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## Government Contracts Advisory

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# FAR Revised To Standardize The Government's Past Performance Evaluation Information

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On August 1, 2013, the Federal Acquisition Regulation ("FAR") Council issued a final rule regarding the Government's documentation and retention of contractor performance evaluations, 75 Fed. Reg. 46,783. The new rule creates a government-wide repository for past performance information and creates standardized contract performance rating and evaluation factors. The rule requires the Contracting Officer ("CO") to complete more frequent performance evaluations, including both annual evaluations and evaluations at the end of contract performance, for all contracts that exceed the simplified acquisition threshold (currently \$150,000). The new rule responds to Government Accountability Office ("GAO") and Office of Federal Procurement Policy ("OFPP") criticisms that past performance did not play a sufficiently significant role in most contract award decisions due, in large part, to questions about the consistency, relevance, and reliability of the past performance data. While the new rule brings much needed consistency to the information used for past performance evaluations, the centralization of the data and the rule's failure to provide a more meaningful appeal process will put a greater burden on contractors to ensure their contract performance data is accurate and to adopt strategies to address and minimize any negative past performance data.

The new rule further standardizes the content of contract performance evaluations. These evaluations must now contain a "clear, non-technical description of the principal purpose of the contract or order." The evaluation must rate contractor performance in at least the following five categories: 1) technical; 2) cost control; 3) schedule/timeliness; 4) management or business relations; and 5) small business subcontracting. COs are free to evaluate additional categories, as appropriate. The rule notes that one such evaluation category can be the offeror's "late or nonpayment to subcontractors," which is consistent with a recent [final rule issued by the Small Business Administration](#).

Another key aspect of the rule is the creation of a standardized rating system. Specifically, COs must rate contractor performance under each evaluated category as Exceptional, Very Good, Satisfactory, Marginal or Unsatisfactory. These five ratings are defined in a new Table 42-1, which is based upon definitions previously contained in the Department of Defense Contractor Performance Assessment Reporting System ("CPARS") Policy Guide. Similar ratings are provided for small business subcontracting evaluation factors for contracts containing FAR 52.219-9. In addition to these ratings, agencies must include award fee adjectival ratings and incentive fee evaluations in CPARS, when applicable.

Finally, agencies must enter contract performance evaluations into CPARS, which automatically feeds information into the Past Performance Information Retrieval System ("PPIRS"). In order to ensure that performance evaluations are completed and entered into CPARS, agencies regularly must evaluate compliance with their contract performance reporting requirements. These evaluations must be provided to contractors "as soon as practicable after completion of the evaluation." The contractor then has at least 30 days to submit comments, rebutting statements or additional information. Any disagreement between the contractor and the CO must be reviewed at a level above the CO. However, the rule makes clear that the ultimate conclusion on performance ratings is a matter within the discretion of the contracting agency.

The foregoing changes create a number of potential issues for the contracting community. First, while the use of a "standardized" rating system should improve the comparability between contract performance evaluations, as with any subjective system, contractors are likely to find some evaluators are "easy graders" while others are not. Furthermore,

the new rule does not change the current system to challenge unreasonable contract performance ratings, which only requires that the CO's decision be reviewed by a person one-level above the CO. This limited administrative remedy leaves contractors with few options other than litigation to challenge unsupported evaluations.

Contractors that are faced with negative past performance data must carefully consider how to mitigate the effect of the negative information. For instance, contractors' proposals should address negative past performance information and describe subsequent corrective actions. Contractors should also take advantage of any opportunity to submit past performance information about their commercial or subcontract work in order to broaden the evaluation of their past performance.

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