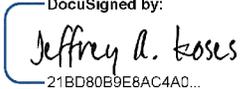




GSA Office of Governmentwide Policy

Class Deviation CD-2021-12
11/3/2021

MEMORANDUM FOR GSA CONTRACTING ACTIVITIES

FROM: JEFFREY A. KOSES 
SENIOR PROCUREMENT EXECUTIVE
OFFICE OF ACQUISITION POLICY (MV)

SUBJECT: FAR Class Deviation - Contractor Performance Assessments for Federal Supply Schedule (FSS) Contracts, Multi-Agency Contracts (MACs) and Governmentwide Acquisition Contracts (GWACs)

1. Purpose.

This memorandum approves a class deviation to deviate from the Federal Acquisition Regulation (FAR) at Subpart 42.15, Contractor Performance Information for Federal Supply Schedules (FSS) contracts, multi-agency contracts (MACs) and government wide acquisition contracts (GWACs).

2. Background.

Federal agencies report past performance in the Contractor Performance Assessment Reporting System (CPARS), in accordance with FAR 42.1501(b). The system is maintained by the Department of the Navy, which provides access to the database for acquisition personnel to record their performance ratings.

In 2015 there was a change to CPARS that prevents past performance for indefinite delivery indefinite quantity (IDIQ) contracts from being reported if those contracts were awarded after February 13, 2015¹. This change was approved by the Office of Management and Budget (OMB) / Office of Federal Procurement Policy (OFPP), but the FAR Council was not consulted on this change. CPARS does not provide any additional guidance as to how performance at the IDIQ contract level should be reported.

Around January 14, 2020, GSA submitted a request to the Integrated Award Environment (IAE) to update CPARS to enable agencies to report past performance for IDIQs to align with FAR 42.1502(c)². GSA highlighted the importance of being able to report base contract level performance with key contract terms that GSA includes in FSS, MAC and GWAC contracts (e.g., systemic Trade Agreement Act country of origin misrepresentations, failure to meet contract-level reporting requirements, failure to report contract sales and remit Industrial

¹ The change is described in the CPARS Guide dated May 2021, paragraph 2.2.1 which documents that reporting will be at the order level only.

² FAR 42.1502(c) clarifies that order-level evaluations shall not consider the requirements under paragraph (g). This means that the assessment required by FAR 42.1502(g) is the responsibility of the base contract-level contracting officer and cannot be delegated down to the order-level.

Funding Fees/Contract Access Fees). GSA noted that failure to report these specific requirements impacts customer agencies who rely on GSA's vetting of contractors prior to competing orders. On February 19, 2020, OMB denied GSA's system change request. GSA submitted another revised request on July 30, 2021 to bring attention to the issue again. In the interim, FAS has requested a deviation to FAR subpart 42.15 in order to maintain FAR compliance, and conducts manual reporting of applicable contracts outside of CPARS.

3. Applicability.

This class deviation applies to FAS, specifically FSS, MAC and GWAC contracting activities.

4. Authority.

This class deviation is issued under the authority of FAR 1.404 and General Services Administration Acquisition Manual (GSAM) 501.404. This class deviation is issued following consultation with the Chair of the Civilian Agency Acquisition Council (CAAC) in accordance with FAR 1.404(a) and GSAM 501.404(a).

5. Deviation.

See Attachment A for the changes in the FAR text as revised by this deviation, subsections listed below:

- a. Amending FAR 42.1502(b)
- b. Amending FAR 42.1502(g)

6. Effective Date.

This deviation is effective immediately and remains in effect until rescinded or incorporated into the FAR or GSAM.

7. Point of Contact.

Any questions regarding this deviation may be directed to Adina Torbertnsson, GSA Acquisition Policy Division, at GSARPolicy@gsa.gov.

Attachments Attachment A – FAR Deviation Text
Attachment B – FAS Business Case

**Class Deviation CD-2021-12
Attachment A**

FAR Text, Line-In/Line-Out

FAR Baseline: FAC 2021-07 effective 09/10/2021

- Additions to baseline made by proposed rule are indicated by **[bold text in brackets]**
- Deletions to baseline made by proposed rule are indicated by ~~strikethroughs~~
- Five asterisks (*****) indicate that there are no revisions between the preceding part and/or subpart, and following section
- Three asterisks (***) indicate that there are no revisions between the material shown within a section or subsection

Part 42 - Contract Administration and Audit Services

Subpart 42.15 - Contractor Performance Information

42.1502 Policy

(b) Contracts. Except as provided in paragraphs (e), (f), and (h) of this section, agencies shall prepare evaluations of contractor performance for each contract (as defined in FAR [part 2](#)) that exceeds the simplified acquisition threshold and for each order that exceeds the simplified acquisition threshold. Agencies are required to prepare an evaluation if a modification to the contract causes the dollar amount to exceed the simplified acquisition threshold. **[For Federal Supply Schedule (FSS) contracts, multi-agency contracts (MACs), and Governmentwide Acquisition Contracts (GWACs) administered by GSA's Federal Acquisition Service (FAS), evaluations are not required at the contract level, but are still required at the order level; however, FAPIIS reporting for 42.1502(g)(2) and 42.1503(h) must still be done.]**

(g) Past performance evaluations shall include an assessment of the contractor's-

(1) 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 [**; for Federal Supply Schedule (FSS) contracts, multi-agency contracts (MACs), and Governmentwide Acquisition Contracts (GWACs) administered by GSA's Federal Acquisition Service (FAS), evaluations are not required at the contract level, but are still required at the order level**]; and

(2) Reduced or untimely payments (as defined in [19.701](#)), made to small business subcontractors, determined by the contracting officer to be unjustified. The contracting officer shall-

(i) Consider and evaluate a contractor's written explanation for a reduced or an untimely payment when determining whether the reduced or untimely payment is justified; and

(ii) Determine that a history of unjustified reduced or untimely payments has occurred when the contractor has reported three or more occasions of unjustified reduced or untimely payments under a single contract within a 12-month period (see [42.1503\(h\)\(1\)\(vi\)](#) and the evaluation ratings in [Table 42-3](#)). The following payment or nonpayment situations are not considered to be unjustified:

- (A) There is a contract dispute on performance.
- (B) A partial payment is made for amounts not in dispute.
- (C) A payment is reduced due to past overpayments.
- (D) There is an administrative mistake.
- (E) Late performance by the subcontractor leads to later payment by the prime contractor.

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GSA Federal Acquisition Service

MEMORANDUM FOR: JEFFREY A. KOSES
SENIOR PROCUREMENT EXECUTIVE (SPE)
OFFICE OF ACQUISITION POLICY (MV)

FROM: MARK J. LEE  5/27/2021
ASSISTANT COMPTROLLER FOR ACQUISITION (R)
OFFICE OF POLICY AND COMPLIANCE (QV)

SUBJECT: Business Case in support of a Class Deviation to FAR Subpart 42.15, *Contractor Performance Information* for Federal Supply Schedule (FSS) Contracts and Governmentwide Acquisition Contracts (GWAC) Administered by the Federal Acquisition Service (FAS)

1.0 NAME OF THE SERVICE REQUESTING THE CHANGE

GSA's Federal Acquisition Service (FAS) Office of Policy and Compliance (QV)

2.0 SUMMARY OF REQUEST

QV requests a Class Deviation to Federal Acquisition Regulation (FAR) 42.1502 *Policy*, paragraphs (b) and (g) to reflect that the requirement to document contractor past performance in the Contractor Performance Assessment Reporting System (CPARS) does not apply to Federal Supply Schedule (FSS) contracts and Governmentwide Acquisition Contracts (GWAC) administered by the Federal Acquisition Service (FAS).

QV is pursuing this Class Deviation to ensure it is clear that FAS Contracting Officers (COs) administering the aforementioned contracts are not required to comply with the requirements outlined in FAR subpart 42.15. This Class deviation is needed until a final determination is made as to whether a CPARS business rule, which precludes the assessment of contractor past performance at the base contract level on multiple award contracts awarded after February 13, 2015, is inconsistent with the FAR and should be disabled. (see section 3.1 for an extended discussion of FAR subpart 42.15 and CPARS)

The proposed Class Deviation revises the language in FAR 42.1502 to annotate that contractor past performance assessments on Federal Supply Schedule (FSS) contracts

and Governmentwide Acquisition Contracts (GWAC) administered by the Federal Acquisition Service (FAS) are not required at the base contract level.

2.1 SIGNIFICANCE OF DEVIATION

This Class Deviation is best categorized as the issuance of a policy or procedure that governs the contracting process or otherwise controls contracting relationships that are not incorporated into agency acquisition regulations in accordance with FAR 1.301(a). (see FAR 1.401 *Definition* paragraph (f)).

This Class Deviation is consistent with the definition of a Significant Revision as outlined in FAR 1.501-1 *Definition* and subject to FAR 1.501-2 Opportunity for public comments and the placement of a notice in the Federal Register.

2.2 DEVIATION DURATION

FAS QV is requesting this Class Deviation remain in effect until rescinded.

3.0 RATIONALE SUPPORTING THE NEED

3.1 DESCRIPTION OF THE PROBLEM OR MATTER TO BE ADDRESSED

FAR subpart 42.15 - Contractor Performance Information outlines policies for recording and maintaining contractor past performance information. According to FAR 42.1502(b), CO's shall prepare evaluations of contractor performance for each contract that exceeds the simplified acquisition threshold. COs are required to prepare past performance evaluations at least annually and at the time the work under a contract or order is completed. (see FAR 42.1502(a) *General*.) In addition, the FAR requires that these evaluations be entered into CPARS, the governmentwide evaluation reporting tool for past performance reports on contracts and orders.

Although some of the CPARS assessment evaluation factors outlined in FAR 42.1503(b)(2) are not applicable at the base contract level of the aforementioned contracts, several of the factors are directly relevant to a contractor's performance at the base contract level, such as a contractor's management or business relations and its compliance with contract terms and conditions, i.e. Trade Agreement Act country of origin misrepresentations, failure to meet reporting requirements, failure to report sales and remit Industrial Funding Fees/Contract Access Fees etc.

Additionally, as per FAR 19.705-1(b)(1), COs are required to incorporate subcontracting plans at the base contract level of FSS and GWAC contracts and FAR [42.1502\(g\)](#) specifically requires the annual assessment of a contractor's performance against, and efforts to achieve the goals identified in its small business subcontracting plan when the contract is awarded to "other than small" business and the contract includes FAR clause [52.219-9](#), *Small Business Subcontracting Plan*.

Note: FAR 42.1502(c) Orders Under Multiple-Agency Contracts clarifies that order-level evaluations shall not consider the requirements under paragraph (g), which means the assessment required by FAR 42.1502(g) is the responsibility of the base contract-level CO and cannot be delegated down to the order-level.

Based on the above, FAS contends that 1) COs administering FSS and GWAC contracts are required by the FAR to assess contractor performance in CPARS at the base contract level and 2) preparing assessments at the base contract level provides meaningful contractor performance information for future source selections relevant to a contractor's management/business relations and compliance with contract terms and conditions.

Until 2015, FAS COs administering FSS and GWAC contracts complied with FAR subpart 42.15 and completed contractor performance assessments at the base contract level in CPARS, which is consistent with both the FAR and GSA/FAS Policy. However, on February 13, 2015, a CPARS system change standardized how multiple-award contracts are represented and CPARS no longer allows for assessments at the base contract-level. Although the system change does not appear to be consistent with FAR 42.1502, specifically paragraphs (a), (b), (c) and (g), as per Section B, paragraph 2.2.1 of the [CPARS guide](#), dated October 2020, the system change was approved by OMB/OFPP.

Note: although the CPARS guide states that MAC contracts awarded after February 13, 2015 can't be assessed at the base contract-level, it appears that the business rule was not applied to MAC contracts, as FSS COs can assess HCATS, BMO, EIS and OASIS contracts awarded between 2017-2020 at the base contract level in CPARS. This was confirmed by 1) reviewing CPARS assessment data/reports for these contract vehicles and 2) verifying that OASIS contracts awarded via onramps in 2019 and 2020 were auto registered in CPARS. This is why the class deviation is limited to FSS and GWAC contracts administered by FAS.

The impact of the system change is that 1) the CPARS AutoRegister list no longer displays Governmentwide Acquisition Contracts (GWAC) and Federal Supply Schedule (FSS) base contracts and 2) CPARS does not allow a CPARS Focal Point to manually register a GWAC/FSS contract. The system change was implemented on a date-forward basis, so contracts awarded prior to February 13, 2015 still show up on the Compliance Metric Report and can be assessed at the base contract-level in CPARS.

In Section A3.31.6, the CPARS guide appears to premise the system change on FAR 19.705-1 (b)(2), which allows COs placing orders to establish subcontracting goals for each order (including FSS orders):

Although paragraph 2.2.1 requires an evaluation to be completed for each order placed against multi-agency indefinite delivery vehicle (IDV), the small business subcontracting assessment must be completed by the agency that awarded the contract unless the contract ordering instructions allow for separate small business subcontracting goals to be incorporated into each order. Multi-agency IDVs include Federal Supply Schedules (FSS), Government Wide Acquisition Contracts (GWAC), and Multiple Agency Contracts (MAC).

Although the FAR allows the ordering level CO to establish subcontracting goals, there is nothing in FAR 19.705-1 nor in the SBA Final Rule that implemented provisions of the Small Business Jobs Act of 2010 ([FAR Case 2014-003](#)) to suggest that a CO administering an FSS or GWAC contract isn't required to assess performance under a subcontracting plan because an ordering level CO has the ability to establish subcontracting goals for an individual order.

FAR 19.705-1 General. paragraph (b)

(1) Except where a contractor has a commercial plan, the contracting officer shall require a subcontracting plan for each indefinite-delivery, indefinite-quantity contract (including task or delivery order contracts, FSS, GWACs, and MACs), when the estimated value of the contract meets the subcontracting plan thresholds at [19.702\(a\)](#) and small business subcontracting opportunities exist.

(2) Contracting officers placing orders may establish small business subcontracting goals for each order. Establishing goals shall not be in the form of a new Subcontracting plan as a contract may not have more than one plan ([19.705-2\(e\)](#)).

Based on the above review of FAR 19.705-1 and FAR subpart 42.15, FAS submitted a JIRA¹ ticket to the Integrated Award Environment (IAE) Change Control Board (CCB) in mid 2019 requesting that the CPARS business rule be disabled. GSA has not received an official response to the JIRA ticket, however, preliminary feedback from OMB is that the current CPARS functionality appears to be in line with FAR requirements and there isn't a need for system development at this time. FAS does not concur with OMB's preliminary response and is pursuing this Class Deviation until such time as a final determination can be made.

3.2 DISCUSSION OF THE BENEFIT TO THE AGENCY AND/OR ORGANIZATION

As CPARS no longer allows GWAC and FSS contracts awarded after February 13, 2015 to be assessed at the base contract level, FAS COs have been advised to manually assess the contractor's performance against its Subcontracting Plan and document the contract file with the manual assessment as an interim measure². Although the contractor's performance is documented in the contract file, performing manual assessments is not efficient or effective and does not fully comply with FAR 42.1502 paragraph (a) which requires that contractor performance assessments be entered into CPARS to support future source selections.

Currently, FAS is attempting to comply with the requirements outlined in FAR subpart 42.15 by preparing CPARS assessments for contracts awarded prior to February 13, 2015 and documenting the contract file with manual contractor performance assessments for contracts awarded after February 13, 2015. Completing manual assessments is 1) more time-consuming than completing assessments in CPARS, 2) inequitable for contracts that are being assessed in CPARS, 3) increases workload for FAS personnel; and 4) does not fulfill the policy objective of CPARS as this information is not made available to the governmentwide acquisition workforce to consider in future source selection decisions. Note: the workload associated with completing manual assessments will continue to grow as FAS has awarded an average of 1,600 FSS contracts per year since FY2018.

Revising the language in FAR 42.1502 to annotate that contractor past performance assessments on FAS FSS and GWAC contracts are not required at the base contract level will align procurement regulations/systems and reduce FAS acquisition workforce workload.

¹ JIRA is an Agile Lifecycle software management tool used by the IAE CCB to manage system change requests.

² Detailed guidance on completing manual contractor performance assessments is provided on the FAS Policy Library under Subcontracting Plans and Past Performance.

4.0 DISCUSSION OF THE EFFECT, IF ANY, ON GSA'S INTERNAL OPERATING PROCEDURES

4.1 ACQUISITION WORKFORCE

This change will directly impact the FAS acquisition workforce as they will no longer be required to complete contractor performance assessments at the base contract level.

4.2 ANOTHER OFFICE WITHIN GSA

Limiting current contractor performance assessment information at the base contract level for multi-agency contracts in CPARS may negatively impact future source selection decisions.

4.3 AUTOMATED SYSTEMS

As CPARS already precludes the assessment of contractor performance at the base contract level for FSS and GWAC contracts awarded after February 13, 2015, the business rule would need to be extended to disable reporting functionality for all FSS and GWAC contracts administered by FAS.

5.0 DISCUSSION OF THE EFFECT ON CONTRACTORS

This Class Deviation will directly impact all contractors, but will have the most significant impact on Other Than Small (OTS) contractors as they will no longer be required to designate a representative to receive, review, comment on and return contractor performance assessments at the base contract level for their subcontracting performance under FSS and GWAC contracts awarded by FAS.

5.1 NUMBER OF CONTRACTS AFFECTED:

14,618 FSS* (source SSQ+ Schedule Sales Query Plus) and
863 GWAC** (source: Schedules elibrary)

*There are 2,464 active FSS contracts awarded to OTS contractors as of 11/01/2020.
(source: SSQ+)

**There are 49 active GWACs awarded to OTS contractors as of 01/21/2021.

5.2 NUMBER OF SMALL BUSINESSES AFFECTED AND POSITIVE/NEGATIVE IMPACT ON SMALL BUSINESSES

There are 12,154 active FSS contracts awarded to small business contractors as of 11/01/2020. (source: SSQ+)

There are 814 active GWAC contracts awarded to small business contractors as of 01/21/2021. (source: GSA eLibrary)

This change will limit the currency and extent of past performance information in CPARS related to a contractor's performance under FSS and GWAC contracts administered by FAS. This limitation may negatively impact future source selection decisions. In addition, as OTS contractors will no longer be assessed in CPARS for their performance against their subcontracting plan, it may disincentivize the contractor from expending a good faith effort on achieving the goals in its subcontracting plan. This risk is mitigated by the requirement for contractors to submit subcontracting reports in the electronic Subcontracting Reporting System (eSRS).

5.3 ESTIMATED ANNUAL COSTS AND BENEFITS ASSOCIATED WITH THE PROPOSED CHANGE

QV does not believe this change will pose a significant economic impact within the meaning of the Regulatory Flexibility Act, 5 U.S.C. § 601, et seq.

5.4 INFORMATION COLLECTION REQUIREMENTS

The proposed FAR changes do not impose information collection requirements pursuant to the Paperwork Reduction Act (44 U.S.C. Chapter 35).

6.0 ANALYSIS OF ALTERNATIVES

An alternative to issuing a Class Deviation to FAR subpart 42.15 would be for the IAE CCB to approve the existing JIRA ticket and disable the CPARS business rule that does not allow reporting at the base contract level for FSS and GWAC contracts. This would ensure the base contract-level CO can complete the annual contractor performance assessments required by FAR 42.1502(a) in CPARS and specifically the subcontracting performance assessments as required by FAR 42.1502(g).

7.0 DISCUSSION OF THE APPROACH TO IMPLEMENT AND MONITOR SUCCESS

Communication will be key to ensuring that both the FAS acquisition workforce and contractors are aware that FAR subpart 42.15 no longer applies to FSS and GWAC contracts administered by FAS. The FAS acquisition workforce will need to fully understand the change in order to respond to contractor inquiries. QV will issue an update to PAP 2019-04 *Evaluating and Reporting Past Performance* and conduct mandatory acquisition workforce training when the revised PAP is issued. QV will also coordinate with the FSS and GWAC programs to augment FAS-wide communications with program specific messaging.

FAS contractors will be notified via program specific messaging/channels, such as the posting of Significant Changes on Interact 30 days prior to the refresh of the MAS solicitation.

8.0 COMPLIANCE WITH CLASS DEVIATION

GSA has established management controls and internal agency procedures, consistent with [FAR subpart 42.15](#), for evaluating and reporting contractor performance.

GSA monitors agency and service-level compliance with entering past performance information into CPARS. This information can be viewed on the [Acquisition Workbench](#) tool on the [Acquisition Dashboard](#).

FAS Office of Policy and Compliance (OPC) tracks Key Performance Indicators (KPI), including CPARS compliance rates in the [FAS Contract Activity Executive Dashboard](#) and in the [Head of Contracting Activity \(HCA\) Scorecard](#) on the [FAS Acquisition Policy Library](#) under [Analytical Tools & Dashboards](#).

9.0 PROPOSED AMENDMENTS TO THE FAR (in line-in line-out format)

The following revision to FAR 42.1502 *Policy* is submitted in accordance with GSAM 501.402(c), which states: “When an HCA knows that a deviation may be required on a permanent basis, the HCA should recommend an appropriate FAR or GSAM revision.”

See below for applicable baseline

- Additions are indicated by **[Bold brackets]**
- Five asterisks (*****) indicate there are no revisions between the preceding part and/or subpart, and the following section
- Three asterisks (***) indicate there are no revisions between the material shown within a section or subsection

FAR Baseline: FAC 2021-05 effective 03/10/2021

Part 42 - Contract Administration and Audit Services

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Subpart 42.15 - Contractor Performance Information

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42.1502 Policy

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(b) Contracts. Except **[for Federal Supply Schedule (FSS) contracts and Governmentwide Acquisition Contracts (GWAC) administered by GSA's Federal Acquisition Service (FAS) and]** as provided in paragraphs (e), (f), and (h) of this section, agencies shall prepare evaluations of contractor performance for each contract (as defined in FAR [part 2](#)) that exceeds the simplified acquisition threshold and for each order that exceeds the simplified acquisition threshold. Agencies are required to prepare an evaluation if a modification to the contract causes the dollar amount to exceed the simplified acquisition threshold.

* * *

(g) Past performance evaluations shall include an assessment of the contractor's-

(1) Performance against, and efforts to achieve, the goals identified in the small business subcontracting plan when the contract**[, with the exception of Federal Supply Schedule (FSS) contracts and Governmentwide Acquisition Contracts (GWAC) administered by GSA's Federal Acquisition Service (FAS)]** includes the clause at [52.219-9](#), Small Business Subcontracting Plan; and

(2) Reduced or untimely payments (as defined in [19.701](#)), made to small business subcontractors, determined by the contracting officer to be unjustified. The contracting officer shall-

(i) Consider and evaluate a contractor's written explanation for a reduced or an untimely payment when determining whether the reduced or untimely payment is justified; and

(ii) Determine that a history of unjustified reduced or untimely payments has occurred when the contractor has reported three or more occasions of unjustified reduced or untimely payments under a single contract within a 12-month period (see [42.1503\(h\)\(1\)\(vi\)](#) and the evaluation ratings in [Table 42-3](#)). The following payment or nonpayment situations are not considered to be unjustified:

- (A) There is a contract dispute on performance.
- (B) A partial payment is made for amounts not in dispute.
- (C) A payment is reduced due to past overpayments.
- (D) There is an administrative mistake.
- (E) Late performance by the subcontractor leads to later payment by the prime contractor.

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10.0 LEGAL SUFFICIENCY STATEMENT

Legal counsel concurs that there is no legal barrier to proceeding with the proposed business case analysis.

Counsel Signature: Adam C. Supple **Date:** 5/5/21

BUSINESS CASE ANALYSIS PREPARED BY:

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