

when a requested and required debriefing is held on the date offered (31 U.S.C. 3553).

233.171 [Amended]

■ 9. Amend section 233.171 by removing “Government Accountability Office” and adding “GAO” in its place.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 10. Add section 252.215–70XX to read as follows:

252.215–70XX Notification to Offerors—Postaward Debriefings.

As prescribed in 215.570, use the following provision:

Notification to Offerors—Postaward Debriefings (DATE)

(a) *Definition.* As used in this provision—*Nontraditional defense contractor* means an entity that is not currently performing and has not performed any contract or subcontract for DoD that is subject to full coverage under the cost accounting standards prescribed pursuant to 41 U.S.C. 1502 and the regulations implementing such section, for at least the 1-year period preceding the solicitation of sources by DoD for the procurement (10 U.S.C. 2302(9)).

(b) *Postaward debriefing.* (1) Upon timely request, the Government will provide a written or oral postaward debriefing for contracts valued at \$10 million or higher to the Offeror, while protecting the confidential and proprietary information of other offerors. The request is considered timely if requested within 3 days of notification of contract award.

(2) When required, the minimum postaward debriefing information will include the following:

(i) For contracts in excess of \$10 million and not in excess of \$100 million with a small business or nontraditional defense contractor, an option for the small business or nontraditional defense contractor to request disclosure of the agency’s written source selection decision document, redacted to protect the confidential and proprietary information of other offerors for the contract award.

(ii) For contracts in excess of \$100 million, disclosure of the agency’s written source selection decision document, redacted to protect the confidential and proprietary information of other offerors for the contract award.

(3) If a postaward debriefing is provided—

(i) The debriefed Offeror may submit additional written questions related to the required and provided debriefing within 2 business days after receiving the debriefing; the agency will respond in writing to timely submitted additional questions within 5 business days after receipt; and

(ii) The postaward debriefing will not be considered to be concluded until—

(A) After the second business day after the agency delivered the debriefing, if no additional written questions were submitted by the debriefed Offeror, or

(B) The agency delivers its written responses to timely submitted additional questions.

(c) *Contract performance.* The Government may suspend performance of or terminate the awarded contract upon notice from the Government Accountability Office of a protest filed within the time periods listed in paragraphs (c)(1) through (4) of this provision, whichever is later:

(1) Within 10 days after the date of contract award.

(2) Within 5 days after the offered date for a debriefing to an unsuccessful offeror that is timely requested, and when requested is required, if the unsuccessful offeror submits no additional questions related to the debriefing.

(3) Within 5 days after the offered date for a debriefing to an unsuccessful offeror that is timely requested, and when requested is required, if the debriefing date offered is not accepted.

(4) Within 5 days after the Government delivers its written response to additional questions timely submitted by the unsuccessful offeror, when a requested and required debriefing is held on the date offered.

(End of provision)

■ 11. Add section 252.216–70YY to read as follows:

252.216–70YY Postaward Debriefings for Task Orders and Delivery Orders.

As prescribed at 216.506(S–71), use the following clause:

Postaward Debriefings for Task Orders and Delivery Orders (DATE)

(a) *Postaward debriefing.* (1) Upon timely request, the Government will provide a written or oral postaward debriefing for task orders or delivery orders valued at \$10 million or higher to the Contractor, regardless of whether the Contractor’s offer for the order was successful or unsuccessful, while protecting the confidential and proprietary information of other contractors. The request is considered timely if requested within 3 days of notification of task order or delivery order award.

(2) If a postaward debriefing is provided—

(i) The debriefed Contractor may submit additional written questions related to the required and provided debriefing within 2 business days after receiving the debriefing; the agency will respond in writing to timely submitted additional questions within 5 business days after receipt; and

(ii) The postaward debriefing will not be considered to be concluded until—

(A) After the second business day after the agency delivered the debriefing, if no additional written questions were submitted by the debriefed Contractor; or

(B) The agency delivers its written responses to timely submitted additional questions.

(b) *Task order or delivery order performance.* The Government may suspend performance of or terminate the awarded task order or delivery order, upon notice from the Government Accountability Office of a protest filed within the time periods listed in

paragraphs (b)(1) through (4) of this clause, whichever is later:

(1) Within 10 days after the date of issuance of a task order or delivery order, where the value of the order exceeds \$25 million (10 U.S.C. 2304c(e)).

(2) Within 5 days after the offered date for a debriefing to an unsuccessful contractor that is timely requested, and when requested is required, if the unsuccessful contractor submits no additional questions related to the debriefing.

(3) Within 5 days after the offered date for a debriefing to an unsuccessful contractor that is timely requested, and when requested is required, if the debriefing date offered is not accepted.

(4) Within 5 days after the Government delivers its written response to additional questions timely submitted by the unsuccessful contractor, when a requested and required debriefing is held on the date offered (31 U.S.C. 3553).

(End of clause)

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 215, 236, 242, and 252

[Docket DARS–2020–0040]

RIN 0750–AK16

Defense Federal Acquisition Regulation Supplement: Past Performance of Subcontractors and Joint Venture Partners (DFARS Case 2018–D055)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2019 that establishes a requirement for use of the best available information regarding past performance of subcontractors and joint venture partners when awarding DoD contracts for construction and architect-engineer services.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before July 19, 2021, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2018–D055, using any of the following methods:

○ *Federal eRulemaking Portal:*
<https://www.regulations.gov>. Search for

“DFARS Case 2018–D055.” Select “Comment Now” and follow the instructions provided to submit a comment. Please “DFARS Case 2018–D055” on any attached documents.

○ *Email:* osd.dfars@mail.mil. Include DFARS Case 2018–D055 in the subject line of the message.

○ *Mail:* Defense Acquisition Regulations System, Attn: Ms. Barbara Trujillo, OUSD(A&S)DPC/DARS, Room 3B938, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to <https://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Barbara Trujillo, telephone 571–372–6102.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to implement section 823 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115–232). Section 823 requires performance evaluations in accordance with specified conditions for individual partners of joint ventures for construction and architect-engineer (A&E) services contracts with an estimated value in accordance with the threshold set forth in FAR 42.1502(e), currently \$750,000; and for first-tier subcontractors performing a portion of a construction or A&E services contract exceeding the threshold set forth in FAR 42.1502(e) or 20 percent of the value of the prime contract, whichever is higher. An exception may be granted when submission of annual past performance evaluations would not provide the best representation of the contractor’s performance, including subcontractors and joint venture partners.

II. Discussion and Analysis

The following changes to the DFARS are proposed to implement section 823 of the NDAA for FY 2019:

DFARS 242.1501–70 defines “first-tier subcontractor” and “subcontractor” as those terms are applicable to subpart 242.15. Requirements for past performance evaluations to be performed for first-tier subcontractors and partners of a joint venture are provided at DFARS 242.1502 paragraph (e) for construction contracts, and

paragraph (f) for A&E services contracts. Specifically, past performance evaluations are required for first-tier subcontractors performing a portion of construction or A&E services contracts or orders that are valued at or above the threshold in FAR 42.1502(e) or 20 percent of the value of the prime contract, whichever is higher. Past performance evaluations are required for individual partners of a joint venture awarded a construction or A&E services contract or order valued at or above the threshold in FAR 42.1502(e).

When acquiring construction or architect-engineer services, contracting officers will consider, as part of the past performance evaluation, an offeror’s past performance as a first-tier subcontractor or individual partner of a joint venture under construction and/or architect-engineer services contracts. In reviewing first-tier subcontractor and joint venture partner past performance evaluations, contracting officers, in coordination with the cognizant requiring office, will work to ensure the following: Consistency between prime and first-tier subcontractor rating information; successful completion of applicable contracts; the same opportunity for each joint venture partner to submit comments, rebutting statements, or additional information consistent with FAR subpart 42.15; and clear identification, in the rating, of the responsibilities of each partner for discrete elements of the work where the partners are not jointly and severally responsible for the project.

DFARS 242.1502, paragraphs (e)(iv) and (f)(iv) provide guidance to contracting officers for providing an exception when the submission of annual past performance ratings would not provide the best representation of the performance of a prime contractor, subcontractor, or joint venture partners.

DFARS 242.1504–70(a) adds a prescription for a new DFARS solicitation provision 252.242–70XX, Identification of Joint Venture Partners for Past Performance—Construction and Architect-Engineer Services, to convey the requirement to identify, as part of an offer, all partners in the joint venture. This provision is required for construction and A&E services solicitations that include the clause at DFARS 252.242–70YY. The provision requires all joint venture partners to be registered in the System for Award Management (SAM) in accordance with FAR 4.11 and FAR provision 52.204–7, System for Award Management, prior to submission of an offer.

DFARS 242.1504–70(b)(1) and (b)(2), respectively, add new prescriptions for the use of two new DFARS contract

clauses: 252.242–70YY, Past Performance of Joint Venture Partners—Construction and Architect-Engineer Services; and 252.242–70ZZ, Past Performance of Subcontractors—Construction and Architect-Engineer Services. The clause at 252.242–70YY informs the contractor that past performance evaluations are required for joint ventures awarded a construction or A&E services contract exceeding the threshold set forth in FAR 42.1502(e) (currently \$750,000). DFARS clause 252.242–70ZZ instructs contractors to prepare past performance evaluations for first-tier subcontractors performing a portion of a construction or an A&E services contract with an estimated value in accordance with the thresholds set forth in FAR 42.1502(e), and 242.1502(e)(i) or 242.1502(f)(i), or 20 percent of the value of the prime contract, whichever is higher. In addition, the clause requires contractors to provide the legal business name, the unique entity identifier, and Commercial and Government Entity (CAGE) code of each first-tier subcontractor under the contract as a part of its offer or as new subcontracts are issued during performance.

New text is added to DFARS 215.305(a)(2)(C) advising contracting officers to consider past performance information on first-tier subcontractors and joint venture partners in source selections for construction and A&E services contracts.

The rule provides cross-references to the policy and requirements of DFARS 242.1502(e) at other applicable subparts for the DFARS.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

To implement section 823 of the NDAA for FY 2019, this proposed rule adds one new solicitation provision and two new contract clauses.

The new solicitation provision is 252.242–70XX, Identification of Joint Venture Partners for Past Performance—Construction and Architect-Engineer Services. This provision is used to convey the identification requirements to joint venture partners.

The two new clauses are 252.242–70YY, Past Performance of Joint Venture Partners—Construction and Architect-Engineer Services; and 252.242–70ZZ, Past Performance of Subcontractors—Construction and Architect-Engineer Services. The clauses inform the contractor that past performance evaluations are required for partners in a joint venture awarded a construction

or A&E services contract exceeding the threshold set forth in FAR 42.1502(e) (currently \$750,000), and for first-tier subcontractors performing a portion of a construction or an A&E services contract with an estimated value in accordance with the threshold set forth in FAR 42.1502(e) or 20 percent of the value of the prime contract, whichever is higher.

DoD is not proposing to apply the requirements of section 823 to contracts at or below the simplified acquisition threshold. Section 823 requirements will not apply to the acquisition of commercial items, including commercially available off-the-shelf items.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

V. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not anticipated to be a major rule under 5 U.S.C. 804.

VI. Regulatory Flexibility Act

This proposed rule may 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.* Therefore, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 823 of the National Defense Authorization Act (NDAA) for Fiscal

Year (FY) 2019. Section 823 requires performance evaluations in accordance with specified conditions for individual partners of joint ventures awarded construction or architect-engineer (A&E) services contracts exceeding the threshold set forth in FAR 42.1502(e) (currently \$750,000), and for first-tier subcontractors performing a portion of a construction or A&E services contract with an estimated value in accordance with the threshold set forth in FAR 42.1502(e) or 20 percent of the value of the prime contract, whichever is higher. An exception may be granted when submission of annual past performance evaluations would not provide the best representation of the contractor's performance, including subcontractors and joint venture partners.

The objective of this proposed rule is to implement the statutory changes to require performance evaluations for first-tier subcontractors and individual partners of joint ventures for construction and A&E services contracts. An exception may apply when submission of annual evaluations would not provide the best representation of the contractor's performance, including subcontractors and joint venture partners.

This rule is expected to impact small entities performing as prime contractors, first-tier subcontractors, or partners in joint ventures awarded construction or A&E services contracts or orders exceeding \$750,000. According to data obtained from the Federal Procurement Data System for fiscal years 2016 through 2018, an average of 490 small entities received DoD contracts, task orders, or delivery orders for construction and A&E services exceeding \$750,000. Those small entities would need to provide performance evaluations of their first-tier subcontractors.

Approximately 822 contracts, task orders, and delivery orders over \$750,000 were awarded each year for construction and A&E services. Each of those awards is estimated to have two to four subcontracts, for a total of 2,121 subcontracts that would require performance evaluations. DoD estimates that approximately 1,208 of those subcontracts were awarded to small entities. These small entities would receive a performance evaluation as a first-tier subcontractor.

DoD estimates that approximately 112 joint ventures per year were awarded contracts, task orders, or delivery orders for construction and A&E services. DoD further estimates that approximately half (56) of those joint ventures include at least one small entity as a partner in the joint venture. Those small entities

would receive a performance evaluation as a partner in the joint venture.

This proposed rule does include new reporting, and other compliance requirements for small businesses. Small business prime contractors will be required to prepare past performance evaluations for their first-tier subcontractors described in DFARS 242.1502(e)(i) and (f)(i). Small businesses that are first-tier subcontractors and small business partners in joint ventures described in DFARS 242.1502(e)(i) and (f)(i) will be given the opportunity to submit comments, rebutting statements, or additional information in response to past performance evaluations. There are no associated recordkeeping requirements. Accordingly, DoD estimates that it takes approximately one hour at an hourly rate of \$56.76 for a contractor representative to draft, review, comment, accomplish senior level concurrence, and return past performance evaluations for: (1) First-tier subcontractors, and (2) joint ventures.

The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known significant alternative approaches to the proposed rule that would meet the statutory requirements.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2018–D055), in correspondence.

VII. Paperwork Reduction Act

The rule contains information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). This rule contains information collection requirements in addition to those at FAR 42.15, under OMB Control Number 9000–0142 for prime contractor past performance evaluations. This rule adds a new DoD information collection requirement that requires the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). Accordingly, DoD has submitted a request for approval of a new information collection requirement concerning a DFARS solicitation provision at 252.242–70XX, Identification of Joint Venture Partners for Past Performance–Construction and

Architect-Engineer Services; and contract clauses at 252.242-70YY, Past Performance of Joint Venture Partners—Construction and Architect-Engineer Services; and 252.242-70ZZ, Past Performance of Subcontractors—Construction and Architect-Engineer Services.

A. Public reporting burden for this collection of information is estimated to average 1.1 hours per response, including the time for reviewing instructions, and completing and reviewing the collection of information. The annual reporting burden is estimated as follows:

(1) 252.242-70XX, Identification of Joint Venture Partners for Past Performance—Construction and Architect-Engineer Services

Respondents: 112.

Responses per respondent: 1.

Total annual responses: 112.

Hours per response: 0.5.

Total response burden hours: 56.

(2) 252.242-70YY, Past Performance of Joint Venture Partners—Construction and Architect-Engineer Services

Respondents: 336.

Responses per respondent: 1.

Total annual responses: 336.

Hours per response: 1.

Total response burden hours: 336.

(3) Past Performance Evaluations of First-Tier Subcontractors Under 252.242-70ZZ, Past Performance of Subcontractors—Construction and Architect-Engineer Services

Respondents: 2,943.

Responses per respondent: 1.

Total annual responses: 2,943.

Hours per response: 1.

Total response burden hours: 2,943.

(4) Information on Newly Awarded First-Tier Subcontracts Under 252.242-70ZZ, Past Performance of Subcontractors—Construction and Architect-Engineer Services

Respondents: 82.

Responses per respondent: 1.

Total annual responses: 82.

Hours per response: 0.5.

Total response Burden Hours: 41.

B. Request for Comments Regarding Paperwork Burden

Written comments and recommendations on the proposed information collection, including suggestions for reducing this burden, should be sent to Ms. Susan Minson at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503, or email Susan_M_Minson@omb.eop.gov, with a copy to the Defense Acquisition Regulations System, Attn: Ms. Barbara Trujillo, OUSD (A&S)DPC/DARS, Room 3B938, 3060 Defense Pentagon, Washington, DC 20301-3060. Comments can be received from 30 to 60 days after the date of this notice, but comments to OMB will be most useful if received by OMB within 30 days after the date of this notice.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the DFARS, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

To obtain a copy of the supporting statement and associated collection instruments, please email osd.dfars@mail.mil. Include DFARS Case 2018-D055 in the subject line of the message.

List of Subjects in 48 CFR Parts 215, 236, 242, and 252

Government procurement.

Jennifer D. Johnson,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 215, 236, 242, and 252 are proposed to be amended as follows:

■ 1. The authority citation for 48 CFR parts 215, 236, 242, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 215—CONTRACTING BY NEGOTIATION

■ 2. Amend section 215.305 by adding paragraph (a)(2)(C) to read as follows:

215.305 Proposal evaluation.

(a)(2) * * *

(C) In accordance with section 823 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232), when acquiring construction or architect-engineer services, contracting officers shall consider an offeror's past performance as a first-tier subcontractor or individual partner of a joint venture under construction and/or architect-engineer services contracts as part of the evaluation of past performance.

PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

■ 3. Add section 236.201 to subpart 236.2 to read as follows:

236.201 Evaluation of contractor performance.

See 242.1502(e) for additional requirements on past performance evaluations for first-tier subcontractors and joint venture partners for construction contracts (section 823 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232)).

■ 4. Amend section 236.570 by adding paragraph (f) to read as follows:

236.570 Additional provisions and clauses.

* * * * *

(f) See 242.1504-70 for the additional provision and clauses required for construction contracts with an estimated value at or above the thresholds set forth in FAR 42.1502(e) and 242.1502(e)(i).

■ 5. Revise section 236.604 to read as follows:

236.604 Performance evaluation.

(1) Prepare a separate performance evaluation after actual construction of the project. Ordinarily, the evaluating official should be the person most familiar with the architect-engineer contractor's performance.

(2) See 242.1502(f) for additional requirements on past performance evaluations for first-tier subcontractors and joint venture partners for architect-engineer services contracts (section 823 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232)).

■ 6. Revise section 236.609-70 to read as follows:

236.609-70 Additional provisions and clauses.

(a) Use the provision at 252.236-7011, Overseas Architect-Engineer Services—Restriction to United States Firms, in solicitations for architect-engineer contracts that are—

(1) Funded with military construction appropriations;

(2) Estimated to exceed \$500,000; and

(3) To be performed in Japan, in any North Atlantic Treaty Organization member country, or in countries bordering the Arabian Gulf.

(b) See 242.1504-70 for the additional provision and clauses required for architect-engineer services contracts with an estimated value at or above the thresholds set forth in FAR 42.1502(e) and 242.1502(f)(i).

**PART 242—CONTRACT
ADMINISTRATION AND AUDIT
SERVICES**

■ 7. Add sections 242.1501 and 242.1501–70 to subpart 242.15 to read as follows:

242.1501 General.

242.1501–70 Definitions.

As used in this subpart—

First-tier subcontractor means a subcontractor awarded a contract directly by the prime contractor for the purpose of acquiring supplies or services (including construction) for performance of a prime contract. It does not include the contractor's supplier agreements with vendors, such as long-term arrangements for materials or supplies that benefit multiple contracts, the costs of which are normally applied to a contractor's general and administrative expenses or indirect costs.

Subcontractor, as defined in FAR 44.101, means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

■ 8. Amend section 242.1502 by adding paragraphs (e) and (f) to read as follows:

242.1502 Policy.

(e)(i) *General*. In addition to the requirements in FAR 42.1502(e), past performance evaluations are required for a construction contract or order, for—

(A) First-tier subcontractors performing a portion of a construction contract or order valued at or above the threshold in FAR 42.1502(e) or 20 percent of the value of the prime contract, whichever is higher, if the overall execution of the work is impacted by the performance of the subcontractor or subcontractors; and

(B) Individual partners of a joint venture awarded a construction contract or order valued at or above the threshold in FAR 42.1502(e) (section 823 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232)).

(ii) *First-tier subcontractor past performance evaluations*. Contracting officers, in coordination with the cognizant requiring office, shall—

(A) Ensure the information included in the prime contractor's ratings of its first-tier subcontractors is not inconsistent with the information included in the rating for the prime contractor, and the first-tier subcontractor evaluations are conducted consistent with the requirements of FAR subpart 42.15;

(B) Ensure negative evaluations of a subcontractor in no way obviate the prime contractor's responsibility for successful completion of the contract and management of its subcontractors; and

(C) Use their best judgment on whether the overall execution of the work is impacted by the performance of the subcontractor or subcontractors.

(iii) *Joint venture contractor past performance evaluations*. Contracting officers, in coordination with the cognizant requiring office, shall—

(A) Ensure the rating for joint ventures, at a minimum, includes an identification that allows the evaluation to be retrieved for each partner of the joint venture;

(B) Provide each joint venture partner the same opportunity to submit comments, rebutting statements, or additional information, consistent with FAR subpart 42.15; and

(C) Ensure the rating clearly identifies the responsibilities of joint venture partners for discrete elements of the work where the partners are not jointly and severally responsible for the project.

(iv) *Exception*. The contracting officer may grant an exception from the annual evaluation requirements under FAR 42.1502(a) for submission of annual evaluations for construction contracts when the past performance ratings would not provide the best representation of the performance of a contractor, subcontractor, or joint venture partners, including—

(A) Where no severable element of the work has been completed; or

(B) When the contracting officer determines that—

(1) An insubstantial portion of the contract work has been completed in the preceding year and the lack of performance is at no fault to the contractor; or

(2) There is an issue in dispute which, until resolved, would likely cause the annual rating to inaccurately reflect the past performance of the contractor.

(C) The contracting officer's decision shall be approved at least one level above the contracting officer.

(f)(i) *General*. In addition to the requirements in FAR 42.1502(f), past performance evaluations are required, for an architect-engineer services contract or order, for—

(A) First-tier subcontractors performing a portion of an architect-engineer services contract or order valued at or above the threshold in FAR 42.1502(e) or 20 percent of the value of the prime contract, whichever is higher, if the overall execution of the work is impacted by the performance of the subcontractor or subcontractors; and

(B) Individual partners of a joint venture awarded an architect-engineer services contract or order valued at or above the threshold in FAR 42.1502(e) (section 823 of the National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232)).

(ii) *First-tier subcontractor past performance evaluations*. Contracting officers, in coordination with the cognizant requiring office, shall—

(A) Ensure the information included in the prime contractor's ratings of its first-tier subcontractors is not inconsistent with the information included in the rating for the prime contractor, and the first-tier subcontractor evaluations are conducted consistent with the requirements of FAR subpart 42.15;

(B) Ensure negative evaluations of a subcontractor in no way obviate the prime contractor's responsibility for successful completion of the contract and management of its subcontractors; and

(C) Use their best judgment on whether the overall execution of the work is impacted by the performance of the subcontractor or subcontractors.

(iii) *Joint venture contractor past performance evaluations*. Contracting officers, in coordination with the cognizant requiring office, shall—

(A) Ensure the rating for joint ventures, at a minimum, includes an identification that allows the evaluation to be retrieved for each partner of the joint venture;

(B) Provide each joint venture partner the same opportunity to submit comments, rebutting statements, or additional information, consistent with FAR subpart 42.15; and

(C) Ensure the rating clearly identifies the responsibilities of joint venture partners for discrete elements of the work where the partners are not jointly and severally responsible for the project.

(iv) *Exception*. The contracting officer may grant an exception from the annual evaluation requirements under FAR 42.1502(a) for submission of annual evaluations for architect-engineer services contracts when the past performance ratings would not provide the best representation of the performance of a prime contractor, subcontractor, or joint venture partners, including—

(A) Where no severable element of the work has been completed; or

(B) When the contracting officer determines that—

(1) An insubstantial portion of the contract work has been completed in the preceding year and the lack of performance is at no fault to the contractor; or

(2) There is an issue in dispute which, until resolved, would likely cause the annual rating to inaccurately reflect the past performance of the contractor.

(C) The contracting officer's decision shall be approved at least one level above the contracting officer.

* * * * *

■ 9. Add section 242.1504–70 to subpart 242.15 to read as follows:

242.1504–70 Solicitation provision and contract clauses.

(a) Use the provision at 252.242–70XX, Identification of Joint Venture Partners for Past Performance—Construction and Architect-Engineer Services, in solicitations that contain the clause at 252.242–70YY.

(b) Use the following clauses in solicitations, contracts, and orders for construction and architect-engineer services if the estimated value is at or above the thresholds in FAR 42.1502(e), and 242.1502(e)(i) for construction or 242.1502(f)(i) for architect-engineer services, respectively:

(1) 252.242–70YY, Past Performance of Joint Venture Partners—Construction and Architect-Engineer Services.

(2) 252.242–70ZZ, Past Performance of Subcontractors—Construction and Architect-Engineer Services.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 10. Add section 252.242–70XX to read as follows:

252.242–70XX Identification of Joint Venture Partners for Past Performance—Construction and Architect-Engineer Services.

As prescribed in 242.1504–70(a), use the following provision:

Identification of Joint Venture Partners for Past Performance—Construction and Architect-Engineer Services (DATE)

(a) All joint venture partners shall be registered in the System for Award Management (see Federal Acquisition

Regulation 52.204–7, System for Award Management) prior to submission of an offer.

(b) The lead joint venture partner shall be identified as a part of an offer.

(c) All joint venture partners shall provide their individual legal names, unique entity identifiers, and their Commercial and Government Entity (CAGE) codes as a part of an offer.

(End of provision)

■ 11. Add section 252.242–70YY to read as follows:

252.242–70YY Past Performance of Joint Venture Partners—Construction and Architect-Engineer Services.

As prescribed in 242.1504–70(b) and (b)(1), use the following clause:

Past Performance of Joint Venture Partners—Construction and Architect-Engineer Services (DATE)

(a) Past performance evaluations conducted on the contract in accordance with Federal Acquisition Regulation (FAR) subpart 42.15 and Defense Federal Acquisition Regulation Supplement 242.1502 will apply to the joint venture Contractor itself, as well as each individual partner of the joint venture identified in the Contractor's offer, to ensure that past performance information in the Contractor Performance Assessment Reporting System on joint venture projects is considered in future awards to individual joint venture partners.

(b) Each partner, through the joint venture, is given the same opportunity to submit comments, rebutting statements, or additional information, consistent with FAR subpart 42.15.

(End of clause)

■ 12. Add section 252.242–70ZZ to read as follows:

252.242–70ZZ Past Performance of Subcontractors—Construction and Architect-Engineer Services.

As prescribed in 242.1504–70(b) and (b)(2), use the following clause:

Past Performance of Subcontractors—Construction and Architect-Engineer Services (DATE)

(a) *Definitions.* As used in this clause—

First-tier subcontractor means a subcontractor awarded a contract directly by the prime contractor for the purpose of acquiring supplies or services (including construction) for performance of a prime contract. It does not include the contractor's supplier agreements with vendors, such as long-term arrangements for materials or supplies that benefit multiple contracts and/or the costs of which are normally applied to a contractor's general and administrative expenses or indirect costs.

Subcontractor means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor (see Federal Acquisition Regulation (FAR) 44.101).

(b) *Past performance evaluations.* The Contractor shall prepare past performance evaluations for first-tier subcontractors performing a portion of a construction or an architect-engineer services contract with an estimated value at or above the threshold set forth in FAR 42.1502(e), or 20 percent of the value of the prime contract, whichever is higher. First-tier subcontractors shall have an opportunity to respond to the past performance evaluation to submit comments, rebutting statements, or additional information, consistent with FAR 42.1503.

(c) *Contractor's responsibility.* Negative evaluations of a subcontractor in no way obviate the Contractor's responsibility for successful completion of the contract and management of its subcontractors.

(d) *Identification of first-tier subcontractors.* The Contractor shall provide the Contracting Officer with the legal business name, the unique entity identifier, and Commercial and Government Entity (CAGE) code of each first-tier subcontractor under the contract that meets the criteria in paragraph (b) of this clause within 60 days after award and within 30 days as new subcontracts that meet the criteria at Defense Federal Acquisition Regulation Supplement 242.1502(e) and (f) are issued during performance.

(End of clause)

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