



AUG 24 2005

GSA Office of the Chief Acquisition Officer

MEMORANDUM FOR ROBERT R. JARRETT  
DIRECTOR  
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM: RALPH J. DESTEFANO, DIRECTOR  
REGULATORY AND FEDERAL ASSISTANCE  
PUBLICATIONS DIVISION

SUBJECT: FAR Case 2004-012, Past Performance Evaluation of Orders

Attached are comments received on the subject FAR case published at 70 FR 35601; June 21, 2005. The comment closing date was August 22, 2005.

<u>Response Number</u>	<u>Date Received</u>	<u>Comment Date</u>	<u>Commenter</u>
2004-012-1	06/24/05	06/24/05	Department of State
2004-012-2	07/11/05	07/11/05	Rogin Associates
2004-012-3	08/05/05	08/05/05	Southwest Research Institute
2004-012-4	08/22/05	08/22/05	Dickstein, Shapiro, Morin & O'Shinsky LLP
2004-012-5	08/22/05	08/22/05	ITAA

Attachments

2004-012-1

**Bouford, Raymond W**

**From:** Bouford, Raymond W  
**Sent:** Thursday, June 23, 2005 5:40 PM  
**To:** 'farcase.2004-012@gsa.gov'  
**Subject:** FAR case 2004-012

do not agree with the proposed rule for the following reasons:

1. GSA FSS ordering is supposed to be a streamlined method of procuring services. GSA makes a responsibility determination, makes a fair and reasonable determination and ensures the company complies with all federal statutes before placing them on the schedule. A determination of the company's compliance with sub-contracting goals should be made before placing them on the schedule if it is to be done at all.
2. Past performance data is already cumbersome to collect and even harder to evaluate with any precision. This just adds one more thorn to the bush. Data collection may be an issue as well.
3. Any good contracting officer ensures subcontract management is evaluated when subcontracts are anticipated and not when they are not. This is not the same as evaluating the small business subcontracting compliance.
4. Manpower has been cut over the years due to the streamlining of acquisitions and the shortage of qualified 1102s. The constant addition of small tasks, such as this requirement, all add up to the need for more labor than we have billets.

*Raymond Bouford*  
Raymond Bouford, CPCM  
Branch Chief/Contracting Officer  
U.S. Department of State  
Facilities Design & Construction Division  
Major Support Branch  
Tel: 703-875-6020  
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*Rec'd  
6/24/05*

2004-012-2



Julia Wise/VPC/CO/GSA/GOV

07/11/2005 01:26 PM

To LaRhonda M. Erby-Spriggs/VII/CO/GSA/GOV@GSA

cc Jeritta A. Parnell/VPC/CO/GSA/GOV@GSA,  
Ronne.Rogin@acquisitionsolutions.com

bcc

Subject FW: farcase.2004-012 public comment

Please log this in as a public comment submitted on July 5, 2005 from Ronne Rogin. Thanks

Julia Wise  
Director  
Contract Policy Division (VPC)  
Office of the Chief Acquisition Officer (OCAO)  
General Services Administration (GSA)  
(202)208-1168/julia.wise@gsa.gov

----- Forwarded by Julia Wise/VPC/CO/GSA/GOV on 07/11/2005 01:12 PM -----



"Rogin, Ronne"  
<Ronne.Rogin@acquisitionsolutions.com>

07/05/2005 08:08 AM

To Julia.wise@gsa.gov

cc

Subject FW: farcase.2004-012

Hi Julia - sorry to bother you, but could you please forward this to the right person at GSA? It came back as undeliverable.

Hope you had a nice long weekend,

Ronne

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From: Rogin, Ronne  
Sent: Tue 7/5/2005 7:56 AM  
To: farcase.2004-12@gsa.gov  
Subject: farcase.2004-012

This rule, to evaluate past performance of subcontractors on orders over \$100,000, seems more than a little burdensome. It would be MUCH more effective to have the contractors report this information on a quarterly basis, as it's the CONTRACT'S past performance in subcontracting that you're really interested in. At the task order level, whether FSS, GWAC or MAC, there's no requirement to even ask for this information (i.e., how much of the work will be done by subcontractors and what is the makeup of those subs...), much less evaluate it.

I understand the point - many solicitations (not at the task order level, but at the contract level) are asking for past performance in subcontracting information. I just think that adding this to the task order level for orders over \$100,000 (which will be A BIG NUMBER!!!!!!!) is not the most efficient way to go about it. Contractors have to track this information, particularly for GWACs and MACs, so why not have them submit once a quarter?

Ronne Rogin  
Rogin Associates

2004-012-3

# SOUTHWEST RESEARCH INSTITUTE®

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August 5, 2005

**Via Electronic Mail**

**Farcase.2004-012@gsa.gov**

**General Services Administration  
Regulatory Secretariat (VIR)  
1800 F Street, NW, Room 4035  
Washington, DC 20405**

**Attn: Laurieann Duarte**

**Re: FAR Case 2004-012 Comments**

Dear Ms. Duarte:

Southwest Research Institute (SwRI®) is pleased to submit the following comments in response to the Federal Register Notice published in 70 FR 35601-35602 (June 21, 2005) related to the proposed rule in Federal Acquisition Regulation (FAR) Case 2004-012 regarding the Federal Acquisition Regulation: Past Performance Evaluation.

The subject case proposes changes to certain sections in 48 CFR Part 42 with respect to Past Performance Evaluation of Orders. SwRI's comments are as follows:

1. The proposed amendment to §42.1501 states that contracting officers will "evaluate a contractor's management of subcontracts, including meeting the goals in its small business subcontracting plans..." This appears to be vague in that it provides no criteria related to any aspect of the evaluation other than meeting the goals of the subcontracting plans. SwRI recommends that the specific evaluation criteria be stated clearly in the regulation.
2. The proposed amendment to §42.1502(b) would require that "Interim evaluations should be prepared... for contracts or orders with a period of performance, including options, exceeding one year." Purchasing activities under a small business subcontracting plan are rarely distributed evenly over the course of a contract or order. As a result, interim evaluations are likely to be biased by the timing of purchases and inaccurate in one of two ways. First, on contracts and orders that are front-end loaded with purchases, interim evaluations will indicate a more favorable performance, possibly placing these contractors at an advantage in pending procurement activities. Second, on contracts and orders that are back-end loaded with purchases, interim evaluations will indicate a less favorable performance, possibly placing these contractors at a disadvantage in pending procurement activities. SwRI recommends deleting the requirement or revising it to account for timing differences related to the purchases over the performance period.



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2004-012-3

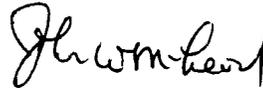
Lauriann Duarte  
August 5, 2005  
Page 2

3. It is SwRI's observation that some goals the Government requires in the contractor's small business subcontracting plan are numbers that cannot actually be met due to availability of services provided by small, disadvantaged, veteran-owned, (etc) businesses. Will the Government consider this during the evaluation period? If so, how will documenting "No, the contractor did not meet the required goals, but did make a good faith effort" affect future procurement opportunities?

SwRI thanks the Administration for this opportunity to provide its comments and recommendations on this important matter.

Please do not hesitate to contact me directly by telephone at (210) 522-3368, by facsimile at (210) 522-5839 or by electronic mail at [john.mcleod@swri.org](mailto:john.mcleod@swri.org) with any questions you may have.

Very truly yours,



John W. McLeod  
Vice President and General Counsel

JWM/mt

2004-012-4

## DICKSTEIN SHAPIRO MORIN &amp; OSHINSKY LLP

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E-Mail Address: NadlerD@dsmo.com

August 22, 2005

VIA Facsimile (202) 501-4067 and  
VIA E-mail ([farcase.2004-012@gsa.gov](mailto:farcase.2004-012@gsa.gov))

General Services Administration  
Attention: Laurieann Duarte  
1800 F Street, N.W., Room 4035  
Washington, DC 20405

Re: **Comments Concerning FAR Case 2004-012 (Federal Register / Vol. 70, No. 118 / Tuesday, June 21, 2005 / Proposed Rules 35601, DOD, GSA, NASA 48 CFR Part 42 Federal Acquisition Regulation; Past Performance Evaluation of Orders)**

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Dear Sir/Madam:

The following comments are submitted regarding FAR case 2004-012. The new rule would authorize an evaluation of a contractor's management of subcontracts, including whether the contractor met its small-business subcontracting plan goals, and would authorize an evaluation of past performance on orders exceeding \$100,000 for certain types of contracts and task orders. Currently, the FAR does not require a review of subcontract management. For the reasons set forth below, the rule should not be promulgated.

**A. The Rule Improperly Includes Evaluations Of Subcontractor Performance**

The proposed rule is unclear as to whether only a prime contractor's performance in administering subcontracts will be evaluated, or whether the quality of the subcontractor's performance will be evaluated and attributed to the prime contractor as part of a "subcontract management" review. The proposed language refers to "contractor's management of subcontracts." That language could be construed by contracting officers to include whether the subcontract was performed on time, was within budget, and resulted in compliant goods and services being delivered to the prime. This is not a proper subject for the rule. The only relevant past performance information is whether the prime contract was timely performed, within budget, and resulted in compliant goods and services being delivered to the government. A prime contractor could take steps to make a subcontractor's poor performance "invisible" to the government customer by ensuring that what is delivered meets the prime contract requirements. Indeed, a prime contractor could have the best selection procedures in place, prepared a comprehensive subcontract, properly and timely placed orders with the subcontractor, had adequate staff monitoring performance, and still have a poor

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Ms. Laurieann Duarte  
August 22, 2005  
Page 2

2004-012-4

performing subcontractor. A prime contractor should not be penalized in its past performance evaluation for a subcontractor's poor performance in such circumstances. The prime contractor will get credit/discredit under the performance evaluation rules already in place for good/poor subcontractor performance if that performance impacts the performance of the prime contract. It is improper to evaluate the performance of the subcontractor and attribute any problems to the prime contractor in a past performance evaluation relating to the award of a new contract, and/or to mark down a proposal because it includes a subcontractor that performed poorly on another subcontract. This also would do a great disservice to the subcontractor who, unlike a prime contractor, cannot include in the record its views of the performance evaluation. See FAR 42.1503(b). Thus, it could improperly harm a subcontractor's ability to win subcontracts.

Prime contractors determine the quality of their prospective subcontractors and select subcontractors based upon past relationships, pricing, and past performance, among other factors. Under the current FAR, the government relies on the prime contractor's ability to choose a subcontractor, and holds the prime contractor fully accountable for that choice. The proposed FAR could be read to allow the government to evaluate the prime contractor's decision to select certain subcontractors in its proposal based on the quality of performance of those subcontractors on other contracts. In effect, the government can second guess the prime contractor in the evaluation, while still holding the prime contractor fully responsible for the performance of the contract. In fact, the rule could be used to veto subcontractors included in a proposal based on their performance under other subcontracts. In either case, such an evaluation would not be meaningful since the subcontractor's performance on a different subcontract may not be relevant to the procurement, may not have affected the outcome of the prime contract, and may have been beyond the control of the prime contractor on the other contract.

The proposed rule needs to better define subcontract management (perhaps by using examples) and to exclude expressly from the definition the quality of a subcontractor's performance. It may be appropriate to determine if the prime contractor has, for example, proper procedures for identifying qualified subcontractors and for awarding subcontracts, flowed down FAR requirements to its subcontractors, timely pays its subcontractors, has adequate staff assigned to administer its subcontractors, has reasonable turnover in subcontractors, and other matters relating to subcontract administration and management. In sum, the rule needs to define and provide examples of what may be evaluated as part of subcontractor management, and to exclude from the definition the quality of the subcontractor's performance and management of its own work.

Ms. Laurieann Duarte  
August 22, 2005  
Page 3

2004-012-4

**B. The Proposed Rule's Addition Of Order Level Past Performance Evaluations Conflicts With The Small Business Act And The FAR**

With respect to that part of the rule that calls for the evaluation of the prime contractor's implementation of small business subcontracting goals, it would be improper to evaluate a GSA Schedule or GWAC holder's ability to achieve its goals on an order-by-order basis for all orders over \$100,000 as contemplated by the proposed rule. Pursuant to the Small Business Act, contractors only are required to have small business subcontracting plans for contracts resulting from negotiated acquisitions expected to exceed \$500,000 that have subcontracting opportunities and sealed bid acquisitions expected to exceed \$500,000 that have subcontracting opportunities. FAR 19.702(a)(1). The proposed rule calls for an evaluation of the contractor's ability to achieve its small business subcontracting goals for orders under \$500,000, and without regard to how the order was awarded. Orders under the GSA Schedule, GWACs, and single agency task order contracts are only occasionally awarded as negotiated or sealed bid acquisitions. More often than not for the GSA Schedule, the FAR Part 8.4 rules for placing orders are followed, which do not require that negotiated or sealed bid acquisition procedures be used. In other words, there will rarely be an order-specific small business subcontracting plan to evaluate orders between \$100,000 and \$500,000. The question then becomes how will a contracting officer carry out this new responsibility for orders between \$100,000 and \$500,000 when there is no order-specific plan. No guidance is provided in the proposed rule.

To the extent the rule means that for orders over \$100,000, the contracting officer placing the order will evaluate the contractor's efforts to achieve its small business goals in the plan that applies to the prime contract, this would be improper. It would mean that an Army contracting officer placing an order under the GSA Schedule could evaluate the contractor's implementation of its GSA Schedule small business plan - without any knowledge of the contractor's other work or any basis for determining whether the contractor's efforts to meet its goals were reasonable. For orders over \$500,000, the same issue may be present as it is not clear that subcontracting plans are required for any of the orders covered by this proposed rule since they may not be separate "contracts" as that term is used in the FAR. The problem is that the contracting officers placing the orders are not going to be in a position to evaluate the contractor's goals and basis for the goals, efforts to meet the goals, and overall compliance with a prime contract subcontracting plan.

Moreover, there is nothing in the proposed rule that addresses how the evaluation by the contracting officer awarding the new contract will be coordinated with and reconciled with the ACO's information and conclusions concerning subcontracting plan compliance under FAR 19.706. There is a reason for FAR 19.706 and having an ACO conduct the evaluation of the contractor's compliance with subcontracting plans and efforts to meet its goals. The ACO has the knowledge about the original assumptions and basis for the plan and its goals, and a vantage point that allows him/her to see all the orders to which the subcontracting plan applies. This allows for a proper and fair assessment of the contractor's efforts under the plan. A single contracting officer for an order has no such data or perspective. At most, the

Ms. Laurieann Duarte  
August 22, 2005  
Page 4

2004-012-4

rule should state that an ACO's subcontracting plan information under FAR 19.706 may be considered in a past performance evaluation.

C. The Proposed Rule's Requirement For "An Assessment of Contractor Performance Against Goals" Is Unreasonable, And Contrary To Law

The current rule already requires a contractor to use good faith efforts to achieve its subcontracting goals. 15 U.S.C. § 637 (d)(4)(F) allows liquidated damages to be assessed against contractors who fail to make a good faith effort to carry out the provisions of their subcontracting plans. (*See also* FAR 19.705-7.) The proposed rule improperly seeks to tie a contract award to meeting subcontracting goals. Only the extent of a contractor's good faith efforts to meet its goals and compliance with the specific plan steps the contractor agreed to take can be evaluated. *See also* FAR 19.705-6, 19.706(g). There are too many factors that are beyond the contractor's control to use performance against goals alone as a proper evaluation factor in an award decision. These factors include the type of goods ordered by the government and the availability of qualified subcontractors.

The proposed rule also does not address how the different types of small business subcontracting plans will be considered. There are three types of subcontracting plans: an Individual Subcontracting Plan, a Master Subcontracting Plan, and a Commercial Products Plan. Several problems arise when comparing the different types of subcontracting plans that a contractor must manage. It is possible to meet subcontracting goals under the Commercial Products Plan(s) that is developed on a company-wide or division-wide basis and relates to the concern's production generally, for both commercial and noncommercial business activity, rather than solely to the Government contract. However, while meeting these goals, it is possible to not meet the individual plan for a particular contract.

The separate plans have different terms and contain different elements. A company may submit a master subcontracting plan which is effective for three years, and later submit an individual plan which will reflect different goals for subsequent years. A Commercial Products Plan(s) is approved by the first federal agency awarding the concern a contract requiring a subcontracting plan during the fiscal year. Subcontracting goals are percentages of projected subcontracting activity under projected revenues and related business activity for the concern's fiscal year. Once approved, the plan remains in effect during the company's fiscal year, is accepted by all federal agencies, and is incorporated into all subsequent federal contracts requiring the development of subcontracting plans. The proposed rule does not address any of these issues.

Sincerely,



David M. Nadler

2004-012-5



August 22, 2005

Ms. Laurieann Duarte  
General Services Administration  
Regulatory Secretariat (VIR)  
1800 F Street, NW  
Room 4035  
Washington, D.C. 20405

Re: FAR Case 2004-012 (70 FR 35601, June 21, 2005), Past Performance Evaluation of Orders

Dear Ms. Duarte:

The Information Technology Association of America respectfully submits the following comments on the above-referenced proposed rule to revise Subpart 42.15 of the Federal Acquisition Regulation to require that a prime contractor's "management of subcontracts, including meeting the goals in its small business subcontracting plans[,] be recorded for use in past performance evaluations during source selection for certain orders.

ITAA is a leading association of information technology companies. ITAA consists of about 350 corporate members located throughout the United States, and a global network of 67 countries' IT associations. The Association's members range from the smallest IT startup to the industry leaders,

Deleted: INSERT BACKGROUND  
ON ITAA.

Currently, FAR Subpart 42.15, Contractor Performance Information, requires that federal agencies evaluate a prime contractor's performance under previously awarded contracts in excess of \$100,000, both at the time the work under the contract is completed and, on an interim basis, annually for those contracts exceeding one year. Further, the evaluation procedures currently require, at FAR Subpart 42.1502(a), "an assessment of contractor performance against, and efforts to achieve, the goals identified in the small business subcontracting plan when the contract includes the clause at 52.219-9, Small Business Subcontracting Plan."

Essentially, the proposed rule would revise the existing FAR coverage in *two* respects:

(1) It would broaden the definition in FAR Subpart 42.1501 of what constitutes past performance information to include "management of subcontracts" generally; that is, *including but not limited to* efforts to achieve the goals identified in a small business subcontracting plan.

(2) It would extend the requirement in FAR Subpart 42.15 to evaluate past performance on *contracts* to include *certain orders placed under certain contracts*, specifically, orders exceeding \$100,000 that are either:

2004-012-5

(a) placed against a Federal Supply Schedule contract or task order/delivery order contract awarded by another agency (*i.e.*, Governmentwide acquisition contract or multi-agency contract); or

(b) placed under single agency task order/delivery order contracts “when such evaluations would produce more useful past performance information 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).”

With regard to the first aspect of the proposed rule—to broaden the FAR definition of what constitutes past performance information to include “management of subcontracts”—ITAA is concerned that the proposed language could be read as permitting a government official to query a prime contractor’s subcontractors for purposes of assessing the prime’s management of its subcontractors. ITAA would view such an interpretation as inviting government interference into a prime contractor’s relationship with its subcontractors. It is well established in case law that the government lacks privity of contract with a subcontractor, and for this reason, government personnel have generally taken a hands-off position on prime-subcontractor matters. To put a prime in the position of being second-guessed on how it handled a subcontract would do injury to the prime-subcontractor relationship—and, very likely, require a contracting officer to insinuate him-/herself into disputes that are not within his/her domain.

As to the second aspect of the proposed rule—the proposal to extend the existing requirement to evaluate a prime’s past performance, including its efforts to achieve its small business subcontracting plan goals, to orders in excess of \$100,000 placed under certain contracts—ITAA does not object *in principle*, but believes that *in practice* such a requirement would prove to be *extremely burdensome* to the federal acquisition workforce, given the huge volume of orders—tens of thousands—in excess of \$100,000. Further, adding another step to the source selection process will take time, thereby possibly delaying award. In addition, the extension of the existing requirement may not be necessary, given that primes already have an incentive to take such goals seriously. If the FAR Councils, nonetheless, decide to extend the existing requirement to orders, ITAA strongly suggests that:

- (1) The rule make clear that a complete past performance evaluation must be performed *for each order*—to entail not only the consideration of subcontract management, but also all other past performance criteria—and, in addition, afford primes an opportunity to comment on the past performance information. In the case of disagreement, the primes can obtain a review at a level above the contracting officer, and to have a copy of its response included in the Contractor Performance Assessment Reporting System (CPARS) or other similar database, as is currently provided in FAR Subpart 42.1503; and
- (2) The dollar threshold should be raised to be consistent with the existing thresholds applicable to Department of Defense contracts (\$1 million for services and information technology and \$5 million for systems).

Following are ITAA’s comments on the specifics of the proposed rule:

Unnecessary and redundant. As mentioned above, there is already FAR coverage on past performance information at the contract level. Further, there is already a requirement that prime contractors be evaluated on their efforts to achieve their subcontracting plan goals as part of the source selection process in awarding contracts. Logically, an entity cannot obtain an order except through a contractual vehicle, so if that entity is already subject to past performance evaluation when competing for

2004-012-5

contracts, it has ample incentive to perform well at the task/delivery order level. In addition, for purposes of determining responsibility, FAR 9.104-3(b) already provides, in part, as follows:

(b) *Satisfactory performance record*...If the pending contract requires a subcontracting plan pursuant to Subpart 19.7, The Small Business Subcontracting Program, the contracting officer shall also consider the prospective contractor's compliance with subcontracting plans under recent contracts.

Moreover, the Defense Contract Management Agency and other federal agencies currently review and rate, typically on a pass/fail basis, contractors' purchasing systems—which includes subcontracts.

If the intent of the proposed rule is to go beyond the existing coverage to further encourage contractors to make best efforts to meet their subcontracting plan goals, ITAA suggests that there are other, less burdensome, ways to do so. One simple way is to offer performance incentives tailored to achieve that outcome.

Absence of objective criteria for evaluation of subcontract management. The proposed rule states that a contractor is to be evaluated on its "management of subcontracts, including meeting the goals in its subcontracting plans," as part of the overall assessment of performance on contracts and orders. Further guidance might be needed in this area.

If one looks to the description of what constitutes "past performance information" in the existing FAR Subpart 42.1501 for guidance, it is readily apparent that the parameters applicable to prime contracts are not necessarily appropriate for assessing management of subcontracts. Past performance information is defined as "relevant information" that "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."

Requiring contracting officials to venture beyond these considerations and evaluate a prime's "subcontract management" will, in our view, introduce a host of difficulties. For instance, it should be recognized that a focus upon a single, fixed percentage would be inappropriate for all circumstances. Rather, the weight to be accorded subcontract management ought to depend, at least in part, on the share of the work as well as the nature of the tasks/deliverables that is subcontracted. For example, in some cases, a subcontractor might perform 50 percent of the dollar value of a contract, but the particular tasks might have a minor bearing on the overall work to be accomplished. In other cases, a subcontractor might perform only 15 percent of the overall dollar value of the contract, but that work might be the make-or-break element of the overall success of the contract.

Another consideration is that the amount of effort expended in managing a subcontract can and does vary widely, due in large part to factors beyond the prime's control. Subcontracting, particularly with a new entity, is a calculated risk. Most federal contractors take very seriously the various socioeconomic laws designed to bring small, inexperienced businesses on board and, accordingly, anticipate a certain amount of coaching will be needed when they enter into a subcontract.

ITAA submits that in a vast majority of cases the only quantifiable element of "subcontract management" alluded to in the proposed rule is the existing requirement to assess a prime's efforts to achieve the goals in its small business subcontracting plan. If a contractor is to be evaluated based on its management of its subcontracts over and above this factor, it would seem that the criteria would have to

2004-012-5

be stated in terms of *measurable criteria*: cost, timeliness of delivery/performance, and quality of supplies/services, in other words, how well the subcontractor—as opposed to the prime—performed in each of those areas. Further, even if the term “subcontract management” were defined in measurable terms, there is no demonstrated link between how well a prime contractor manages its subcontracts and the end result.

Contracting officer's inability to obtain reliable information. A major difficulty posed by the proposed rule is that, more than likely, a contracting officer (CO) does not have first-hand knowledge of a prime-subcontractor relationship. Aside from direct observation, the only way for a CO to assess how well a prime has managed a subcontract is *to ask both parties*. It would be difficult in many cases for the government to be confident that it has obtained unbiased input. A prime would be more inclined to report that all went smoothly—even if it didn't always go smoothly—in part to cover for a subcontractor it wanted to keep. (In fact, some companies have a policy of not making any statement regarding subcontractor performance so as to avoid potential litigation.) Likewise, a subcontractor, for reasons of its own, might be more inclined to downplay problems encountered during contract performance in the hope of receiving more work from the prime or blame the prime for its own shortcomings to avoid being held accountable.

Deleted: todownplay

Cost/benefit. Given the huge volume—literally *tens of thousands*—of task/delivery orders over \$100,000 and the number of vendors, the proposed rule would place an enormous additional burden on the federal acquisition workforce. Contracting officials would be required to complete past performance evaluations for each of these tens of thousands of orders—not just when work under an order is completed, but on an annual interim basis for those orders that exceed one year. ITAA is concerned that this added burden would far outweigh any anticipated benefit. If a past performance evaluation is to be required in placing orders, we urge that the threshold be raised significantly, at the very least to the levels currently applicable to DOD contractors (referenced above).

Moreover, adding a new factor—subcontract management—to the definition of past performance information to be assessed ultimately will mean using that assessment in the source selection process. There are only so many discrete factors and subfactors that can be meaningfully considered in that process. The introduction of a new past performance factor also raises the question of how much weight to accord the subcontract management element of past performance relative to other factors. Given that a prime contractor is already evaluated on its own track record, it would seem that the weight to be assigned to subcontract management would be small, in which case the benefit to be derived, if any, would not merit the time and effort entailed in collecting the information in the first place.

Provide ability to comment on adverse past performance evaluations. Fundamental to the notion of fairness in a past performance evaluation is the opportunity for a contractor to submit comments, rebuttals, and/or additional information and, in the case of disagreement between the parties, to be afforded an opportunity for review at a level above the contracting officer. Such a procedure is afforded under FAR Subpart 42.1503(b), but unless that paragraph is revised, it does not appear that it would extend to the management of subcontracts. As it stands, the proposed rule does not contemplate any revision to the reference in paragraph (b) to evaluations of “contractor performance.” If contractors are to be evaluated based on their management of subcontracts, this needs to be stated explicitly. As mentioned above, if the FAR Councils determine to extend the existing requirement to orders, ITAA strongly urges that primes be afforded the same opportunity to comment on the past performance information and, in the case of disagreement, to obtain a review at a level above the contracting officer, and to have a copy of its response included in the CPARS or similar database, as is currently provided in FAR Subpart 42.1503.

2004-012-5

Limit application to contracts that contain the requirement for subcontracting plans. Although the proposed FAR 42.1502(c) retains the wording of the current FAR 42.1502(a) that an assessment of contractor performance against, and efforts to achieve, the goals identified in the small business subcontracting plan is to apply “when the contract includes the clause at 52.219-9, Small Business Subcontracting Plan,” there is no such qualifier in the proposed FAR 42.1501, General. ITAA recommends that the same limitation that is included in FAR 42.1502(c) be incorporated into FAR 42.1501, so as to read, after the word “satisfaction”:

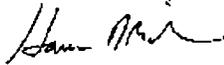
*the contractor's management of subcontracts, including meeting the goals in its subcontracting plans when the contract includes the clause at 52.219-9, Small Business Subcontracting Plan.*

Retention of records. FAR 42.1503(e) currently states that past performance information is not required to be retained for purposes of source selection for longer than three years “after completion of contract performance.” The proposed rule would delete the word “contract,” making it unclear whether the phrase refers to completion of the underlying contract or task/delivery order pursuant to that contract. The proposed rule is drafted such that the coverage on past performance procedures as they pertain to orders is woven into the existing coverage on evaluation of contracts. This makes for confusion. In the case of past performance evaluation of contract performance, presumably the intent was to base the three-year record retention period on completion of *contract* performance. In the case of past performance evaluation of orders, however, presumably the intent is to base the three-year record retention period on completion of an *order*, in recognition of the fact that contract performance on multiple award schedules contracts may extend well beyond the three-year limit on retention of past performance information. If the FAR Councils proceed with a final rule, this distinction certainly needs to be made. Also, it should be recognized that the expanded scope of records to be retained no doubt will increase the burden on an already overtaxed acquisition workforce.

In conclusion, ITAA believes the proposed rule to expand the current past performance information requirements in FAR Subpart 42.15 is not needed and would present several difficult issues that may negatively affect the government and prime contractors. For the reasons stated above, we respectfully request that the FAR Councils consider withdrawing the proposed rule. Alternatively, ITAA suggests proceeding only with that portion of the proposed rule that pertains to extending the current FAR requirements to certain orders, subject to the terms discussed above, and/or revising the FAR to improve the existing guidance on and implementation of past performance information as it relates to contracts.

ITAA would welcome the opportunity to provide additional information.

Very truly yours,



Harris N. Miller  
President



SEP 9 2005

MEMORANDUM FOR ROBERT R. JARRETT  
DIRECTOR  
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM: RALPH J. DESTEFANO, DIRECTOR  
REGULATORY AND FEDERAL ASSISTANCE  
PUBLICATIONS DIVISION

SUBJECT: FAR Case 2004-012, Past Performance Evaluation of Orders

Attached are additional comments received on the subject FAR case published at 70 FR 35601; June 21, 2005. The comment closing date was August 22, 2005.

<u>Response Number</u>	<u>Date Received</u>	<u>Comment Date</u>	<u>Commenter</u>
2004-012-6	08/29/05	08/29/05	Coalition for Government Procurement
2004-012-7	08/30/05	08/22/05	ABA

Attachments

2004-012-6



Laurieann  
Duarte/VIR/CO/GSA/GOV  
08/29/2005 01:40 PM

To farcase.2004-012@gsa.gov  
cc LaRhonda M. Erby-Spriggs/VI/CO/GSA/GOV@GSA  
bcc  
Subject Fw: FAR case 2004-012

May your day be well,

Laurieann

Laurieann Duarte  
Supervisor  
Regulatory Secretariat  
Office of the Chief Acquisition Officer  
General Services Administration  
202.501.4225  
202.306.1418 (cell)

----- Forwarded by Laurieann Duarte/VIR/CO/GSA/GOV on 08/29/2005 01:40 PM -----



kcoulter@thecgp.org  
08/29/2005 10:19 AM

To laurieann.duarte@gsa.gov  
cc  
Subject FAR case 2004-012

Ms. Laurieann Duarte  
General Services Administration  
Regulatory Secretariat (VIR)  
1800 F Street, NW  
Room 4035  
Washington, D.C. 20405

Re: FAR Case 2004-012, (70 FR 35601, June 21, 2005), Past Performance Evaluation of Orders

Dear Ms. Duarte:

The Coalition for Government Procurement appreciates this opportunity to submit comments on FAR Case 2004-012. This FAR case proposes to revise FAR Subpart 42.15 to:

(1) significantly expand the current requirement that contracting officers evaluate contractors' past

*Handwritten signature and date:*  
K. Coulter  
8-29-05

2004-012-6

performance on contracts to include orders placed under those contracts as well, i.e., orders exceeding \$100,000 that are: (a) placed against a Federal Supply Schedule contract or task/delivery order contracts awarded by another agency (GWACs or multi-agency contracts); and (2) placed under single agency task order/delivery order contracts "when such evaluations would produce more useful past performance information for source selection officials than that contained in the overall contract evaluation).

(2) broaden the FAR definition of what constitutes past performance information to include "management of subcontracts," including but not limited to efforts to achieve the goals identified in a small business subcontracting plan.

The Coalition respectfully contends that the proposed rule would have a significant detrimental impact not only on industry-GSA schedules and GWACs contractors and subcontractors-but also on the government purchaser, the government buyer, and the taxpayer. The Coalition contends that the rule as presently conceived would prove to be unworkable, particularly as it affects small businesses, which comprise 37.1% of all schedules holders. The Coalition accordingly recommends that, if a decision is made to go forward with this rule-making effort:

- (1) the threshold for evaluating past performance on orders be raised to \$1 million; and
- (2) the portion of the proposed rule that concerns subcontract management be deleted in its entirety.

The Coalition is a 330-member association of companies selling commercial solutions to the federal government. Our members include both large and small businesses, many of them suppliers to DOD. Coalition members account for nearly 75% of all sales made through GSA Multiple Award Schedule contracts and over half of all commercial solutions purchased annually by the government. We have worked with government officials for over 24 years to ensure common sense in government procurement.

Given the nature of our world today, the federal government needs new procurement processes which will bring products and services to end-users more quickly-not more slowly with more hurdles which industry needs to jump over to arrive at the goal of delivery. As the government faces unrest overseas and attempts to maintain efficient activities here, it needs access to a streamlined government procurement system. A responsive system is essential to the success of each of these missions. Placing new obstacles in the way of those involved in running our nation's most critical national interests is not an appropriate step at this time. Potential delays and errors in this process are dangerous.

By extending the existing requirement to evaluate a prime's past performance, including small business subcontracting plan goals, to orders in excess of \$100,000 placed under certain contracts, this proposed rule would add a additional step-a hurdle-to the source selection process that would be highly onerous. This would not only add to the time of the procurement process, but also the burden placed on the contracting personnel given the enormous volume of orders-on the order of tens of thousands-in excess of \$100,000. Thinking through the process that would be set in motion under the proposed rule, the government would have to (1) do a full-blown past performance assessment on each and every order, (2) allow contractors an opportunity to comment (FAR Subpart 42.1503 says a contractor must be afforded a minimum 30-day period to comment on an evaluation as well as an opportunity to obtain a review at a level above the contracting officer); (3) enter the data into a database; and (4) retrieve it for purposes of source selection evaluations down the road, which in turn would entail selecting from the voluminous evaluations on order those most relevant). Adding these steps to the source selection process would be unwieldy. It would subject prime contractors to a microscopic examination of even routine, repetitive,

2004-012-6

small dollar value orders. In so doing, it would bog down the system, robbing the acquisition workforce of valuable time that could be put to better use on other aspects of the procurement process. Further, extending the process when not necessary, again, would jeopardize the success of our nation's mission.

If the government insists on rating performance on orders, we submit that the proposed \$100,000 threshold ought to be raised to \$1 million.

Turning to the second aspect of the proposed rule-evaluating a prime's management of its subcontracts-the Coalition observes that past performance evaluations were originally created to provide the government with a review of actual work done by those with first-hand knowledge of that work. But as past performance evaluations evolve, they attempt to encompass areas outside of actual work done including small business subcontracting, as it does in this proposed rule. The Coalition is concerned that the proposed broadening of the FAR definition of what constitutes past performance information to include management of subcontracts, even if it could somehow be expressed via objective, measurable criteria (we point out that the proposed rule contains no such criteria at present, which is highly problematic in and of itself), will unavoidably infringe on the prime-subcontractor relationship. In the Schedules Program, the prime-subcontractor relationship is being treated more and more by contracting officers as a commercial exchange, and the privity of contract and shielding from government scrutiny that is associated with that concept should be respected as such.

In addition, the expansion of what constitutes past performance to include subcontract management is overkill because a subcontractor's performance is part and parcel of the prime's. Their destinies are intertwined. What the proposed rule is saying in effect is that even if a prime delivers the supplies/services promised in a TO/DO on time and within budget, it could still somehow be faulted for not managing its subcontractor well. This is illogical on its face. The Coalition suggests that the government would have a hard time defending itself against an administrative challenge to such a past performance assessment.

In conclusion, the Coalition believes the proposed rule to expand the current past performance information requirements is unnecessary from the government's perspective and unworkable from the perspectives of both the government and prime contractors-particularly small businesses. For the reasons stated above, we request that the proposed rule be withdrawn. Alternatively, the Coalition recommends that the portion of the rule that would extend the scope of past performance evaluations to orders be limited to orders over \$1 million. We recommend that the portion of the proposed rule that pertains to subcontract management be deleted in its entirety.

We again appreciate this opportunity to submit these comments and look forward to working with you in the crafting of a final rule.

Sincerely,

Kathryn Coulter



Assistant Executive Director Comments on Past Perf on Orders Rule 8-05.pdf



2004-2005

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August 22, 2005

2004-012-7

**VIA E-MAIL AND FIRST CLASS MAIL**

General Services Administration  
Regulatory Secretariat (VIR)  
1800 F Street, N.W., Room 4035  
Washington, DC 20405  
Attention: Laurieann Duarte

**RE: Proposed Rule, FAR Case 2004-012, 70 Fed. Reg. 35601 (June 21, 2005); Past Performance Evaluation of Orders**

Dear Ms. Duarte:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section's governing Council and substantive committees have members representing these three segments, to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.<sup>1</sup>

The Section is concerned about the utility of the proposed change and offers the following background and observations. As proposed, the new provisions of FAR Subpart 42.15 would add a requirement for contracting officers on completion

<sup>1</sup> This letter is available in pdf format at <http://www.abanet.org/contract/Federal/regsgcomm/home.html> under the topic "Performance Issues."

Rec'd via  
8/30/05

2004-012-7

of the work (i) to evaluate a contractor's management of subcontracts, including meeting the goals in its small business subcontracting plans, and (ii) evaluate past performance on:

- contracts exceeding \$100,000;
- orders exceeding \$100,000 placed against a Federal Supply Schedule contract or a task-order contract or delivery-order contract awarded by another agency (*i.e.*, Government-wide acquisition contract or multi-agency contract);
- orders exceeding \$100,000 placed against single agency task-order and delivery-order contracts when such evaluations would produce more useful past performance information for source selection than that contained in the overall contract evaluation.

The Section's focus in these comments is on whether additional emphasis on past performance/subcontract management evaluation and reporting will redirect scarce resources from prime contract management to the detriment of overall contract performance. Although subcontract management logically appears to be an essential element of successful program performance, past performance analysis at the prime level would appear to adequately capture subcontract management. Several DOD studies have validated this point. There is no indication that the proposed change in FAR Case 2004-012 would be accompanied by authorization for additional resources for affected government agencies or allowance for increased payments to affected contractors. In fact, the proposal notes it is not a significant regulatory action.

During the late 1980's and early 1990's the U. S. Air Force and U. S. Navy, in conjunction with the Defense Contract Administration Services ("DCAS"), did an extensive review of past performance evaluations and the role of subcontract management concerning the Joint Cruise Missile program. This review was prompted by subcontract problems on procurements critical to national security. Included in this review were major weapon systems as well as small procurements and GSA schedule procurements. The small procurement and GSA items served essential interface requirements with the major weapon systems.

The Section understands that the result of this review provided critical guidance on subcontract management. It showed that government emphasis on past performance and subcontract management had actually resulted in reduced quality and increased cost. This was because limited government and contractor resources were diverted from other tasks. The increased emphasis on documenting

2004-012-7

past performance and subcontract practices did not bring about increased resources for either government agencies or contractors in the tight competitive market. Hence, other tasks were sacrificed. It is unlikely that the proposed change in FAR Case 2004-012 would result in authorization for additional resources for affected government agencies or allowance for increased price for affected contractors. Additionally, the previous study showed that much of the past performance/subcontract data collected was incomplete and inaccurate, due to limited resources, resulting in more confusing past performance analysis.

The Air Force/Navy review recommended the following:

- a. Limit evaluation of subcontract management to major systems as defined in 10 U.S.C. §2302d. The joint Government-contractor management teams are created to actively monitor subcontract activity. These are recognized and funded additional resources. DCAS established Contractor Performance Subcontractor Review teams for this purpose.
- b. Focus of past performance evaluations on all other contracts should be on end-product quality, cost, and schedule. The procurements that showed the best overall results were those where the Government and contractor focused past performance on the end result--delivered quality, schedule, and cost.
- c. In every case, the end-product quality, schedule, and cost were directly proportional to adequacy of subcontract management.

In the late 1990's, the U. S. Navy and Hewlett Packard conducted another review of past performance and subcontract management data, this time of the TAC IV program. This review covered major competitive procurements, commercial off-the-shelf procurements, and GSA schedule procurements. The results of the TAC IV procurement review were entirely consistent with the previous review: Detailed past performance evaluations, including subcontract management, were only effective on "major system" procurements as defined in 10 U.S.C. §2302d where joint dedicated government/contractor program management teams were established. On smaller procurements, where detailed past performance-subcontract management data was required, quality and schedule were negatively impacted due to diverted resources. Also, the data collected was found to be incomplete and inaccurate confusing any past performance evaluation.

The results from these investigations and studies appear applicable to the FAR Case 2004-012 proposal. That is, limited government resources and

2004-02-7

contractor personnel are most effective if past performance focuses on the end product--looking at delivered quality, meeting delivery schedule, and final cost--recognizing that if quality, schedule, and cost are acceptable, subcontract management must also have been acceptable.

We note also that FAR 9.104-3 requires the contracting officer to consider the contractor's compliance with subcontracting plans under previous contracts when the contract at issue requires a subcontracting plan. If a concern that compliance with small business contracting plans is not being adequately monitored is prompting this proposed rule is, the answer is likely to be increased management emphasis rather than adding a largely redundant regulatory requirement.

If the Government still believes Far Subpart 42.15 should be revised, then carefully structured regulatory language should be promulgated. Detailed instructions should be carefully tailored to limit the effect on already tightly stretched government resources. It must also be structured so that contractors do not become overly focused upon documenting subcontractor performance to ensure the "next award" at the expense of quality performance on the present contract.

In this case, the Section recommends that the following regulatory language be included:

Although evaluation of past performance regarding subcontract management has been useful in some types of acquisitions, generally experience has shown that the focus should be on end-product quality, cost, and schedule. Therefore, on procurements over \$100,000, evaluation of subcontract management shall be used as follows.

- If delivered quality, schedule, and cost have been in accordance with contract requirements and specifications, it may be presumed that past performance, including subcontract management, is acceptable.
- If there is a problem with delivered quality, schedule, or cost, then the Government will identify the cause of the problem as part of any past performance analysis, including subcontract management, if applicable.

2004-012-7

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,



Robert L. Schaefer  
Chair, Section of Public Contract Law

cc: Michael A. Hordell  
Patricia A. Meagher  
Michael W. Mutek  
Carol N. Park-Conroy  
Patricia H. Wittie  
Hubert J. Bell, Jr.  
Mary Ellen Coster Williams  
Council Members  
Co-Chairs and Vice-Chairs of the Acquisition  
Reform and Experimental Processes Committee  
David Kasanow



SEP 19 2005

MEMORANDUM FOR ROBERT R. JARRETT  
DIRECTOR  
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM:  RALPH J. DESTEFANO, DIRECTOR  
REGULATORY AND FEDERAL ASSISTANCE  
PUBLICATIONS DIVISION

SUBJECT: FAR Case 2004-012, Past Performance Evaluation of  
Orders

Attached is a late comment received on the subject FAR case published at 70 FR 35601; June 21, 2005. The comment closing date was August 22, 2005.

<u>Response Number</u>	<u>Date Received</u>	<u>Comment Date</u>	<u>Commenter</u>
2004-012-8	09/16/05	09/16/05	DOJ

Attachment

2004-012-8



Cecelia L.  
Davis/VPC/CO/GSA/GOV  
09/16/2005 10:34 AM

To Laurieann Duarte/VIR/CO/GSA/GOV@GSA, LaRhonda M.  
Erby-Spriggs/VI/CO/GSA/GOV@GSA  
cc  
bcc  
Subject FW: Federal Acquisition Regulation (FAR) Case 2004-012,  
"Past Performance Evaluation of Orders"

Hi Ladies,

This comment is from Department of Justice and it was not posted. The comment period has closed. Would you please posted this one?

Cecelia L. Davis  
Procurement Analyst  
General Services Administration  
Office of the Chief Acquisition Officer  
(202) 219-0202

----- Forwarded by Cecelia L. Davis/VPC/CO/GSA/GOV on 09/16/2005 10:20 AM -----



"Anne.D.Hudson@usdoj.gov"  
<Anne.D.Hudson@usdoj.gov>  
09/16/2005 09:03 AM

To "Cecelia.Davis@gsa.gov" <Cecelia.Davis@gsa.gov>  
cc "JBasile@omb.eop.gov" <JBasile@omb.eop.gov>  
Subject FW: Federal Acquisition Regulation (FAR) Case 2004-012,  
"Past Performance Evaluation of Orders"

Hi:

I am forwarding a copy of the email that I sent forth for the Department of Justice July 29, 2005 concerning this FAR case.  
Thanks, Anne

> -----Original Message-----

> From: Hudson, Anne D  
> Sent: Friday, July 29, 2005 10:06 AM  
> To: 'farcase.2004-012@gsa.gov'  
> Subject: Federal Acquisition Regulation (FAR) Case 2004-012, "Past Performance Evaluation of Orders"

>  
> Below are Department of Justice comments:

>  
> 1. GSA schedule vendors report their subcontract plans and achievements to GSA Contracting Officers (COs). GSA COs report schedule vendor subcontract dollars and achievements in the Federal Procurement Data System-Next Generation (FPDS-NG). GWAC and multi-agency contract vendors report their subcontract plans and achievements to the principal COs. Clarify how COs issuing orders on these contract vehicles will obtain information on the proposed subcontract plans to report achievements. What recourse does the CO issuing orders have when they can not obtain timely subcontract plan information from the principal CO? If vendors will be required to provide the information to ordering officers, how will the change in the current terms and conditions of Schedule, GWAC and multi-agency contracts be managed?

>  
> 2. Clarify how the subcontract effort of a task or delivery order exceeding \$100,000 will be determined when the vendor subcontract plan is based on the contract as a whole.

>

> 3. Subcontract plans are only required from large businesses. Although 42.1502(c) states, "the contract includes the clause at 52.219-9, Small Business Subcontracting Plan", recommend to clarify by adding in (a), "agencies shall, where the prime contractor is a large business prepare an evaluation of contractor performance at the time the work under the contract or order is completed--".

>

> 4. The proposed rule creates duplication of effort and confusion. Clarify how conflict will be resolved when a CO issuing orders scores the contractor low and the principal CO scores the contractor high on the contract as a whole.

>

> Anne D. Hudson

> Senior Procurement Analyst

> U.S. Department of Justice

> Chief Acquisition Officer's Staff

> MPS/Procurement Policy and Review Group

> 1331 Pennsylvania Avenue, (NPB) NW, Washington, DC 20530

> Office: (202) 616-3759

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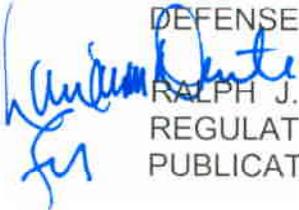
> anne.d.hudson@usdoj.gov

>



SEP 30 2005

MEMORANDUM FOR ROBERT R. JARRETT  
DIRECTOR  
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM:  RALPH J. DESTEFANO, DIRECTOR  
REGULATORY AND FEDERAL ASSISTANCE  
PUBLICATIONS DIVISION

SUBJECT: FAR Case 2004-012, Past Performance Evaluation of Orders

Attached are late comments received on the subject FAR case published at 70 FR 35601; June 21, 2005. The comment closing date was August 22, 2005.

<u>Response Number</u>	<u>Date Received</u>	<u>Comment Date</u>	<u>Commenter</u>
2004-012-9	09/28/05	08/22/05	CODSIA
2004-012-10	09/28/05	08/22/05	The Boeing Company

Attachments

2004-012-9

**Council of Defense and Space Industries Associations**

1000 Wilson Boulevard, Suite 1800

Arlington, VA 22209

[www.codsia.org](http://www.codsia.org)

(703) 243-2020

August 22, 2005

General Services Administration  
Regulatory Secretariat (VIR)  
1800 F Street, N.W., Suite 4035  
Washington, D.C. 20405

ATTN: Laurieann Duarte

Ref: FAR Case 2004-012, Proposed Rule: Past Performance Evaluation of Orders

By email: [farcase.2004-012@gsa.gov](mailto:farcase.2004-012@gsa.gov)

CODSIA Case No. 03-05

Dear Ms. Duarte:

On behalf of the Council of Defense and Space Industries Association (CODSIA), we are pleased to submit comments on the referenced proposed rule, published in the Federal Register on June 21, 2005 (70 F.R. 35601, et. seq.) The proposed rule would amend the Federal Acquisition Regulations (FAR) to require past performance evaluation of certain orders, and to ensure that subcontracting management is addressed during evaluation of a contractor's past performance.

Formed in 1964 by the industry associations with common interests in the defense and space fields, CODSIA is currently composed of six associations representing over 4,000 member firms across the nation. Participation in CODSIA projects is strictly voluntary. A decision by any member association to abstain from participating in a particular activity is not necessarily an indication of dissent.

Introduction

As noted in the supplementary information, there currently is no FAR Part 42 guidance directed to evaluating a contractor's subcontract management efforts in achieving its subcontract goals in the performance of Government contracts. This proposed amendment is intended to ensure that the acquisition community considers a prime contractor's management of its subcontracts, including management of small and minority business subcontracting plan goals, as part of the overall assessment of performance on contracts and orders.

Scope of Rule's Coverage

The effect of this amendment is that subcontract management efforts regarding subcontracting goals will be recorded for use in past performance evaluations during source selection. While CODSIA agrees that the Government should obtain and evaluate relevant past performance information in order to establish the credibility and capability of bidders, evaluating a contractor's achievement of its numerical subcontracting goals should not be viewed as the ultimate panacea for enforcing subcontract management.

Although the requirement to assess a contractor's "performance against, and efforts to achieve the goals..." appears in both the current and proposed text, CODSIA is concerned that the new emphasis provided by this proposed rule could have the effect of turning what is now a goal (imposed by the agency) into a hard contract requirement against which a contractor's past performance is measured.

One issue not fully addressed covers percentage goals and good faith efforts to comply with those goals – and making compliance with a "good faith goal" a factor in measuring a company's past performance for source selection purposes. There should be an affirmative requirement that the contracting officer seek to determine the reason for a particular contractor's apparent past "failures" to achieve goals in cases where such past performance information may not be, or appear to be, favorable. There may be circumstances where the failure to achieve goals was not due to the conduct of the contractor, such as contract reductions in scope, other changes or early terminations affect subcontracting plan management and performance, initially made in good faith. Contractors must be provided an opportunity to provide information to the contracting officer making assessments of past performance based on allegations that a contractor did not make good faith efforts to achieve its subcontracting goals. Indeed, FAR Subpart 42.1503(b) does afford an opportunity for contractors to submit comments, rebuttals, and/or additional information and, in the case of disagreement between the parties, to be afforded an opportunity for review at a level above the contracting officer. If the proposed rule is implemented, it should be made clear that this opportunity is extended to any past performance evaluation of subcontract plans.

In addition, Government agencies (consistent with OFPP Policy Letter 99-1) often establish specific negotiated goals for individual subcontracting categories (e.g., 23% small business, 5% women-owned, 3% service-disabled, etc). Large prime contractors often have stated that they would prefer an overall subcontracting goal, allowing the contractor to meet the subcontracting goal with the best mix feasible for contract performance. However, when such individual goals are imposed, contractors are concerned that they will be penalized for not achieving their subcontracting goal in one area, even though they may have over-achieved their goal in another area. Such over-achievement should be considered as part of their "good faith" efforts.

Furthermore, despite the fact that rating past performance has been in use for years, certain inconsistencies in its application, as well as questions regarding the ultimate confidentiality of such information, continue to exist. Specific areas that need to be addressed include utilizing a centralized system that is fair, consistently applied, and accurate; maintaining relevancy; providing reference checks; improving the evaluation process (including the use of neutral ratings); and allowing timely contractor response to all ratings. Improvements in these areas will allow for better collection of past performance information and its use as a valuable tool in evaluating prime contractor performance on both overall contract requirements as well as efforts relating to its subcontracting plans.

#### Specific Comments on Proposed Rule

Should the FAR Council move forward with the proposed rule, CODSIA recommends the following clarifications:

*Subpart 42.1501- General.* In response to the requirement for the Government to add contractor's management of subcontractors as a past performance element, CODSIA suggests that all the agencies develop consistent criteria for that measurement in order to allow contractors to be more effective in managing their subcontracts and facilitating cross-agency use of a single system. Differing guidance within the individual agencies will only lend confusion – and not improve the evaluation process nor achieve the intended goal of improving subcontract management.

2004-012-9

Since the Defense Department's Contractor Performance Assessment Reporting System (CPARS) already considers subcontract management as part of the overall assessment of a contractor's management, this is the guidance that should be followed.

Subpart Para 42.1502- Policy. Paragraph (a)(3) allows, if not encourages, the evaluation of subcontracting plans in the source selection for Schedule purchases, Government-wide acquisition contracts (GWACs) or multi-agency contracts (MACs). CODSIA believes it inappropriate for the Government to factor in subcontracting for a Schedule purchase, a GWAC or MAC because CODSIA members are not sure how this appropriately could be accomplished. In addition, the permissive (i.e., "may") nature of this element of the proposed rule necessarily means that Government buyers will not employ a uniform method in their evaluation of the vendors on the Schedule, etc. This places a commercial vendor in an uncertain contracting environment because none of the vendors with a GSA Schedule offering will know what Government buyer is evaluating what small business subcontracting element in his/her determination to purchase from any Schedule vendor. This is particularly true for Schedule buys because a small business subcontracting "factor" dilutes the utility of the Schedule to contracting officers.

Paragraph (c) provides that "the evaluation of contractor performance is generally for the entity, division, or unit that performed the contract or order." To strengthen the relevance of the past performance information, we encourage adding authority to collect information based on CAGE Codes.

#### Application of Threshold

The supplementary information outlines the types and dollar levels for the contracts to be evaluated. The requirement would be applied on: acquisitions exceeding \$100,000 placed against a Federal Supply Schedule contract or a task-order contract or delivery-order contract awarded by another agency (i.e., Government-wide acquisition contract or multi-agency contract); and, single agency task-order and delivery-order contracts over \$100,000 when such evaluations would produce more useful past performance information for source selection than in the overall contract evaluation.

CODSIA is concerned that the dollar threshold of \$100,000 may be too low, if a contracting officer really intends to conduct a full evaluation of past performance information. This is an additional task for the contracting officer to perform before any award is made, and may add considerable time to the process. Certainly doing a simple check of a company's progress against the goals could be done quickly, but checking numbers without reading any relevant comments submitted justifying results, or lack thereof, could be detrimental to many primes. *And, this would be done on every acquisition.* Often, the subcontracting goals are stated in terms of the total contract, and progress on each order is not tracked or required with as much rigor. Furthermore, in many cases, the agency acquisitions are conducted as a straight pass-through of the order to the subcontractor, with little management on the part of the prime.

#### Other Issues to Consider

Comprehensive Subcontracting Plans. Congress has encouraged the use of comprehensive, company-wide goals for the Department of Defense (DoD). This proposed rule looks at performance of the entity, division or unit performing the contract or order. The assessment of a comprehensive subcontracting plan does not appear to be part of the equation under the proposed rule – and, therefore, could undermine DoD's use of contractor's comprehensive subcontracting plans. This same comment applies to the Government-wide preference for Commercial Subcontracting Plans under FAR 52.219-9(g).

Incentives and Penalties. CODSIA notes that FAR 19.705-7 provides for the assessment of liquidated damages for a contractor's "failure to make a good faith effort to comply with a subcontracting plan."

2004-012-9

A more appropriate approach, however, would be for agencies to expand their use of performance incentives (e.g., award fees) tailored to encouraging contractors to make best efforts to meet or exceed their subcontracting plan goals, rather than enforcement of penalties.

Evaluation Factors. CODSIA questions how much weight would be accorded to this new past performance subfactor relative to other subfactors, particularly the contractor's overall performance on the contract. We are further concerned that this requirement could turn into a purely numerical analysis to determine a prime's ability to manage their subcontracts. Achievement of the subcontracting goal is only one factor of the overall management "pie," but it appears to be the only factor being evaluated for past performance. And, as stated previously, a "goal" is a "goal," not a contract obligation. The contract obligation is to make a good faith effort to meet the proposed and accepted subcontracting goals. Therefore, CODSIA recommends that the evaluation of past performance pertaining to subcontracting management must include a determination of whether the prime contractors made the required good faith effort to achieve its subcontracting commitment made to small businesses as part of their winning proposal, not simply that they are managing their subcontracts from an administrative perspective, i.e., achievement of their numerical small business subcontracting goals.

#### Relevant Agency Initiatives to Consider with this Proposed Rule

Department of Defense Guidance. The thresholds outlined in the proposed rule are inconsistent with those currently used by the Department of Defense to collect their past performance data – and this level is different from those of the civilian agencies. As noted in Appendix C of the Department of Defense Past Performance Information Guide (Version 2), dated May 2001, the established thresholds are over \$1M for services and \$5M for systems. CODSIA recommends that the proposed rule be amended to reflect these thresholds for the Department of Defense; lower thresholds may be appropriate for the civilian agencies.

Small Business Administration. In October 2003, the Small Business Administration (SBA) issued a proposed rule on subcontracting assistance in Government contracting programs. A final rule was issued on December 20, 2004, amending 13 CFR part 125, to strengthen the requirements for evaluating a prime contractor's performance and good faith efforts in achieving its subcontracting goals. The final rule also authorizes the evaluation of past performance in meeting subcontracting goals as a source selection factor when placing orders on the Federal Supply Schedules, Government-wide agency schedules, and multiple-agency contracts.

OFPP. Policy Letter 99-1, issued by the Office of Federal Procurement Policy (OFPP) on small business procurement goals provides guidance to Executive Branch departments and agencies on government-wide goals for procurement contracts awarded to small businesses, HUBZone small businesses, small disadvantaged businesses and women-owned small businesses. It also provides guidance on reporting requirements that will help the Small Business Administration (SBA) determine whether agencies are reaching these goals – these are based on good faith efforts to achieving their goals as established by the SBA.

New Electronic Subcontracting Reporting System. The new Government-wide electronic subcontracting reporting system (eSRS) should help relieve Federal contractors from having to file paper submissions and standardize forms for reporting their progress in meeting small business subcontracting goals. This system is expected to be in full use by October 1, 2005, the start of fiscal year 2006.

#### Conclusion

Before moving forward with this proposed rule, we suggest that the FAR Council host a public meeting in order to further discuss the impact of the proposal. CODSIA supports a strong

2004-012-9

subcontracting assistance program that is aimed at establishing realistic goals, and fair and appropriate compliance enforcement, but believes further review may be needed in order to achieve what we believe are the intended goals of the proposed rule to improve subcontracting.

Thank you for your attention to these comments. If you have any questions or need any additional information, please contact Cathy Garman of the Contract Services Association, who serves as our point of contact for this matter; she can be reached at (703-243-2020 or at [cathy@csa-dc.org](mailto:cathy@csa-dc.org).

Sincerely,



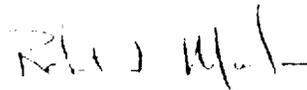
Chris Jahn  
President  
Contract Services Association



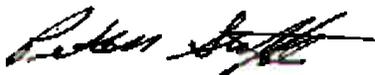
Alan Chvotkin  
Senior Vice President & Counsel  
Professional Services Council



Dan Heinemeier  
President  
GEIA  
Electronic Industries Alliance



Robert T. Marlow  
Vice President, Government Div.  
Aerospace Industries Association



Peter Steffes  
Vice President  
Government Policy  
National Industrial Association



Cynthia Brown  
President  
American Shipbuilding Association

2004-012-10

August 22, 2005

General Services Administration  
Regulatory Secretariat (VIR)  
1800 F Street, NW, Suite 4035  
Washington, D. C. 20405

ATTN: Laurieann Duarte

Ref: FAR Case 2004-012, Past Performance Evaluation of Orders

By email: farcase.2004-012@gsa.gov

The Boeing Company is pleased to offer its views on the proposed rule that was published in the Federal Register on June 21, 2005. (70 Fed. Reg. 35601, et seq.). We appreciate the opportunity to provide comments.

The Boeing Company has a long standing commitment to small business programs. However, due to our changing business model and increased lead systems integrator (LSI) role our small business subcontracting opportunities continue to be reduced at the first tier level, even as opportunities throughout the entire supply chain expand. As we continue to seek out innovative ways to address this business reality, we encourage the federal government to identify and implement metrics that provide a more holistic view of the health of small business in America.

We are concerned that the proposed rule does not adequately define the past performance evaluation process and lacks specifics concerning the evaluation criteria. Without a prescribed process and specific, objective criteria, each contracting official may use separate approaches and potentially subjective criteria. This can result in arbitrary and inconsistent applications of the small business subcontracting evaluation process among contractors and within the federal agencies. Traditionally, small businesses are concentrated in markets with minimal capitalization and narrowly focused intellectual property which can limit competitive advantages. Therefore, rigid single evaluation criteria are poor predictors of likely performance.

It is our opinion that adequate performance oversight is currently provided through our participation in the Department of Defense (DoD) Comprehensive Subcontracting Plan (CSP). We are concerned that the proposed rule would result in additional cost to both prime contractors and the government.

Considering the importance of fairness in the source selection process we recommend that the government involve DoD, Defense Contract Management Agency (DCMA) and other stakeholders including prime contractors in the development of the evaluation criteria and obtain support from all sectors of the federal government prior to publication of the proposed rule.



2004-012-10

We believe the Federal Government should not be involved in the "privity of contract" issues between a prime contractor and their subcontractor. To do so would do injury to the prime-subcontractor relationship and would likely require a contracting officer to become involved in disputes/issues that are outside his/her province.

We appreciate the opportunity to comment on these important issues. Please feel free to direct any comments / concerns regarding the above input to Edward Ferguson (703) 465-3604 or Mark Olague (253) 773-2173.



A handwritten signature in black ink that reads 'Warren L. Reece'.

Warren L. Reece  
Director, Contracts Policy & Process