating system (e.g., exceptional, very good, satisfactory, marginal, and unsatisfactory). Rating definitions shall reflect those in the tables below:

TABLE 42-1—EVALUATION RATINGS DEFINITIONS

Rating	Definition	Note
Exceptional .....	Performance meets contractual requirements and exceeds many to the Government's benefit. The contractual performance of the element or sub-element being evaluated was accomplished with few minor problems for which corrective actions taken by the contractor was highly effective.	To justify an Exceptional rating, identify multiple significant events and state how they were of benefit to the Government. A singular benefit, however, could be of such magnitude that it alone constitutes an Exceptional rating. Also, there should have been NO significant weaknesses identified.
Very Good .....	Performance meets contractual requirements and exceeds some to the Government's benefit. The contractual performance of the element or sub-element being evaluated was accomplished with some minor problems for which corrective actions taken by the contractor was effective.	To justify a Very Good rating, identify a significant event and state how it was a benefit to the Government. There should have been no significant weaknesses identified.
Satisfactory .....	Performance meets contractual requirements. The contractual performance of the element or sub-element contains some minor problems for which corrective actions taken by the contractor appear or were satisfactory.	To justify a Satisfactory rating, there should have been only minor problems, or major problems the contractor recovered from without impact to the contract/order. There should have been NO significant weaknesses identified. A fundamental principle of assigning ratings is that contractors will not be evaluated with a rating lower than Satisfactory solely for not performing beyond the requirements of the contract/order.
Marginal .....	Performance does not meet some contractual requirements. The contractual performance of the element or sub-element being evaluated reflects a serious problem for which the contractor has not yet identified corrective actions. The contractor's proposed actions appear only marginally effective or were not fully implemented.	To justify Marginal performance, identify a significant event in each category that the contractor had trouble overcoming and state how it impacted the Government. A Marginal rating should be supported by referencing the management tool that notified the contractor of the contractual deficiency (e.g., management, quality, safety, or environmental deficiency report or letter).

TABLE 42-1—EVALUATION RATINGS DEFINITIONS—Continued

Rating	Definition	Note
Unsatisfactory .....	Performance does not meet most contractual requirements and recovery is not likely in a timely manner. The contractual performance of the element or sub-element contains a serious problem(s) for which the contractor's corrective actions appear or were ineffective.	To justify an Unsatisfactory rating, identify multiple significant events in each category that the contractor had trouble overcoming and state how it impacted the Government. A singular problem, however, could be of such serious magnitude that it alone constitutes an unsatisfactory rating. An Unsatisfactory rating should be supported by referencing the management tools used to notify the contractor of the contractual deficiencies (e.g., management, quality, safety, or environmental deficiency reports, or letters).

**Note 1:** Plus or minus signs may be used to indicate an improving (+) or worsening (–) trend insufficient to change the evaluation status.  
**Note 2:** N/A (not applicable) should be used if the ratings are not going to be applied to a particular area for evaluation.

TABLE 42-2—EVALUATION RATINGS DEFINITIONS

[For the Small Business Subcontracting Evaluation Factor, when 52.219-9 is used]

Rating	Definition	Note
Exceptional .....	Exceeded all statutory goals or goals as negotiated. Had exceptional success with initiatives to assist, promote, and utilize small business (SB), small disadvantaged business (SDB), women-owned small business (WOSB), HUBZone small business, veteran-owned small business (VOSB) and service disabled veteran owned small business (SDVOSB). Complied with FAR 52.219-8, Utilization of Small Business Concerns. Exceeded any other small business participation requirements incorporated in the contract/order, including the use of small businesses in mission critical aspects of the program. Went above and beyond the required elements of the subcontracting plan and other small business requirements of the contract/order. Completed and submitted Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate and timely manner.	To justify an Exceptional rating, identify multiple significant events and state how they were a benefit to small business utilization. A singular benefit, however, could be of such magnitude that it constitutes an Exceptional rating. Small businesses should be given meaningful and innovative work directly related to the contract, and opportunities should not be limited to indirect work such as cleaning offices, supplies, landscaping, etc. Also, there should have been no significant weaknesses identified.
Very Good .....	Met all of the statutory goals or goals as negotiated. Had significant success with initiatives to assist, promote and utilize SB, SDB, WOSB, HUBZone, VOSB, and SDVOSB. Complied with FAR 52.219-8, Utilization of Small Business Concerns. Met or exceeded any other small business participation requirements incorporated in the contract/order, including the use of small businesses in mission critical aspects of the program. Endeavored to go above and beyond the required elements of the subcontracting plan. Completed and submitted Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate and timely manner.	To justify a Very Good rating, identify a significant event and state how they were a benefit to small business utilization. Small businesses should be given meaningful and innovative opportunities to participate as subcontractors for work directly related to the contract, and opportunities should not be limited to indirect work such as cleaning offices, supplies, landscaping, etc. There should be no significant weaknesses identified.
Satisfactory .....	Demonstrated a good faith effort to meet all of the negotiated subcontracting goals in the various socio-economic categories for the current period. Complied with FAR 52.219-8, Utilization of Small Business Concerns. Met any other small business participation requirements included in the contract/order. Fulfilled the requirements of the subcontracting plan included in the contract/order. Completed and submitted Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate and timely manner.	To justify a Satisfactory rating, there should have been only minor problems, or major problems the contractor has addressed or taken corrective action. There should have been no significant weaknesses identified. A fundamental principle of assigning ratings is that contractors will not be assessed a rating lower than Satisfactory solely for not performing beyond the requirements of the contract/order.
Marginal .....	Deficient in meeting key subcontracting plan elements. Deficient in complying with FAR 52.219-8, Utilization of Small Business Concerns, and any other small business participation requirements in the contract/order. Did not submit Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate or timely manner. Failed to satisfy one or more requirements of a corrective action plan currently in place; however, does show an interest in bringing performance to a satisfactory level and has demonstrated a commitment to apply the necessary resources to do so. Required a corrective action plan.	To justify Marginal performance, identify a significant event that the contractor had trouble overcoming and how it impacted small business utilization. A Marginal rating should be supported by referencing the actions taken by the government that notified the contractor of the contractual deficiency.

TABLE 42-2—EVALUATION RATINGS DEFINITIONS—Continued  
 [For the Small Business Subcontracting Evaluation Factor, when 52.219-9 is used]

Rating	Definition	Note
Unsatisfactory .....	Noncompliant with FAR 52.219-8 and 52.219-9, and any other small business participation requirements in the contract/order. Did not submit Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate or timely manner. Showed little interest in bringing performance to a satisfactory level or is generally uncooperative. Required a corrective action plan.	To justify an Unsatisfactory rating, identify multiple significant events that the contractor had trouble overcoming and state how it impacted small business utilization. A singular problem, however, could be of such serious magnitude that it alone constitutes an Unsatisfactory rating. An Unsatisfactory rating should be supported by referencing the actions taken by the government to notify the contractor of the deficiencies. When an Unsatisfactory rating is justified, the contracting officer must consider whether the contractor made a good faith effort to comply with the requirements of the subcontracting plan required by FAR 52.219-9 and follow the procedures outlined in FAR 52.219-16, Liquidated Damages-Subcontracting Plan.

**Note 1:** Plus or minus signs may be used to indicate an improving (+) or worsening (–) trend insufficient to change evaluation status.

**Note 2:** For subcontracting plans under the DoD Comprehensive Small Business Subcontracting Plan (Test Program), DFARS 252.219-7004 (deviation), the ratings entered in CPARS shall mirror those assigned by the Defense Contract Management Agency who is responsible for monitoring such plans.

**Note 3:** Generally, zero percent is not a goal unless the Contracting Officer determined when negotiating the subcontracting plan that no subcontracting opportunities exist in a particular socio-economic category. In such cases, the contractor shall be considered to have met the goal for any socio-economic category where the goal negotiated in the plan was zero.

(c)(1) When the contract provides for incentive fees, the incentive-fee contract performance evaluation shall be entered into CPARS.

(2) When the contract provides for award fee, the award fee-contract performance adjectival rating as described in 16.401(e)(3) shall be entered into CPARS.

(d) Agency evaluations of contractor performance, including both negative and positive evaluations, prepared under this subpart shall be provided to the contractor as soon as practicable after completion of the evaluation. Contractor will receive a CPARS-system generated notification when an evaluation is ready for comment. 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." Evaluation of Federal Prison Industries (FPI) performance may be used to support a waiver request (see 8.604) when FPI is a mandatory source in accordance with subpart 8.6. 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. A copy of the annual or final past performance evaluation shall be provided to the contractor as soon as it is finalized.

(e) Agencies shall require frequent evaluation (e.g., quarterly) of agency compliance with the reporting requirements in 42.1502, so agencies can readily identify delinquent past performance reports and monitor their reports for quality control.

(f) Agencies shall prepare and submit all past performance evaluations electronically in the CPARS at <http://www.cpars.gov/>. These evaluations are automatically transmitted to the Past Performance Information Retrieval System (PPIRS) at <http://www.ppirs.gov/>. 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).

(g) Agencies shall use the past performance information in PPIRS that

is within three years (six for construction and architect-engineer contracts) and information contained in the Federal Awardee Performance and Integrity Information System (FAPIIS), e.g., terminations for default or cause.

(h) *Other contractor performance information.* (1) Agencies shall ensure information is accurately reported in the FAPIIS module of CPARS within 3 calendar days after a contracting officer—

(i) Issues a final determination that a contractor has submitted defective cost or pricing data;

(ii) Makes a subsequent change to the final determination concerning defective cost or pricing data pursuant to 15.407-1(d);

(iii) Issues a final termination for cause or default notice; or

(iv) Makes a subsequent withdrawal or a conversion of a termination for default to a termination for convenience.

(2) Agencies shall establish CPARS Focal Points who will register users to report data into the FAPIIS module of CPARS (available at <http://www.cpars.gov/>), then select FAPIIS).

(3) With regard to information that may be covered by a disclosure exemption under the Freedom of Information Act, the contracting officer shall follow the procedures at 9.105-2(b)(2)(iv).

## PART 49—TERMINATION OF CONTRACTS

### 49.402–8 [Amended]

10. Amend section 49.402–8 by removing “42.1503(f)” and adding “42.1503(h)” in its place.

[FR Doc. 2012–21973 Filed 9–5–12; 8:45 am]

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 8, 9, and 52

[FAR Case 2009–024; Docket 2009–024; Sequence 2]

RIN 9000–AM07

#### Federal Acquisition Regulation; Prioritizing Sources of Supplies and Services for Use by the Government

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

**ACTION:** Proposed rule; correction.

**SUMMARY:** This document corrects the preamble to a proposed rule published in the *Federal Register* of June 14, 2011, regarding Prioritizing Sources of Supplies and Services for Use by the Government. This document adds an Initial Regulatory Flexibility Analysis which has been determined to be necessary since the initial publication of the proposed rule.

**DATES:** Interested parties should submit written comments to the Regulatory Secretariat at one of the addressees shown below on or before October 9, 2012 to be considered in the formation of the final rule.

**ADDRESSES:** Submit comments in response to FAR Case 2009–024 by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for “FAR Case 2009–024.” Select the link “Submit a Comment” that corresponds with “FAR Case 2009–024.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2009–024” on your attached document.

- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275

First Street NE., 7th Floor, Washington, DC 20417.

*Instructions:* Please submit comments only and cite FAR Case 2009–024, 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:** Ms. Patricia Corrigan, Procurement Analyst, at 202–208–1963, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAR Case 2009–024.

**SUPPLEMENTARY INFORMATION:** DoD, GSA, and NASA published a proposed rule in the *Federal Register* at 76 FR 34634 on June 14, 2011, to amend the FAR part 8. FAR part 8 requires Federal agencies to satisfy their requirements for supplies and services from or through a list of sources in order of priority. The proposed rule would amend FAR part 8 by revising FAR 8.000, 8.002, 8.003, and 8.004, eliminating outdated categories, and distinguishing between mandatory sources and non-mandatory sources for consideration. Public comments were received requesting the publication of Initial Regulatory Flexibility Analysis (IRFA) as part of the rule. Based on the comments, DoD, GSA and NASA determined it necessary since the initial publication of the proposed rule to issue an IRFA. Comments on the rest of the proposed rule will be addressed with the issuance of the final rule.

#### Regulatory Flexibility Act

The change may 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 the Initial Regulatory Flexibility Analysis (IRFA) is summarized as follows:

The objective of this rule is to clarify the order of preference for sources that must be considered, and to distinguish them from sources that should be considered where an agency is unable to satisfy requirements for supplies and services from mandatory sources.

The basis for this proposed rule is the Government Accountability Office (GAO) decision in the protest of Murray-Benjamin Electric Company, B–298481, 2006 CPD 129, September 7, 2006 at <http://www.gao.gov/decisions/bidpro/298481.pdf>. Based upon issues brought forward in the decision, it was determined that FAR Part 8 should be amended to eliminate confusion about the use of mandatory versus non-mandatory sources. Two sections of the FAR are being amended to list only mandatory Government supply sources, and a new section is being added to encourage agencies to give

consideration to using certain existing non-mandatory sources to leverage agency buying power and achieve administrative efficiencies that reduce costs and produce savings for our taxpayers. No new mandatory sources are proposed for consideration, only existing sources were included for informational purposes. The clarification is being made to assist both the public and the Federal contracting community by allowing them to better understand and distinguish between sources that are mandatory for use and those that are not mandatory. The non-mandatory sources (*e.g.*, Federal Supply Schedules, Governmentwide acquisition contracts, multi-agency contracts, blanket purchase agreements (BPAs) under Federal Supply Schedule contracts (*e.g.*, Federal Strategic Sourcing Initiative (FSSI) agreements)) in the new section are existing sources intended for use by multiple agencies, and existed prior to promulgation of the proposed change to the FAR. The proposed rule only reflects the practice and use of the existing non-mandatory sources throughout the Government. The existing non-mandatory sources are being listed prior to commercial sources, but agencies remain free to compete their requirements among commercial sources of supply, where it is in their best interest to meet their needs through an open-market procurement.

Because the rule clarifies regulations in FAR Part 8 on the use of existing mandatory and non-mandatory sources, it is estimated that the rule will apply to all entities doing business with the Government, regardless of business size. Based on Federal Procurement Data System reporting data, in Fiscal Year 2011, a Governmentwide total of 193,515 new awards were made to small businesses and other than small businesses. Of that total, 130,704 new award actions were made to small business entities. The remaining 62,811 award actions were made to other than small businesses. This clarification, consistent with the GAO decision in the Murray-Benjamin Electric Company protest (B–298481), clarifies existing FAR text regarding existing mandatory and non-mandatory sources. No new sources were added to the FAR and all contractors are encouraged to participate in the mandatory and non-mandatory source programs.

This rule does not add any new compliance requirements or information collection requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules.

No acceptable alternatives were determined. By providing clarification, the rule reduces the probability that applicable statutes, regulation, and policy will be misinterpreted or misapplied at the possible economic detriment of small entities.

The Regulatory Secretariat will be submitting a copy of the Initial Regulatory Flexibility Analysis (IRFA) to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. The Councils invite comments from small business concerns and other interested parties on