

IV. 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 this rule will only have significant impact on an offeror that is engaging in an activity for which sanctions may be imposed under section 5 of the Iran Sanctions Act or certain transactions with Iran's Revolutionary Guard Corps. Domestic entities generally do not engage in activity that would cause them to be subject to the procurement bans described in this rule due to current restrictions on trade with Iran (see, *e.g.*, Department of Treasury Office of Foreign Assets Control regulations at 31 CFR 560). Accordingly, it is expected that the number of domestic entities significantly impacted by this rule will be minimal, if any. The Regulatory Flexibility Act is for the protection of United States small entities, not foreign entities.

V. Paperwork Reduction Act

The final rule does not contain any 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).

List of Subjects in 48 CFR Parts 4, 25, and 52

Government procurement.

Dated: July 26, 2013.

William Clark,

Acting Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Interim Rule Adopted as Final With Changes

Accordingly, the interim rule amending 48 CFR parts 4, 25, and 52, which was published in the **Federal Register** at 77 FR 73516, December 10, 2012, is adopted as final with the following changes:

■ 1. The authority citation for 48 CFR parts 25 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 25—FOREIGN ACQUISITION

25.700 [Amended]

■ 2. Amend section 25.700 by removing from paragraph (c) "Reduction Act" and adding "Reduction" in its place.

25.703–3 [Amended]

■ 3. Amend section 25.703–3 by removing from paragraph (a) "<https://www.acquisition.gov>" and adding "<http://www.acquisition.gov>" in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 4. Amend section 52.212–3 by revising the date of the provision and by removing from the introductory text and paragraph (b)(2) "<https://www.acquisition.gov>" and adding "<http://www.acquisition.gov>" in its place.

The revision reads as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

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Offeror Representations and Certifications—Commercial Items (AUG 2013)

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[FR Doc. 2013–18454 Filed 7–31–13; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 8, 12, 15, 17, 42, and 49

[FAC 2005–69; FAR Case 2012–009; Item III; Docket 2012–0009, Sequence 1]

RIN 9000–AM09

Federal Acquisition Regulation; Documenting Contractor Performance

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to provide Governmentwide standardized past performance evaluation factors and performance rating categories and require that past performance information be entered into the Contractor Performance Assessment Reporting System (CPARS), the single Governmentwide past performance reporting system.

DATES: *Effective:* September 3, 2013.

FOR FURTHER INFORMATION CONTACT: Mr. Curtis E. Glover, Sr., Procurement Analyst, at 202–501–1448, for

clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAC 2005–69, FAR Case 2012–009.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 76 FR 37704 on June 28, 2011, under FAR Case 2009–042, to implement recommendations from Government Accountability Office (GAO) Report GAO–09–374, entitled "Better Performance Information Needed to Support Agency Contract Award Decisions," and Office of Federal Procurement Policy (OFPP) memorandum entitled "Improving the Use of Contractor Performance Information" (dated July 29, 2009). Two amendments to the proposed rule were published in the **Federal Register** at 76 FR 48776 on August 9, 2011, and at 76 FR 50714 on August 16, 2011. Twenty three respondents submitted comments on the proposed rule. A second proposed rule that was published in the **Federal Register** at 77 FR 54864 on September 6, 2012, addressed all comments received in response to the first proposed rule and, in addition, proposed to implement paragraphs (a), (b), and (d) of section 806 of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112–81). The second proposed rule further requested comments on the merits of modifying the FAR requirements governing the appeal process to evaluate if this would improve or weaken the effectiveness of past performance policies and associated principles of impartiality and accountability. Seventeen respondents submitted comments on the second proposed rule. This rule also incorporates agency management accountability requirements from section 853 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112–239). In the interim, the Governmentwide Guidance for the Contractor Performance Assessment Reporting System (CPARS) was released in November 2012 and is available at <http://www.cpars.gov/cparsfiles/pdfs/CPARS-Guidance.pdf>.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of Significant Changes

- FAR 42.1503(b)(4) is revised by adding two tables:
 - Table 42–1—Evaluation Ratings Definitions; and
 - Table 42–2—Evaluation Ratings Definitions (for the Small Business Subcontracting Evaluation Factor when the FAR clause at 52.218–9 is used).
- FAR subpart 42.15 is reorganized for clarity and consistency of subject matter.
- FAR 42.1502, Policy, is revised to clarify when past performance evaluations are required for contracts and orders.
- The procedures and responsibilities for contributing to and conducting past performance evaluations are addressed and clarified at FAR 42.1503, Procedures. This section also includes a new requirement for past performance reports to include a clear, non-technical description of the principal purpose of the contract or order.
- In accordance with statutory direction, FAR 42.1503(c) includes the requirement to enter the award-fee performance adjectival rating and incentive-fee contract performance evaluation into CPARS when applicable.
- Agencies are required, at FAR 42.1503(e), to conduct frequent evaluations of agency compliance with past performance evaluation requirements so agencies can readily identify delinquent and deficient past performance reports for quality control.

B. Analysis of Public Comments

1. General

Comment: Three respondents expressed support for the intent of the rule to standardize the past performance evaluation factors and rating categories.

Response: Noted.

Comment: One respondent commented that, under FAR 17.207, language should be added to paragraph (c)(6), or a new paragraph (c)(7) should be added, to ensure that past performance evaluations are done on all recently completed task/delivery orders so that the contracting officer considering exercising an option had the most recent performance information.

Response: The text at FAR 17.207(c)(6) has been revised, and a new (c)(7) has been added to address the respondent's concern.

Comment: One respondent commented that, in FAR 42.1503(b)(2)(vi), “defective cost and

pricing data” should be changed to “defective cost or pricing data”.

Response: Agreed.

Comments: Three respondents commented that the examples listed for a sixth evaluation factor should be deleted. It was noted that the FAR 43.1503(b)(2)(vi) examples should be deleted because they are inflammatory negative examples, they duplicated Federal Awardee Performance and Integrity Information System (FAPIIS), and they were examples of performance findings rather than other areas of evaluation.

Response: The “other” evaluation factor was added to capture events that may have a bearing on contractor performance that do not fit well within any of the other five categories. The examples listed are just some of the factors that the contracting officer may consider, and they in no way preclude the inclusion of positive information regarding the contractor's performance. Evaluations include negative and positive information about the contractor's performance to inform the contractor of the Government's concerns so improvements can be made to achieve the intended results under the contract. The “Other” evaluation factor allows flexibility for contracting officers to consider factors unique to each contract.

Comment: One respondent commented that the contractor should be allowed to evaluate Government input.

Response: Contractors are given an opportunity to provide rebuttal statements in response to agency evaluations. The final decision is solely the agency's discretion.

Comment: One respondent commented that the proposed FAR case should be withdrawn and reconsidered by the FAR Council.

Response: It is in the Government's interest to proceed with the case.

Comments: Two respondents commented that the three- to six-year retention period for past performance information is not long enough. One respondent commented that, in FAR 42.1503(g), the language “Agencies shall use the past performance information in PPIRS that is within three years (six for construction . . .)” should be changed to “Agencies shall use the past performance information in PPIRS that reflects performance within the last three years (six for construction)”.

Response: The respondents' comments are noted. However, the current retention periods in the Past Performance Information Retrieval System (PPIRS) are appropriate.

Comment: One respondent commented that cost control can be harmful to some businesses.

Response: The requirement for cost control is not new to contractor performance information; it is included in FAR 42.1501 and listed as an example to consider when reviewing relevant information. Cost control is not the only factor that is considered relevant past performance information, but it is relevant information for source selection officials to consider especially under cost contracts. Other factors such as technical, schedule/timeliness, and management or business relations are some of the relevant considerations reported in past performance evaluations, and that also will be used to evaluate a contractor's overall performance.

Comment: One respondent commented on establishing uniform definitions for evaluation factors.

Response: By adding the CPARS rating factors, uniform definitions are established and standardized for evaluation ratings. However, there is flexibility to tailor evaluation ratings to the contract type, size, content, and complexity of the contractual requirements.

Comment: One respondent commented on linking past performance in FAR 42.1503(d) to future responsibility determinations in FAR subpart 9.1 and the impact of a contractor with more than one contract to have a negative performance evaluation on one contract take precedence over good or excellent performance on many other contracts in future responsibility determinations.

Response: Contracting officers are required to use sound judgment in determining the weight and relevance of all information in relation to the present acquisition. FAR 15.305(a)(1)(i) on use of past performance information in source selection states that the comparative assessment of past performance is separate from the responsibility determination required under FAR subpart 9.1.

Comment: The respondent's company was unfairly evaluated in multiple 100 percent 8(a) set-aside solicitations because an agency procurement office blocked the contracting officer technical representatives from putting their past performance evaluations in the CPARS and PPIRS, according to the respondent.

Response: This comment is outside the scope of this case. However, the respondent should contact the agency small business office or the Small Business Administration's (SBA) Procurement Center Representatives (PCR) and Commercial Market

Representatives (CMR) for assistance. SBA's PCRs and CMRs play an important role in helping ensure that small businesses gain access to contracting and subcontracting opportunities.

Comment: One respondent commented that an important feature of the system is the ability of the seller to be able to post a response to all (particularly negative) reviews, as well as the buyer being able to revise an evaluation.

Response: FAR 42.1503(d) does allow contractors to submit comments, rebutting statements, or additional information. If there is a disagreement between the parties, the contractor can request a review of the evaluation at a level above the contracting officer. The ultimate conclusion on the performance evaluation is a decision of the contracting agency.

Comments: Two respondents applauded the Councils for clearly identifying the contracting officer as the ultimate person responsible for performing past performance evaluations where agency procedures do not specify a responsible representative.

Response: Noted.

Comment: One respondent expressed appreciation for the standardized evaluation ratings; however, the respondent felt that, while standardization may mitigate some evaluation inconsistencies, the rating inconsistencies would likely persist given the subjective nature of the system.

Response: The objective of the rule is to standardize the past performance evaluation rating definitions. Any specific individual evaluation should be addressed with the agency contracting officer responsible for that past performance rating.

Comment: One respondent commented that the FAR Council should consider requiring that regularly scheduled past performance evaluation discussions be considered as part of the partnering process that the agencies promote.

Response: The comment reflects issues related to administration and not policy.

Comment: One respondent commented that the FAR Council should consider mandating that Federal agencies regularly assess the evaluations given by their regional offices. The respondent was concerned because of inconsistent evaluations among the regional offices within an agency, such as different parameters for the top rating.

Response: Agencies are encouraged to conduct contract management reviews

or procurement management reviews that entail reviewing contract administration functions performed under the contract, such as monitoring whether or not evaluations are timely, complete, and include quality and useful information. See FAR 42.1501(b).

Comments: Two respondents commented that many agencies require past performance questionnaires, which require much of the same information as the past performance evaluation. The respondents stated that these processes needed to be better integrated and streamlined to save time and money for both the Government and contractors.

Response: FAR 15.305(a)(2)(ii) provides offerors an opportunity to identify past or current contracts (including Federal, State, and local government and private) for efforts similar to the Government requirement. In this fashion, an offeror may convey relevant performance information of which the Government may be unaware.

Comments: Several respondents commented on Construction Contractor Appraisal Support System (CCASS). One respondent commented that contracting officers should be required to utilize and rely upon Contractor Performance Assessment Reporting System (CPARS). Another respondent commented that individuals responsible for completing the past performance information in CCASS were not required to address all elements of the evaluation.

Response: CCASS includes assessments of a contractor's performance and provides a record, both positive and negative, on completed construction contract performance. All reports should be complete. Questions about incomplete CCASS reports should be directed to the contracting officer or <https://www.cpars.gov>.

Comments: Two respondents recommended that there should be additional requirements for the timely completion and timely release of past performance evaluations. One respondent suggested a FAR clause to better bind the Government to completing evaluations on time. This respondent also recommended the appointment of a past performance ombudsman.

Response: Contracting officers are required to provide evaluations to contractors as soon as practicable after completion of the evaluation. This FAR change encourages agencies to monitor their timely reporting of past performance information, so the respondent's concerns should lessen over time. The Office of Federal Procurement Policy (OFPP), since FY 2010, has issued policy memoranda to

ensure agencies are compliant with the past performance reporting requirements in FAR subpart 42.15 (see OFPP Memo dated March 6, 2013, Improving the Collection and Use of Information about Contractor Performance and Integrity at <http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/improving-the-collection-and-use-of-information-about-contractor-performance-and-integrity.pdf>; OFPP Memo dated January 21, 2011, Improving Contractor Past Performance Assessments: Summary of the Office of Federal Procurement Policy's Review, and Strategies for Improvement at http://www.whitehouse.gov/sites/default/files/omb/procurement/contract_perf/PastPerformanceMemo-21-Jan-2011.pdf; and the OFPP memo dated July 29, 2009, Improving the Use of Contractor Performance Information at http://www.whitehouse.gov/sites/default/files/omb/assets/procurement/improving_use_of_contractor_perf_info.pdf.

2. Appeals Process

Comment: The FAR currently requires agencies to provide for review of agency evaluations at a level above the contracting officer to consider disagreements between the parties regarding the evaluation. In accordance with the FAR Council's Retrospective Plan and Analysis of Existing Rules, this requirement, at FAR 42.1503(b), was singled out in the second proposed rule with a request for comments on whether modifying the appeal process would improve or weaken the effectiveness of past performance policies and associated principles of impartiality and accountability. There were seven responses to this request; all urged that the appeals process be retained.

The respondents considered that elimination of the appeals process would reduce contractor competition, increase the likelihood of disruptive and costly litigation, weaken the effectiveness of past performance review procedures, and undermine confidence in the process. One respondent noted that, even when the appeals process was not used, it acted as an important due-process protection for contractors. The availability of the appeals process, according to respondents, ensures that individual Government rater bias or lack of understanding of the complete program, not just contracting issues, can be brought out and addressed.

None of the respondents was of the opinion that eliminating the past performance evaluation appeals process would improve economy or efficiency. One respondent cited the statistic that 30 percent of its initial past performance

evaluations contained errors that, upon appeal, resulted in substantive changes in the final performance ratings and/or narratives. Another respondent stressed that the past performance appeals process benefits not just contractors, but the Government, in that it ensures more accurate information is available for source selection decisions.

Response: The process for appealing an initial past performance evaluation remains in FAR 42.1503 to allow the contractor the ability to comment on the evaluation and agencies the opportunity to consider the contractor's rebuttal statement and material, and, if appropriate, revise the evaluation to reflect any agreed upon changes. However, it should be noted that the existence of an appeal need not delay making a past performance evaluation available to source selection officials.

Comment: One respondent suggested changing the text at FAR 42.1503(d) from "Agencies shall provide for review at a level above the contracting officer to consider disagreements between the parties regarding the evaluation," to "Agencies shall provide for review at a level above the individual who completed the evaluation in CPARS to consider disagreements between the parties regarding the evaluation."

Response: The FAR language explicitly refers to a level above the contracting officer, which means within the contracting office. The Councils consider it appropriate to retain the review function in the contracting office.

Comments: Six respondents commented that they did not support the elimination of the "appeals process" where agencies are required to provide for review of agency evaluation at a level above the contracting officer. A seventh respondent commented on the need for a procedure to ensure impartiality and hold agencies accountable for their assessments.

Response: A contractor is authorized to appeal a past performance evaluation and the agency is required to provide for review at a level above the contracting officer to consider disagreements between the parties. The appeals process is addressed at FAR 42.1503(b) in the current FAR, but is moved to FAR 42.1503(d) in this final rule. This final rule does not eliminate or modify the appeals process.

Comment: One respondent stated CPARS and the FAR do not properly address the contractor appeal process.

Response: The FAR requires that agencies provide for a review at a level above the contracting officer. The ultimate conclusion on the performance evaluation is a decision of the

contracting agency. Specifics of the appeal process properly are left to agencies' discretion.

3. Rating Tables

Comment: One respondent commented that the evaluation ratings definitions included in the proposed Tables 42-1 and 42-2 need to be changed. The phrase "and exceeds many" under the Exceptional rating, as well as the phrase "and exceeds some" under the Very Good rating, should be removed.

Response: These phrases allow the exceptional or very good contractor to be rewarded for exceeding Government requirements. This benefits the contractor not only in regard to the current requirement, but also future requirements that it may be considered for.

Comment: One respondent commented that the FAR Council should consider reducing the number of possible ratings from the currently proposed five. This respondent recommended that the proposed rule eliminate the exceptional and marginal ratings. The respondent suggested that the FAR Council should consider mandating that Federal owners clearly define in the solicitation or contract what type of performance on a particular project merits ratings of Exceptional, Very Good, Satisfactory, etc.

Response: The exceptional rating allows the Government to recognize performance that goes well beyond the norm, and the marginal rating allows the Government to identify a contractor that has serious performance issues, but that is still trying to perform to the Government requirement. The respondent's second comment is noted. The Governmentwide CPARS Guide was released in November 2012 with the existing five ratings (exceptional, very good, satisfactory, marginal, and unsatisfactory) that were considered necessary to address various levels of performance. It includes the description of each rating, and the rating assigned the contractor should correspond to the performance requirements stated in the contract or order (e.g., 30 day delivery schedule, 100 percent report accuracy).

Comment: One respondent had a concern with the evaluation rating definitions in Table 42-1. Specifically, the respondent felt that the Councils should use numbers and not subjective terms such as "few minor problems" or "some minor problems".

Response: The Councils see no issue with the words "few" or "some" in this context.

Comment: One respondent had a concern regarding past performance evaluations including records of forecasting and cost controlling and the impact on future contracts. This respondent felt that a contractor could not use the best quality of raw materials in order to achieve a lower than forecasted cost.

Response: Noted.

Comment: One respondent agreed that the revision to FAR 42.1503(b)(2)(vi) referencing "late or nonpayment to subcontractors" is a substantial improvement of the current FAR provision. This respondent also suggested that the language could be further enhanced by breaking it out from the evaluation factor "other" and offering it as another evaluation factor on its own.

Response: It is not necessary to break out a separate category.

Comment: One respondent commented that, in FAR 42.1503(b)(4), the sentence "Rating definitions shall reflect those in the tables below:" should be changed to "The narratives for the evaluation factors must support the ratings given by reflecting the rating definitions in the tables below:"

Response: The change to the FAR text uses similar language.

Comment: One respondent commented that, in Table 42-1, Definitions; "Exceptional", in the last sentence, "corrective actions taken by the contractor was highly effective", should be changed to "corrective actions taken by the contractor were highly effective". This respondent also commented that under the "Very Good" definition in the last sentence, that "corrective actions taken by the contractor was effective", should be changed to "corrective action taken by the contractor were effective".

Response: These corrections were made in the final rule.

4. Past Performance Evaluations on Science and Technology/Research and Development Contracts

Comments: Several respondents requested that the Councils exempt research and development contracts, or the subset of science and technology contracts, from past performance assessments. One respondent asked to limit the requirement to actions exceeding \$10 million dollars. Two respondents pointed out that the CPARS guidance excludes certain science and technology contracts. Two respondents stated that many of the mandatory evaluation factors are not relevant to science and technology contracts.

Response: It is not in the Government's best interest to exempt

research and development contracts from past performance assessments, at any dollar value, because doing so would not allow the Government to obtain information about the contractor's performance. There are past performance evaluations of science and technology contracts in CPARS now. The requirement at FAR 42.1503(b)(1) to "include a clear, non-technical description of the principal purpose of the contract or order" was added specifically for science and technology contracts.

5. Release of Information

Comments: One respondent recommended increased clarity for FAR 42.1503(d) because the paragraph could be read to allow release of past performance information to third parties once the periods in FAR 42.1503(g) have expired. The respondent recommended that past performance evaluations be made public after source selection. A respondent asked that the rule clarify that the past performance information would not be publicly displayed.

Another respondent advocated the wide release of past performance evaluations to the public.

One respondent advocated a revision to the rule that would permit the release of past performance information relating to late or nonpayment of subcontractors.

Response: The purpose of this case is to provide Governmentwide standardized past performance evaluation factors and performance rating categories and require that past performance information be entered into the CPARS. The proposed rule did not propose any changes to the FAR with regard to public release of past performance evaluations. Therefore, any such changes in the final rule would be outside the scope of this case.

Comments: One respondent recommended that past performance ratings information in FAPIIS be publicly displayed. The respondent requested that it be made legal to disclose past performance information.

Response: It is outside the scope of this case to seek a legislative change.

6. Other Comments

Comment: One respondent stated that the proposed rule creates a double standard and allows personal judgment by the evaluator. The respondent recommended a definition of what qualifies a contract to be assessed under more scrutiny and a new table for contracts that fit the definition be added to the FAR.

Response: An additional definition and new table are not necessary. The tables added are existing tables that

reside in CPARS and have been used by various Federal acquisition personnel since the system was established. These tables and definitions are being transferred into the FAR to standardize and regulate the ratings and evaluation factors across the Federal Government.

Comments: Two respondents recommended that the new process provided for in any final rule be applied only to new solicitations first issued after the effective date of any final rule.

Response: As a matter of policy, CPARS was implemented Governmentwide on October 1, 2010. There was no migration of the past performance reviews to CPARS. If a review was in process, it would have been completed in the review system an agency was using before October 1, 2010.

III. 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. This rule is not a major rule under 5 U.S.C. 804.

IV. 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 this rule codifies in the FAR existing past performance reporting guidelines and practices. The evaluation factors and rating system language proposed are currently used by Federal agencies. There are no new requirements placed on small entities.

V. Paperwork Reduction Act

The final rule does not contain any 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).

List of Subjects in 48 CFR Parts 8, 12, 15, 17, 42, and 49

Government procurement.

Dated: July 26, 2013.

William Clark,

Acting Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 8, 12, 15, 17, 42, and 49 as set forth below:

■ 1. The authority citation for 48 CFR parts 8, 12, 15, and 17 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

8.406–4 [Amended]

■ 2. Amend section 8.406–4 by removing from paragraph (e) "42.1503(f)" and adding "42.1503(h)" in its place.

■ 3. Revise section 8.406–7 to read as follows:

8.406–7 Contractor Performance Evaluation.

Ordering activities must prepare at least annually and at the time the work under the order is completed, an evaluation of contractor performance for each order that exceeds the simplified acquisition threshold in accordance with 42.1502(c).

PART 12—ACQUISITION OF COMMERCIAL ITEMS

12.403 [Amended]

■ 4. Amend section 12.403 by removing from paragraph (c)(4) "42.1503(f)" and adding "42.1503(h)" in its place.

PART 15—CONTRACTING BY NEGOTIATION

15.407–1 [Amended]

■ 5. Amend section 15.407–1 by removing from the introductory text of paragraph (d) "42.1503(f)" and adding "42.1503(h)" in its place.

PART 17—SPECIAL CONTRACTING METHODS

■ 6. Amend section 17.207 by—

■ a. Removing from paragraph (c)(4) "and";

■ b. Removing from the end of paragraph (c)(5) the period and adding ";" in its place; and

■ c. Adding paragraphs (c)(6) and (7) to read as follows:

17.207 Exercise of options.

* * * * *

(c) * * *

(6) The contractor's past performance evaluations on other contract actions have been considered; and

(7) The contractor's performance on this contract has been acceptable, *e.g.*, received satisfactory ratings.

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PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 7. The authority citation for 48 CFR part 42 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

■ 8. Revise sections 42.1500 and 42.1501 to read as follows:

42.1500 Scope of subpart.

This subpart provides policies and establishes responsibilities for recording and maintaining contractor performance information. This subpart does not apply to procedures used by agencies in determining fees under award or incentive fee contracts. See subpart 16.4. However, the fee amount paid to contractors should be reflective of the contractor's performance and the past performance evaluation should closely parallel and be consistent with the fee determinations.

42.1501 General.

(a) Past performance information (including the ratings and supporting narratives) is relevant information, for future source selection purposes, regarding a contractor's actions under previously awarded contracts or orders. It includes, for example, the contractor's record of—

(1) Conforming to requirements and to standards of good workmanship;

(2) Forecasting and controlling costs;

(3) Adherence to schedules, including the administrative aspects of performance;

(4) Reasonable and cooperative behavior and commitment to customer satisfaction;

(5) Reporting into databases (see subparts 4.14 and 4.15, and reporting requirements in the solicitation provisions and clauses referenced in 9.104–7);

(6) Integrity and business ethics; and

(7) Business-like concern for the interest of the customer.

(b) Agencies shall monitor their compliance with the past performance evaluation requirements (see 42.1502), and use the Contractor Performance Assessment Reporting System (CPARS) and Past Performance Information Retrieval System (PPIRS) metric tools to measure the quality and timely

reporting of past performance information.

■ 9. Amend section 42.1502 by revising paragraphs (a) through (d) and (i) to read as follows:

42.1502 Policy.

(a) *General.* Past performance evaluations shall be prepared at least annually and at the time the work under a contract or order is completed. Past performance evaluations are required for contracts and orders for supplies, services, research and development, and contingency operations, including contracts and orders performed inside and outside the United States, with the exception of architect-engineer and construction contracts or orders, which will still be reported into the Architect-Engineer Contract Administration Support System (ACASS) and Construction Contractor Appraisal Support System (CCASS) databases of CPARS. These evaluations are generally for the entity, division, or unit that performed the contract or order. Past performance information shall be entered into CPARS, the Governmentwide evaluation reporting tool for all past performance reports on contracts and orders. Instructions for submitting evaluations into CPARS are available at <http://www.cpars.gov/>.

(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.

(c) *Orders under multiple-agency contracts.* Agencies shall prepare an evaluation of contractor performance for each order that exceeds the simplified acquisition threshold that is placed under a Federal Supply Schedule contract or placed under a task-order contract or a delivery-order contract awarded by another agency (*i.e.*, Governmentwide acquisition contract or multi-agency contract). Agencies placing orders under their own multiple-agency contract shall also prepare evaluations for their own orders. This evaluation shall not consider the requirements under paragraph (g) of this section. Agencies are required to prepare an evaluation if a modification to the order causes the dollar amount to exceed the simplified acquisition threshold.

(d) *Orders under single-agency contracts.* For single-agency task-order and delivery-order contracts, the contracting officer may require performance evaluations for each order in excess of the simplified acquisition threshold when such evaluations would produce more useful past performance information for source selection officials than that contained in the overall contract evaluation (*e.g.*, when the scope of the basic contract is very broad and the nature of individual orders could be significantly different). This evaluation need not consider the requirements under paragraph (g) of this section unless the contracting officer deems it appropriate.

* * * * *

(i) Agencies shall promptly report other contractor information in accordance with 42.1503(h).

■ 10. Revise section 42.1503 to read as follows:

42.1503 Procedures.

(a)(1) Agencies shall assign responsibility and management accountability for the completeness of past performance submissions. Agency procedures for the past performance evaluation system shall—

(i) Generally provide for input to the evaluations from the technical office, contracting office, program management office and, where appropriate, quality assurance and end users of the product or service;

(ii) Identify and assign past performance evaluation roles and responsibilities to those individuals responsible for preparing and reviewing interim evaluations, if prepared, and final evaluations (*e.g.*, contracting officers, contracting officer representatives, project managers, and program managers). 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; and

(iii) Address management controls and appropriate management reviews of past performance evaluations, to include accountability for documenting past performance on PPIRS.

(2) If agency procedures do not specify the individuals responsible for past performance evaluation duties, the contracting officer is responsible for this function.

(3) Interim evaluations may be prepared as required, in accordance with agency procedures.

(b)(1) The evaluation should include a clear, non-technical description of the

principal purpose of the contract or order. The evaluation should reflect how the contractor performed. The evaluation should include clear relevant information that accurately depicts the contractor's performance, and be based on objective facts supported by program and contract or order performance data. The evaluations should be tailored to the contract type, size, content, and complexity of the contractual requirements.

(2) Evaluation factors for each assessment shall include, at a minimum, the following:

- (i) Technical (quality of product or service).
- (ii) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements).
- (iii) Schedule/timeliness.
- (iv) Management or business relations.
- (v) Small business subcontracting (as applicable, see Table 42-2).
- (vi) Other (as applicable) (e.g., late or nonpayment to subcontractors, trafficking violations, tax delinquency, failure to report in accordance with contract terms and conditions, defective cost or pricing data, terminations, suspension and debarments).

(3) Evaluation factors may include subfactors.

(4) Each factor and subfactor used shall be evaluated and a supporting narrative provided. Each evaluation factor, as listed in paragraph (b)(2) of this section, shall be rated in accordance with a five scale rating system (i.e., exceptional, very good, satisfactory, marginal, and unsatisfactory). The ratings and narratives must reflect the definitions in the tables 42-1 or 42-2 of this section.

(c)(1) When the contract provides for incentive fees, the incentive-fee contract performance evaluation shall be entered into CPARS.

(2) When the contract provides for award fee, the award fee-contract performance adjectival rating as described in 16.401(e)(3) shall be entered into CPARS.

(d) Agency evaluations of contractor performance, including both negative

and positive evaluations, prepared under this subpart shall be provided to the contractor as soon as practicable after completion of the evaluation. The contractor will receive a CPARS-system generated notification when an evaluation is ready for comment. Contractors shall be given a minimum of 30 days to submit comments, rebutting statements, or additional information. Agencies shall provide for review at a level above the contracting officer to consider disagreements between the parties regarding the evaluation. The ultimate conclusion on the performance evaluation is a decision of the contracting agency. Copies of the evaluation, contractor response, and review comments, if any, shall be retained as part of the evaluation. These evaluations may be used to support future award decisions, and should therefore be marked "Source Selection Information". Evaluation of Federal Prison Industries (FPI) performance may be used to support a waiver request (see 8.604) when FPI is a mandatory source in accordance with subpart 8.6. The completed evaluation shall not be released to other than Government personnel and the contractor whose performance is being evaluated during the period the information may be used to provide source selection information. 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. Evaluations used in determining award or incentive fee payments may also be used to satisfy the requirements of this subpart. A copy of the annual or final past performance evaluation shall be provided to the contractor as soon as it is finalized.

(e) Agencies shall require frequent evaluation (e.g., monthly, quarterly) of agency compliance with the reporting requirements in 42.1502, so agencies can readily identify delinquent past performance reports and monitor their reports for quality control.

(f) Agencies shall prepare and submit all past performance evaluations electronically in the CPARS at <http://www.cpars.gov/>.

These evaluations are automatically transmitted to PPIRS at <http://www.ppirs.gov>. Past performance evaluations for classified contracts and special access programs shall not be reported in CPARS, but will be reported as stated in this subpart and in accordance with agency procedures. Agencies shall ensure that appropriate management and technical controls are in place to ensure that only authorized personnel have access to the data and the information safeguarded in accordance with 42.1503(d).

(g) Agencies shall use the past performance information in PPIRS that is within three years (six for construction and architect-engineer contracts) of the completion of performance of the evaluated contract or order, and information contained in the Federal Awardee Performance and Integrity Information System (FAPIIS), e.g., terminations for default or cause.

(h) *Other contractor performance information.* (1) Agencies shall ensure information is accurately reported in the Federal Awardee Performance and Integrity Information System (FAPIIS) module of CPARS within 3 calendar 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 CPARS focal points who will register users to report data into the FAPIIS module of CPARS (available at <http://www.cpars.gov/>), then select FAPIIS).

(3) With regard to information that may be covered by a disclosure exemption under the Freedom of Information Act, the contracting officer shall follow the procedures at 9.105-2(b)(2)(iv).

TABLE 42-1—EVALUATION RATINGS DEFINITIONS

Rating	Definition	Note
(a) Exceptional	Performance meets contractual requirements and exceeds many to the Government's benefit. The contractual performance of the element or sub-element being evaluated was accomplished with few minor problems for which corrective actions taken by the contractor were highly effective.	To justify an Exceptional rating, identify multiple significant events and state how they were of benefit to the Government. A singular benefit, however, could be of such magnitude that it alone constitutes an Exceptional rating. Also, there should have been NO significant weaknesses identified.

TABLE 42-1—EVALUATION RATINGS DEFINITIONS—Continued

Rating	Definition	Note
(b) Very Good	Performance meets contractual requirements and exceeds some to the Government's benefit. The contractual performance of the element or sub-element being evaluated was accomplished with some minor problems for which corrective actions taken by the contractor were effective.	To justify a Very Good rating, identify a significant event and state how it was a benefit to the Government. There should have been no significant weaknesses identified.
(c) Satisfactory	Performance meets contractual requirements. The contractual performance of the element or sub-element contains some minor problems for which corrective actions taken by the contractor appear or were satisfactory.	To justify a Satisfactory rating, there should have been only minor problems, or major problems the contractor recovered from without impact to the contract/order. There should have been NO significant weaknesses identified. A fundamental principle of assigning ratings is that contractors will not be evaluated with a rating lower than Satisfactory solely for not performing beyond the requirements of the contract/order.
(d) Marginal	Performance does not meet some contractual requirements. The contractual performance of the element or sub-element being evaluated reflects a serious problem for which the contractor has not yet identified corrective actions. The contractor's proposed actions appear only marginally effective or were not fully implemented.	To justify Marginal performance, identify a significant event in each category that the contractor had trouble overcoming and state how it impacted the Government. A Marginal rating should be supported by referencing the management tool that notified the contractor of the contractual deficiency (e.g., management, quality, safety, or environmental deficiency report or letter).
(e) Unsatisfactory	Performance does not meet most contractual requirements and recovery is not likely in a timely manner. The contractual performance of the element or sub-element contains a serious problem(s) for which the contractor's corrective actions appear or were ineffective.	To justify an Unsatisfactory rating, identify multiple significant events in each category that the contractor had trouble overcoming and state how it impacted the Government. A singular problem, however, could be of such serious magnitude that it alone constitutes an unsatisfactory rating. An Unsatisfactory rating should be supported by referencing the management tools used to notify the contractor of the contractual deficiencies (e.g., management, quality, safety, or environmental deficiency reports, or letters).

Note 1: Plus or minus signs may be used to indicate an improving (+) or worsening (–) trend insufficient to change the evaluation status.
Note 2: N/A (not applicable) should be used if the ratings are not going to be applied to a particular area for evaluation.

TABLE 42-2—EVALUATION RATINGS DEFINITIONS

[For the Small Business Subcontracting Evaluation Factor, when 52.219-9 is used]

Rating	Definition	Note
(a) Exceptional	Exceeded all statutory goals or goals as negotiated. Had exceptional success with initiatives to assist, promote, and utilize small business (SB), small disadvantaged business (SDB), women-owned small business (WOSB), HUBZone small business, veteran-owned small business (VOSB) and service disabled veteran owned small business (SDVOSB). Complied with FAR 52.219-8, Utilization of Small Business Concerns. Exceeded any other small business participation requirements incorporated in the contract/order, including the use of small businesses in mission critical aspects of the program. Went above and beyond the required elements of the subcontracting plan and other small business requirements of the contract/order. Completed and submitted Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate and timely manner.	To justify an Exceptional rating, identify multiple significant events and state how they were a benefit to small business utilization. A singular benefit, however, could be of such magnitude that it constitutes an Exceptional rating. Small businesses should be given meaningful and innovative work directly related to the contract, and opportunities should not be limited to indirect work such as cleaning offices, supplies, landscaping, etc. Also, there should have been no significant weaknesses identified.

TABLE 42-2—EVALUATION RATINGS DEFINITIONS—Continued
 [For the Small Business Subcontracting Evaluation Factor, when 52.219-9 is used]

Rating	Definition	Note
(b) Very Good	Met all of the statutory goals or goals as negotiated. Had significant success with initiatives to assist, promote and utilize SB, SDB, WOSB, HUBZone, VOSB, and SDVOSB. Complied with FAR 52.219-8, Utilization of Small Business Concerns. Met or exceeded any other small business participation requirements incorporated in the contract/order, including the use of small businesses in mission critical aspects of the program. Endeavored to go above and beyond the required elements of the subcontracting plan. Completed and submitted Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate and timely manner.	To justify a Very Good rating, identify a significant event and state how it was a benefit to small business utilization. Small businesses should be given meaningful and innovative opportunities to participate as subcontractors for work directly related to the contract, and opportunities should not be limited to indirect work such as cleaning offices, supplies, landscaping, etc. There should be no significant weaknesses identified.
(c) Satisfactory	Demonstrated a good faith effort to meet all of the negotiated subcontracting goals in the various socio-economic categories for the current period. Complied with FAR 52.219-8, Utilization of Small Business Concerns. Met any other small business participation requirements included in the contract/order. Fulfilled the requirements of the subcontracting plan included in the contract/order. Completed and submitted Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate and timely manner.	To justify a Satisfactory rating, there should have been only minor problems, or major problems the contractor has addressed or taken corrective action. There should have been no significant weaknesses identified. A fundamental principle of assigning ratings is that contractors will not be assessed a rating lower than Satisfactory solely for not performing beyond the requirements of the contract/order.
(d) Marginal	Deficient in meeting key subcontracting plan elements. Deficient in complying with FAR 52.219-8, Utilization of Small Business Concerns, and any other small business participation requirements in the contract/order. Did not submit Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate or timely manner. Failed to satisfy one or more requirements of a corrective action plan currently in place; however, does show an interest in bringing performance to a satisfactory level and has demonstrated a commitment to apply the necessary resources to do so. Required a corrective action plan.	To justify Marginal performance, identify a significant event that the contractor had trouble overcoming and how it impacted small business utilization. A Marginal rating should be supported by referencing the actions taken by the government that notified the contractor of the contractual deficiency.
(e) Unsatisfactory	Noncompliant with FAR 52.219-8 and 52.219-9, and any other small business participation requirements in the contract/order. Did not submit Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate or timely manner. Showed little interest in bringing performance to a satisfactory level or is generally uncooperative. Required a corrective action plan.	To justify an Unsatisfactory rating, identify multiple significant events that the contractor had trouble overcoming and state how it impacted small business utilization. A singular problem, however, could be of such serious magnitude that it alone constitutes an Unsatisfactory rating. An Unsatisfactory rating should be supported by referencing the actions taken by the government to notify the contractor of the deficiencies. When an Unsatisfactory rating is justified, the contracting officer must consider whether the contractor made a good faith effort to comply with the requirements of the subcontracting plan required by FAR 52.219-9 and follow the procedures outlined in FAR 52.219-16, Liquidated Damages-Subcontracting Plan.

Note 1: Plus or minus signs may be used to indicate an improving (+) or worsening (–) trend insufficient to change evaluation status.

Note 2: Generally, zero percent is not a goal unless the contracting officer determined when negotiating the subcontracting plan that no subcontracting opportunities exist in a particular socio-economic category. In such cases, the contractor shall be considered to have met the goal for any socio-economic category where the goal negotiated in the plan was zero.

PART 49—TERMINATION OF CONTRACTS

■ 11. The authority citation for 48 CFR part 49 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

49.402–8 [Amended]

■ 12. Amend section 49.402–8 by removing “42.1503(f)” and adding “42.1503(h)” in its place.

[FR Doc. 2013–18461 Filed 7–31–13; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 16

[FAC 2005–69; FAR Case 2013–011; Item IV; Docket 2013–0011, Sequence 1]

RIN 9000–AM16

Federal Acquisition Regulation; Repeal of Sunset for Certain Protests of Task or Delivery Order Contracts

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

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a section of the National Defense Authorization Act (NDAA) for Fiscal Year 2013. This section removes the sunset date for protests against certain orders under a task-order contract or delivery-order contract for title 10 agencies only.

DATES: *Effective:* September 3, 2013.

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202–208–4949, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202–501–4755. Please cite FAC 2005–69, FAR Case 2013–011.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are issuing this final rule to amend the FAR to implement section 830 of the 2013 NDAA (Pub. L. 112–239) enacted January 2, 2013, for agencies covered by title 10 of the United States Code, namely DoD, NASA, and Coast Guard.

This section removes the sunset date for protests against the issuance or proposed issuance of an order, valued at more than \$10 million, under a task-order contract or delivery-order contract for title 10 agencies only. The authority to protest the placement of such orders does not expire for DoD, NASA, and the Coast Guard. This rule does not affect title 41 agencies, which continue to have a sunset date of September 30, 2016.

II. Publication of This Final Rule for Public Comment Is Not Required by Statute

“Publication of proposed regulations”, 41 U.S.C. 1707, is the statute which applies to the publication of the FAR. Paragraph (a)(1) of the statute requires that a procurement policy, regulation, procedure, or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operation procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule is not required to be published for public comment because this rule reflects the statutory elimination of the sunset date for protest for title 10 agencies. The FAR revision informs the acquisition community of this change.

III. 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. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a significant FAR revision and 41 U.S.C. 1707 does not require publication for public comment.

V. Paperwork Reduction Act

The final rule does not contain any 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).

List of Subject in 48 CFR Part 16

Government procurement.

Dated: July 26, 2013.

William Clark,

Acting Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR part 16 as set forth below:

PART 16—TYPES OF CONTRACTS

■ 1. The authority citation for 48 CFR part 16 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

■ 2. Amend section 16.505 by revising paragraph (a)(10)(ii) to read as follows:

16.505 Ordering.

(a) * * *

(10) * * *

(ii) The authority to protest the placement of an order under (a)(10)(i)(B) of this section expires on September 30, 2016, for agencies other than DoD, NASA, and the Coast Guard (41 U.S.C. 4103(d) and 41 U.S.C. 4106(f)). The authority to protest the placement of an order under (a)(10)(i)(B) of this section does not expire for DoD, NASA, and the Coast Guard.

* * * * *

[FR Doc. 2013–18462 Filed 7–31–13; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 25 and 52

[FAC 2005–69; FAR Case 2013–009; Item V; Docket 2013–0009, Sequence 1]

RIN 9000–AM62

Federal Acquisition Regulation; Least Developed Countries That Are Designated Countries

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