



ACQUISITION,
TECHNOLOGY
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE

**3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000**

OCT 12 2010

MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS
COMMAND, (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION
COMMAND, (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY
(PROCUREMENT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(ACQUISITION & LOGISTICS MANAGEMENT)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING)
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DOD FIELD ACTIVITIES

SUBJECT: Implementation of the new FAR Rule, Termination for Default Reporting (FAR Case 2008-016)

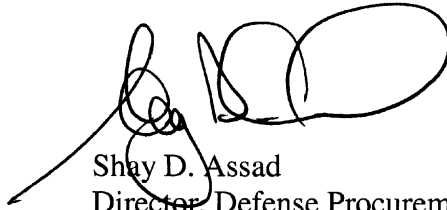
The Federal Acquisition Regulation (FAR) Final Rule for Termination for Default Reporting was published in the Federal Register on Wednesday, September 29, 2010, copy attached. Effective date is October 29, 2010.

All reporting shall be in accordance with the new FAR subpart 42.1503(f). Termination data must be reported in the Federal Awardee Performance and Integrity Information System (FAPIIS) module of the Past Performance Information Retrieval System (PPIRS) within three (3) working days after the contracting officer issues a final termination for cause or default notice or makes a subsequent withdrawal or a conversion of a termination for default to a termination for convenience.

Information submitted includes the following data: date of action (when termination for default or termination for cause was signed), contractor Data Universal Numbering System (DUNS) number, Commercial and Government Entity (CAGE) code (optional), contractor name, doing business as (DBA name) (optional) and full physical address, Product Service Code (PSC); North American Industrial Classification System (NAICS), contract number, reporting agency and office code, reporting official name, address, telephone number and email address plus the modification issuing the termination.

With the effective date of this final rule, the memorandum dated July 23, 2008, Subject: Termination Notification, is hereby rescinded. The termination information included in the DoD Termination List found in PPIRS-RC and PPIRS-SR will remain on the site for the next two years and may be used as another source to determine contractor responsibility.

My point of contact for this memorandum is Ms Sandra K. Ross. She can be reached at Sandra.ross@osd.mil, 703-695-9774 or DSN 225-9774.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above the printed name.

Shay D. Assad
Director, Defense Procurement
and Acquisition Policy

Attachment:
As stated

(c)(1) * * *
 (xviii) * * * This provision applies to all solicitations.
 (xix) 52.225-25, Prohibition on Engaging in Sanctioned Activities Relating to Iran—Certification. This provision applies to all solicitations.

* * * * *
 ■ 8. Amend section 52.212-3 by—
 ■ a. Revising the date of the clause;
 ■ b. Removing from the introductory text “through (m) of” and adding “through (o) of” in its place;
 ■ c. Removing from the first undesignated paragraph of (b)(2) “through (n) of” and adding “through (o) of” in its place; and
 ■ d. Adding paragraph (o).
 The revised and added text reads as follows:

52.212-3 Offeror Representations and Certifications—Commercial Items.

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS (SEP 2010)

* * * * *

(o) Sanctioned activities relating to Iran. (1) Unless a waiver is granted or an exception applies as provided in paragraph (o)(2) of this provision, by submission of its offer, the offeror certifies that the offeror, or any person owned or controlled by the offeror, does not engage in any activities for which sanctions may be imposed under section 5 of the Iran Sanctions Act of 1996.

(2) The certification requirement of paragraph (o)(1) of this provision does not apply if—
 (i) This solicitation includes a trade agreements certification (e.g., 52.212-3(g) or a comparable agency provision); and
 (ii) The offeror has certified that all the offered products to be supplied are designated country end products.

* * * * *
 ■ 9. Add section 52.225-25 to read as follows:

52.225-25 Prohibition on Engaging in Sanctioned Activities Relating to Iran—Certification.

As prescribed at 25.1103(e), insert the following provision:

PROHIBITION ON ENGAGING IN SANCTIONED ACTIVITIES RELATING TO IRAN—CERTIFICATION (SEP 2010)

(a) *Definition.*
 Person—
 (1) Means—
 (i) A natural person;
 (ii) A corporation, business association, partnership, society, trust, financial institution, insurer, underwriter, guarantor, and any other business organization, any other nongovernmental entity, organization, or group, and any governmental entity operating as a business enterprise; and

(iii) Any successor to any entity described in paragraph (1)(ii) of this definition; and
 (2) Does not include a government or governmental entity that is not operating as a business enterprise.

(b) *Certification.* Except as provided in paragraph (c) of this provision or if a waiver has been granted in accordance with FAR 25.703-2(d), by submission of its offer, the offeror certifies that the offeror, or any person owned or controlled by the offeror, does not engage in any activities for which sanctions may be imposed under section 5 of the Iran Sanctions Act of 1996. These sanctioned activities are in the areas of development of the petroleum resources of Iran, production of refined petroleum products in Iran, sale and provision of refined petroleum products to Iran, and contributing to Iran’s ability to acquire or develop certain weapons.

(c) *Exception for trade agreements.* The certification requirement of paragraph (b) of this provision does not apply if—

(1) This solicitation includes a trade agreements certification (e.g., 52.225-4, 52.225-11 or comparable agency provision); and
 (2) The offeror has certified that all the offered products to be supplied are designated country end products or designated country construction material.
 (End of provision)

[FR Doc. 2010-24165 Filed 9-28-10; 8:45 am]
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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

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

[FAC 2005-46; FAR Case 2008-016; Item III; Docket 2009-0032, Sequence 1]

RIN 9000-AL45

Federal Acquisition Regulation; Termination for Default Reporting

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) are issuing a final rule amending the Federal Acquisition Regulation (FAR) to establish procedures for contracting officers to provide contractor information, such as terminations for cause or default and defective cost or pricing data, into the Past Performance Information System (PPIRS) and Federal Awardee Performance and Integrity Information

System (FAPIS) module within PPIRS. This information will assist the contracting officer in making an informed source selection and award decision. Instructions on access to the FAPIS module and how to input data into the FAPIS module will be available at <http://www.ppirs.gov/fapis.html>.

DATES: *Effective Date:* October 29, 2010.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Jeritta Parnell, Procurement Analyst, at (202) 501-4082. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-46, FAR case 2008-016.

SUPPLEMENTARY INFORMATION:

A. Background

The Councils have agreed on a final rule amending the FAR to revise the contractor performance information process. This case sets forth requirements for contracting officers to report defective cost or pricing data and terminations for cause or default into the FAPIS module of the PPIRS. Evaluation of past performance information, especially terminations, manages risks associated with timely, effective, and cost efficient completion of contracts, a key objective of the President’s March 4, 2009, Memorandum on Government Contracting.

The Councils published in the *Federal Register* at 74 FR 45394 on September 2, 2009, a proposed rule with request for comments. Four respondents submitted fifteen comments.

B. Discussion of Public Comments

The comments received were grouped under six general topics. A summary of these topics and a discussion of the comments and the changes made to the proposed rule as a result of those comments are provided below:

1. Certification Regarding Responsibility Matters

Comment: One respondent recommended deletion of the certification on terminations found in FAR clause 52.209-5, Certification Regarding Responsibility Matters, since the information concerning terminations will be available to contracting officers in PPIRS. The respondent further suggested that conforming deletions should also be made at FAR 52.204-8(c)(1)(v) and in the Online Representations and Certifications Application (ORCA) Web site.

Response: The Councils disagree. PPIRS is the repository for

determinations made by contracting officers. PPIRS is not a repository for certifications made by contractors when certifications are required. Executive order 12689 requires the inclusion of the certification at FAR 52.209-5. FAR 9.105-1 also requires contracting officers to consider contractor certifications in making a contractor determination of responsibility.

2. Contractor Rebuttal

Comment: Two of the four respondents submitted comments requesting that the contractor be given an opportunity to post rebutting statements and additional information into PPIRS and this information be retained as long as the fundamental information is retained in PPIRS.

Response: When termination records are posted in the FAPIIS module of PPIRS, contractors will have an opportunity to provide additional information as required by section 872 of the Duncan Hunter National Defense Authorization Act of 2009 (Pub. L. 110-417). This process should not be confused with the rebuttal process for past performance information as specified in FAR 42.1503(b).

3. Defective Pricing Information

Comment: One respondent submitted two separate comments suggesting that defective pricing information not be included in PPIRS.

Response: The Councils disagree. The Councils believe that defective cost or pricing data is relevant to other contractor performance information to be considered when evaluating contractor's performance for award of contracts. However, the Councils did clarify in FAR 15.407-1(d) and 42.1503(f) that the contracting officer shall report only the final determination.

4. Relevance and Currency

Comment: One respondent submitted two separate comments on relevance and currency. One comment stated that the FAR does not provide any guidance with respect to relevance when determining the relevance and currency of any termination for cause or default information in PPIRS. The second comment suggested that the rule explain how the contracting officer will evaluate defective pricing information recorded in PPIRS.

Response: The Councils disagree with revising the rule. Relevancy is specific to the instant contract and based on the circumstances of contract performance. Contracting officers are responsible for making a determination of the relevancy of the information. The Councils will

work with the Federal Acquisition Institute and the Defense Acquisition University to develop guidance and training for contracting officials on the proper use of the reported information.

5. Removal of Detrimental Information

Comment: Two respondents submitted comments concerning removal of detrimental information from PPIRS. One comment suggested that the Government remove unfavorable information from PPIRS should it no longer be valid. For example, when terminations for cause or default are converted to termination for convenience or withdrawn the contracting officer should remove from PPIRS any reference to the termination for default. The respondent recommended changing the language at FAR 8.406-8 and 12.403.

Response: The Councils disagree that a change to the rule is necessary. The language at FAR 8.406-4(e), 12.403(c)(4), 15.407-1, and 49.402-8 states that the contracting officer shall report a subsequent withdrawal or a conversion to a termination for convenience in accordance with FAR 42.1503(f).

Comment: Another respondent suggested the Government should be held to the same high standard of record keeping as no system is infallible. Determination of malice and intent should be made before contract termination occurs. Follow-up systems should be in place to make sure that when an error occurs and is corrected that the Government does hold up its side of the bargain and remove detrimental information.

Response: Comment noted. Throughout the revised coverage, language was added that in the event a termination for cause is subsequently converted to a termination for convenience, or otherwise withdrawn, the contracting officer shall ensure that a notice of the conversion or withdrawal is reported in accordance with FAR 42.1503(f).

6. Timing of Posting of Defective Pricing Information

Five comments were received from two respondents regarding the timing and posting of defective pricing information.

Comment: The respondents believe that it is not clear that the intent of this language is to post this information before or after a defective pricing case has been resolved.

Response: The Councils agree. Language was clarified at FAR 15.407-1 to add the word "final" before determination in the coverage. In

addition, a requirement was added to update PPIRS.

Comment: One respondent expressed concern that posting within 10 days is not likely to happen.

Response: The Councils disagree. There were no objections to the 10-day timeframe made by the agencies during the proposed rule comment period. The 10-day timeframe was changed to 3 working days to be synonymous with the requirements of FAPIIS.

Summary of Major Changes to the Proposed Rule

- New coverage at FAR 8.406-8 was moved to FAR 8.406-4(e).
- Language was clarified at FAR 15.407-1 to add "contracting officer's final" before "determination" in the coverage. A requirement was added to update PPIRS.
- In FAR 42.1503, the 10-day timeframe was changed to 3 working days to be synonymous with the requirements of FAPIIS. Language was clarified on what a "conversion" is. Language was added to address agency focal points.

This is a significant regulatory action and, therefore, was subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not 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 rule does not impose any additional requirements on small entities. The collection and reporting of past performance information is an internal process to the Government. The rule merely puts into effect the internal requirement that contracting officers report defective cost or pricing data and terminations for cause or default into PPIRS.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 8, 12, 15, 42, and 49

Government procurement.

Dated: September 21, 2010.
Edward Loeb,
Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 8, 12, 15, 42, and 49 as set forth below:

■ 1. The authority citation for 48 CFR parts 8, 12, 15, 42, and 49 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

Part 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 2. Amend section 8.406–4 by adding paragraph (e) to read as follows:

8.406–4 Termination for cause.

(e) *Reporting.* An ordering activity contracting officer, in accordance with agency procedures, shall ensure that information related to termination for cause notices and any amendments are reported. In the event the termination for cause is subsequently converted to a termination for convenience, or is otherwise withdrawn, the contracting officer shall ensure that a notice of the conversion or withdrawal is reported. All reporting shall be in accordance with 42.1503(f).

Part 12—ACQUISITION OF COMMERCIAL ITEMS

■ 3. Amend section 12.403 by adding paragraph (c)(4) to read as follows:

12.403 Termination.

(c) * * *
(4) The contracting officer, in accordance with agency procedures, shall ensure that information related to termination for cause notices and any amendments are reported. In the event the termination for cause is subsequently converted to a termination for convenience, or is otherwise withdrawn, the contracting officer shall ensure that a notice of the conversion or withdrawal is reported. All reporting shall be in accordance with 42.1503(f).

PART 15—CONTRACTING BY NEGOTIATION

■ 4. Amend section 15.407–1 by revising paragraph (d) to read as follows:

15.407–1 Defective cost or pricing data.

(d) For each advisory audit received based on a postaward review that indicates defective pricing, the contracting officer shall make a

determination as to whether or not the data submitted were defective and relied upon. Before making such a determination, the contracting officer should give the contractor an opportunity to support the accuracy, completeness, and currency of the data in question. The contracting officer shall prepare a memorandum documenting both the determination and any corrective action taken as a result. The contracting officer shall send one copy of this memorandum to the auditor and, if the contract has been assigned for administration, one copy to the administrative contracting officer (ACO). A copy of the memorandum or other notice of the contracting officer's determination shall be provided to the contractor. When the contracting officer determines that the contractor submitted defective cost or pricing data, the contracting officer, in accordance with agency procedures, shall ensure that information relating to the contracting officer's final determination is reported in accordance with 42.1503(f). Agencies shall ensure updated information that changes a contracting officer's prior final determination is reported into the FAPIIS module of PPIRS in the event of a—

- (1) Contracting officer's decision in accordance with the Contract Disputes Act;
- (2) Board of Contract Appeals decision; or
- (3) Court decision.

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 5. Amend section 42.1502 by adding paragraph (i) to read as follows:

42.1502 Policy.

(i) Agencies shall promptly report other contractor information in accordance with 42.1503(f).
■ 6. Amend section 42.1503 by revising paragraph (a) and adding paragraph (f) to read as follows:

42.1503 Procedures.

(a) Agency procedures for the past performance evaluation system shall generally provide for input to the evaluations from the technical office, contracting office and, where appropriate, end users of the product or service. Agency procedures shall identify those responsible for preparing interim and final evaluations. 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. Interim evaluations shall be prepared as required, in accordance with agency procedures.

(f) *Other contractor information.* (1) Agencies shall ensure information is reported in the FAPIIS module of PPIRS within 3 working 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 focal points and register users to report data into the FAPIIS module of PPIRS (available at <http://www.cpars.csd.disa.mil>, then select FAPIIS). Instructions on reporting are available at <http://www.ppirs.gov> and at <http://www.ppirs.gov/fapiis.html>.

PART 49—TERMINATION OF CONTRACTS

■ 7. Add section 49.402–8 to read as follows:

49.402–8 Reporting information.

The contracting officer, in accordance with agency procedures, shall ensure that information relating to the termination for default notice and a subsequent withdrawal or a conversion to a termination for convenience is reported in accordance with 42.1503(f).