

public comments before agreeing to convert the proposed rule to a final rule with minor changes. A summary of the comments is provided below:

Comment: To avoid potential misinterpretation, the rule should more clearly call attention to the mandatory source requirement for purchase of FPI products and more clearly point out that a negative past performance evaluation may be used as a basis for a waiver request.

Response: We agree. The intent of the rule is to ensure contracting officers understand that the waiver process is still in effect and that performance evaluations may be used to support future award decisions. Therefore, the final rule amends FAR 8.607 and 42.1503(b) to more clearly articulate that the waiver requirement, referred to at FAR 8.605 as a clearance, still applies and that a negative performance evaluation can be used to support clearance requests.

Comment: There is no basis for an assessment of FPI's past performance. FPI's past performance is irrelevant to whether an agency is required to obtain goods from FPI because of its mandatory source status. Therefore, the collection of data is a patent waste of Government resources since it cannot be used for source selection purposes.

Response: We believe that there is benefit to assessing FPI's performance. The May 2000 Office of Federal Procurement Policy (OFPP) guide "Best Practices for Collecting and Using Current and Past Performance Information" states that the active dialog that results from assessing a contractor's current performance results in better performance on the instant contract, and that such assessments are a basic best practice for good contract administration. As previously stated, this information can also be used to support FPI clearance requests.

Comment: What is the relationship between this rule and Section 811 of the National Defense Authorization Act of FY 2002? Section 811 does not apply to agencies outside of DoD.

Response: This rule has no relationship to Section 811 of the FY 2002 National Defense Authorization Act. The genesis of this case was a memorandum from FPI requesting past performance evaluations on their contracts.

This is not a significant regulatory action and, therefore, was not 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 extending the collection of past performance data to include FPI contracts can be accomplished within our normal means of performing business and further serves to promote competition among offerors.

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. 3501, *et seq.*

List of Subjects in 48 CFR Parts 8 and 42

Government procurement.

Dated: May 13, 2003.

Laura G. Smith,

Director, Acquisition Policy Division.

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

■ 1. The authority citation for 48 CFR parts 8 and 42 is revised 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. Add section 8.607 to read as follows:

8.607 Evaluating FPI performance.

Agencies shall evaluate FPI contract performance in accordance with subpart 42.15. Performance evaluations do not negate the requirements of 8.602 and 8.605, but they may be used to support a clearance request in accordance with 8.605.

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

42.1502 [Amended]

■ 3. Amend section 42.1502 in the first sentence of paragraph (b) by removing "subparts 8.6 and" and adding "subpart" in its place.

■ 4. Amend section 42.1503 in paragraph (b) by adding a new seventh sentence to read as follows:

42.1503 Procedures.

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(b) * * * Evaluation of Federal Prison Industries (FPI) performance may be used to support a clearance request (see 8.605) when FPI is a mandatory source in accordance with subpart 8.6. * * *

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 52

[FAC 2001-14; FAR Case 2000-009; Item VII]

RIN 9000-AJ34

Federal Acquisition Regulation; Contract Terms and Conditions Required To Implement Statute or Executive Orders—Commercial Items

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 (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to update the clause regarding commercial items contract terms and conditions required to implement statute or Executive orders.

DATES: Effective Date: June 23, 2003.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Victoria Moss, Procurement Analyst, at (202) 501-4764. Please cite FAC 2001-14, FAR case 2000-009.

SUPPLEMENTARY INFORMATION:

A. Background

Federal Acquisition Regulation Part 12, Acquisition of Commercial Items, was developed to implement Title VIII of the Federal Acquisition Streamlining Act of 1994 (FASA) (Pub. L. 103-355). The regulations became effective on October 1, 1995. Several areas have been identified that need updating and clarification. This rule addresses some of those changes.