



# Past Performance Case Study

## **FAR Case 2012-028; Federal Acquisition Regulation; Contractor Comment Period, Past Performance Evaluations**

### Introduction

Section 853 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112-239, enacted January 2, 2013) required revisions to the Federal Acquisition Regulation on past performance evaluations. Specifically, the “Federal Acquisition Regulatory Council (sic) shall develop a strategy for ensuring that timely, accurate, and complete information on contractor performance is included in past performance databases used by executive agencies for making source selection decisions.”

Two timelines were specified. The first stated “affected contractors...are afforded up to 14 calendar days, from the date of delivery of the information provided...to submit comments, rebuttals, or additional information pertaining to past performance for inclusion in...databases.” The second timeline agency requires that “evaluations of contractor past performance, including any comments, rebuttals, or additional information...are included in the relevant past performance database not later than the date that is 14 days after the date of delivery of the information provided” to the contractor.

### Analysis

The Contractor Performance Assessment Reporting System (CPARS) processes the assessment and provides it to the Past Performance Information Retrieval System (PPIRS), so agency source selection officials can review the reports. CPARS provides an automatic notification to the contractor when a past performance evaluation has been submitted to the system and is available for contractor comment. According to the FAR Council, this “is the equivalent of ‘providing’ the past performance evaluation to the contractor, and it starts the suspense period for contractor comment or rebuttal.”

The previous version of the FAR at 42.1503(b) provided “a minimum of 30 days” for contractor comments, rebutting statements, or additional information in response to the Government’s past performance evaluation, and the past performance evaluation was not made available until after the contractor’s comments have been made. The proposed rule was published on August 7, 2013<sup>1</sup> and the final rule was published on May 30, 2014<sup>2</sup>.

### Data

No changes were made to the interim rule. There were numerous comments concerning the reasonableness of the 14 day response time, with one commenter noting that “it takes time for



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the contractor to gather input from multiple employees and subcontractors and draft an objective response.” Another commenter provided data which indicated that 39 percent of all contractor comments were not provided within a 14 day period. One respondent stated that the reductions in the contractor comment period “places the integrity of the past performance system at significant risk due to the likelihood that it will result in incorrect information passing through the system and on to procurement offices”. Another respondent strongly objected because it would “sacrifice the quality (of past performance evaluations) for quantity.” Another commenter did indicate the 14 day period was reasonable because it set a fixed period. The response to these comments was that the FAR Council (speaking through its subordinates, the Civilian Agency Acquisition Council and the Defense Acquisition Regulation Council) was “provided no latitude under the terms of the law.”

Another commenter stated that, after receipt of the past performance evaluation, the contractor should be provided the “opportunity to request a meeting with the assessment official to discuss differences and possible modifications to the ratings and the comments.” The commenter stated that the meetings, according to the respondent, often result in a better assessment for the Government. The FAR Council’s response was that such a meeting was not a requirement, but that there was no prohibition.

Three commenters stated the proposed rule does not require the Government to make a timely revision in PPIRS (sic) if the Government determines, after the 14-day period expired, that it was in error. The Council responded that “agencies are required to have internal management and technical controls for past performance evaluations”.

One commenter stated that “because the 14-day time period is statutory, the Council should consider guidelines to ensure that requirements for the content of past performance evaluations are clear, concise, and contain sufficient detail to allow a contractor to promptly begin its assessment of any negative findings.” The response was that “FAR 42.1501(b) and 42.1503(b)(1) to require the Government to provide past performance evaluations that are clear, concise, and contain sufficient detail to allow a contractor to begin its assessment promptly.” However, this specific language does not exist in the FAR.

Lastly a commenter noted that paragraph (d) of section 853 of the NDAA allows the contractor to submit comments, rebuttals, or additional information pertaining to past performance after the 14 day period has elapsed and that contractors may challenge a past performance evaluation in accordance with applicable laws, regulations, or procedures. The Council noted that updates may be submitted at any time until the evaluation is removed from PPIRS.



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## Conclusion

The FAR change is fairly straightforward and therefore not likely to be misinterpreted. It does bring up the issue as to whether the change is reasonable. Given the change is enshrined in federal law, it becomes nearly impossible to make any change via the rulemaking process if it is determined that a change is required. The challenge is to determine the best method of implementing the change. Could the rule have been better written? Besides updating the rule what could be done?

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<sup>1</sup> Federal Acquisition Regulation; Contractor Comment Period, Past Performance Evaluations; Proposed Rule, 78 Fed. Reg. No. 152 (August 7, 2013) (to be codified at 48 C.F.R. Part 42)

<sup>2</sup> Federal Acquisition Regulation; Contractor Comment Period, Past Performance Evaluations; Final Rule, 79 Fed. Reg. No. 104 (May 30, 2014) (to be codified at 48 C.F.R. Part 42)