



PROJECT ON GOVERNMENT OVERSIGHT

September 29, 2011

General Services Administration
Regulatory Secretariat (MVCB)
ATTN: Hada Flowers
1275 First Street, NE, 7th Floor
Washington, DC 20417

Submitted via Regulations.gov

Subject: **FAR Case 2009-042**

Dear Ms. Flowers:

The Project On Government Oversight (POGO) is an independent nonprofit organization committed to achieving a more accountable and transparent federal government. POGO provides the following public comments to FAR Case 2009-042, “Federal Acquisition Regulation; Documenting Contractor Performance,” (76 Fed. Reg. 37704, June 28, 2011).¹

POGO supports the proposed amendments to the Federal Acquisition Regulation (FAR) standardizing the collection and evaluation of past performance information. The amendments will further the goal of improved past performance assessments as most recently articulated in a January 2011 Office of Federal Procurement Policy memorandum, which is to ensure that contracting officials make “informed business decisions” when awarding contracts and that the government only works with “companies that deliver quality goods and services on time and within budget.”²

The award of government contracts is predicated on a basic principle – taxpayer dollars should be awarded to responsible companies. The Federal Acquisition Regulation (FAR) Subpart 9.103 states that “[p]urchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only” and that “[i]n the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility.”³ A consistent government-wide past performance system will help ensure that contracting officers make informed contract award decisions.

¹ Corrections to the proposed rule were published on August 9, 2011 (76 Fed. Reg. 48776) and August 16, 2011 (75 Fed. Reg. 50714).

² Office of Federal Procurement Policy, “Improving Contractor Past Performance Assessments: Summary of the Office of Federal Procurement Policy’s Review, and Strategies for Improvement,” p. 1, January 21, 2011. http://www.whitehouse.gov/sites/default/files/omb/procurement/contract_perf/PastPerformanceMemo-21-Jan-2011.pdf (Downloaded September 8, 2011)

³ FAR Subpart 9.103(a) and (b). https://www.acquisition.gov/far/current/html/Subpart%209_1.html#wp1084058

However, POGO does not support the proposed amendment requiring contractor performance evaluations to be marked “Source Selection Information” and limited in release only to government personnel and the contractor. The following rationale is provided:

Disclosure of such information **could** cause harm both to the commercial interest of the Government and to the competitive position of the contractor being evaluated as well as impede the efficiency of Government operations.⁴ (emphasis added)

POGO agrees that past performance evaluations should not be publicly released if there is a legitimate threat to commercial interests. The problem with this amendment, however, is that it does not take into account that there are instances when releasing past performance information does not pose such a threat.

The government currently makes public certain contractor past performance information, most notably in Government Accountability Office (GAO) bid protest decisions. These decisions, which are posted on the GAO’s website,⁵ frequently contain past performance ratings, scores, and “report cards,” and even anecdotal details about contractors’ performance histories.⁶ The GAO explains its policy on its website:

We seek to issue decisions that provide meaningful and transparent explanations for our rulings. Even if a protective order is issued for a protest, **information in the public version of a protected decision will be redacted only where it is proprietary or is source-selection-sensitive. For example, evaluation point scores and adjectival ratings, unfavorable or adverse past performance information, and total cost or price generally will not be redacted from a decision.**⁷ (emphasis added)

This passage is significant for two reasons: First, it emphasizes the importance of transparency in the contracting process. Second, it supports POGO’s argument that some past performance information is appropriate for public release. In the GAO’s estimation, past performance information—evaluation scores, ratings, even “unfavorable or adverse” information—is “generally” not proprietary or source selection-sensitive and therefore can be published unredacted in its decisions.

The GAO frequently discloses contractor past performance evaluation information with no apparent harm to the government’s commercial interests or the efficiency of its operations. As for the effect of the GAO’s policy on contractors, there is a big difference between disclosures that legitimately harm their commercial interests and those that merely cause them embarrassment or inconvenience. Contracting officials should have the discretion to make this determination on a case-by-case basis.

⁴ 76 Fed. Reg. 48777.

⁵ <http://www.gao.gov/legal/bids/browsecent.html>

⁶ See *Northeast Military Sales, Inc.*, B-404153, January 13, 2011. <http://www.gao.gov/decisions/bidpro/404153.htm> (Downloaded September 8, 2011)

⁷ U.S. Government Accountability Office, “Bid Protest FAQs,” <http://www.gao.gov/legal/bids/bidfaqs.html>

As POGO argued to the FAR Council earlier this year,⁸ past performance information should be posted on the public Federal Awardee Performance and Integrity Information System (FAPIS) website. Publicly releasing this data will improve efforts to hold contractors accountable and ensure the government receives good value from its contracts.

In conclusion, the FAR Council should abandon the blanket ban on publicly releasing contractor past performance evaluations. Instead, it should consider posting on the public FAPIS site all past performance information that does not pose a legitimate threat to commercial proprietary or personal privacy interests.

Thank you for your consideration of these comments.

Sincerely,



SKA Neil Gordon
Investigator
ngordon@pogo.org

⁸ Project On Government Oversight, "POGO Urges Public Access to Contractor Past Performance and Pre-April 15th FAPIS Data," March 25, 2011. <http://www.pogo.org/pogo-files/letters/contract-oversight/co-fcmd-20110325.html>