May 23, 2000

Mr. David Muzio
Office of Federal Procurement Policy
Office of Management and Budget
Executive Office of the President
725 17th Street, N.W.
Washington, D.C. 20503

Re: Comments to OFPP’s "Best Practices for Using Current and Past Performance Information"

Dear Mr. Muzio:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments concerning the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section’s governing Council and substantive committees contain members representing these three segments, to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments related to acquisition regulations and the acquisition process under special authority granted by the Association’s Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

Summary of Comments

The Section offers the following comments relating to the final draft of OFPP’s Best Practices for Using Current and Past Performance Information (the “final draft”), which it received on April 7, 2000. Preliminarily, the Section continues to support the collection and use of past performance information in source selections because of the potential benefits to the Government in selecting better performing contractors, and in motivating contractors to improve performance in existing contracts.

The Section participated in the Government’s efforts to achieve a fair and effective past performance process by sponsoring and conducting a past performance survey of Government and private industry. The results of the survey were the basis of the Section’s May 6, 1999, proposed revisions to the Federal Acquisition Regulation (FAR) past performance provisions. The Section is encouraged that the final draft addresses many of the concerns raised in the past performance survey and the Section’s proposed FAR revisions. In particular, the Section strongly endorses the final draft’s overall emphasis on open communications with contractors and providing contractors the opportunity to be active participants in the evaluation process. Accordingly, our comments are limited to those areas in which the Section believes the final draft should provide additional guidance.

Specifically, the Section recommends that the OFPP consider providing additional guidance concerning the
following areas:

(1) Strongly encourage agencies to designate an impartial senior agency official who would be empowered to conduct independent reviews and resolve disagreements concerning past performance evaluations;

(2) Make explicit that adverse performance information that is the subject of claims or litigation should be considered in subsequent source selections only after the contractor has had the opportunity to comment on the nature of the claim during the source selection itself;

(3) Caution agencies that, absent clear abuse of the process, it is improper to downgrade or penalize a contractor because it actively pursued claims through the Contract Disputes Act claims resolution process;

(4) Strongly encourage source selection evaluators to diligently pursue inquiries directed to those references listed by offerors in their proposals until a response is obtained, and agencies to respond to requests for information;

(5) Advise agencies that existing performance-evaluation systems and reports should be used in the source selection process only if such systems and reports provide all necessary information to create a past performance record that is current, accurate, and complete; and,

(6) Provide guidance to agencies that private-sector references should be used only if such references do not have a conflict of interest and if any such data can be adequately verified through other sources.

The Section believes that its recommendations would improve the final draft by emphasizing the fairness principles inherent to public procurement. Fairness must be an essential element of the past performance process to ensure that: (i) the source selection authority will have the necessary confidence in the credibility of past performance assessments to rely on such assessments as a significant factor in the award decision; and (ii) an offeror will be encouraged to participate in government procurements by knowing that it will have a fair and meaningful opportunity to participate in the past performance evaluation process.

A contractor that disagrees with the Government’s evaluation of its past performance currently may challenge the evaluation, inter alia, through an administrative process by submitting to the agency "comments, rebutting statements, or additional information." FAR 42.1503. Although the FAR also provides for review of such information at "a level above the contracting officer to consider disagreements between the parties regarding the evaluation," the FAR states that the "ultimate conclusion on the performance evaluation is a decision of the contracting agency." FAR 42.1503.

The final draft in the last paragraph on page 12 simply restates the FAR provision without providing additional guidance concerning the need for impartiality or for removing the review process from the original evaluator’s chain of command and influence. The Section recommends that the final draft language be changed to strongly encourage agencies to designate an independent senior agency official who would be authorized to resolve disagreements concerning performance evaluations under FAR Part 42. An independent agency official would provide contractors access to a quick and inexpensive dispute-resolution process that would be independent of the organization and individuals that issued the challenged performance evaluation. The Section anticipates that most disagreements over performance evaluations could be resolved at the agency level, which would increase contractors' confidence in the process and ensure the fairness of past performance evaluations.

The FAR currently provides similar agency-level review processes -- by an impartial senior agency official who is independent of the contracting officer -- for (i) task order contracts and (ii) use of full and open competition. See FAR 16.505(a) ("The head of the agency shall designate a task order contract and delivery order contract ombudsman who shall be responsible for reviewing complaints from contractors."); FAR
6.502 ("Agency and procuring activity competition advocates are responsible for promoting the acquisition of commercial items, challenging requirements that are not stated in terms of functions to be performed, performance required or essential physical characteristics, and challenging barriers to the acquisition of commercial items and full and open competition such as unnecessarily restrictive statements of work, unnecessarily detailed specifications, and unnecessarily burdensome contract clauses.")

The Section's recommendation with regard to designation of an independent senior agency official to review past performance challenges is similar to the ombudsman requirement for task orders in FAR 16.505. Agencies should be encouraged to designate an independent senior official who would be responsible for reviewing complaints from contractors concerning past performance evaluations and to hold an administrative hearing if considered necessary by the official. To address contractors' concerns of impartiality and fairness, the final draft should state that the official should (i) not be in the contracting officer's or the evaluators' reporting chain and (ii) not have been involved in the challenged evaluation. Further, to ensure that the proposed process does not unnecessarily delay the completion of an evaluation, the agency should use its best efforts to resolve disagreements concerning evaluations within 30 days of the contractor's request for review by the independent senior agency official. Finally, the independent senior agency official could also be the agency's competition advocate.

One of the most troublesome issues concerning past performance evaluations is the extent to which source selection officials should consider negative evaluations when there are pending claims or litigation involving the contract upon which the evaluation is based. During the FAR 15 Rewrite process, contractors expressed concern that it would be unfair for source selection officials to rely on such evaluations, arguing that such evaluations should not be used when the underlying performance of the parties is in dispute or being litigated (e.g., when the contractor has received a negative performance evaluation that reflects what the contractor contends were performance problems caused by the Government's constructive change orders). 62 Fed. Reg. 51224, Sept. 30, 1997. The FAR Council disagreed on the grounds that exclusion of performance evaluations that are the subject of litigation would encourage contractors to file claims just to keep the Government from using the negative evaluations in future source selections. Id.

The Section agrees that an outright prohibition on the use of disputed information potentially could result in an increase in litigation to prevent the Government from using an otherwise valid negative assessment. The Section believes, however, that such information should be considered only if the contractor is permitted to comment on the nature of the claim during the source selection process. The Section's position is consistent with the spirit of FAR 15.306, which mandates that contractors must have an opportunity to address adverse past performance information to which the contractor has not had a prior opportunity to respond. Nevertheless, the current FAR language is inadequate to address the particular situation in which the underlying performance is in dispute and is being litigated. In that situation the requirement for the contractor to have had an opportunity to address the adverse information may have been satisfied -- before the litigation commenced or before the contractor fully appreciated Government causes of the allegedly poor performance -- through the contractor's rebuttal submitted pursuant to FAR 42.1503. The result would be that the Government could use the adverse information -- and the contractor's incomplete or outdated rebuttal -- in a subsequent source selection without providing any additional opportunity for the contractor to address and update the information.

Therefore, to ensure fairness and the integrity of the source selection process, the Section believes that the final draft's language concerning Evaluating Past Performance on page 22 should be amended to explicitly state that adverse performance information that is the subject of a claim or litigation should not be considered in subsequent source selections unless the contractor has been provided the opportunity to comment on the nature of the claim during the source selection itself. Further, past performance evaluations that are the subject of a claim or litigation should be appropriately marked by the agency as long as the litigation is pending.

FAR Part 33.2 implements the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-612 (CDA), which authorizes contractors to pursue claims against the Government, among other matters, when there is disagreement regarding the scope or cost of unanticipated changes to contract performance requirements. The claims process is absolutely essential to achieve fundamental fairness in the Government procurement process.
process in response to Government action or inaction that results in increased contractor costs of performance. Moreover, the statutory claims process is a fundamental right granted the contractor in recognition of its obligation to continue contract performance pending resolution of any claims. See FAR 33.213. Accordingly, there is concern among contractors that evaluation of past performance under the "business relations" criterion potentially could result in a chilling of the contract claims process if agencies downgrade or penalize contractors for exercising their CDA rights by filing valid claims.

The General Accounting Office (GAO) specifically addressed this issue in Nova Group, Inc., B-282947, Sep. 15, 1999, 99-2 CPD ¶ 56. In that case, the GAO held that the agency had improperly downgraded the offeror’s past performance business relations rating based on its history of filing nine claims over fifteen years for alleged changes to the contract requirements. The GAO stated that the evaluation essentially penalized the contractor for using the CDA prescribed claims resolution process:

Nor would such consideration be proper, given that the protester was merely using the framework for resolving such disputes that Congress established in the Contract Disputes Act. We think that it would be improper for contracting agencies to impose evaluation penalties merely for an offeror's having availed itself of the contract claims process, such as occurred here; imposing such penalties would create barriers to legal remedies created by Congress.

Id. at 9.

The Section believes that the final draft should be modified in two areas to reflect this guidance from the GAO. First, language should be added to the final draft on page 22 to provide explicit guidance to agencies on this issue. The final draft should emphasize that, unless the contractor has clearly abused the claims or disputes process, submitting requests for equitable adjustment or claims under the CDA should not be used to evaluate business relations or the offeror’s past performance in any respect.

Second, in Appendix III (Performance Rating Guidelines), the last bullet under each of the ratings for Business Relations should be modified to eliminate the presumption that multiple change proposals on a contract necessarily reflect poor contractor performance. Changes occur on contracts for many reasons, including Government actions or inactions for which the contractor is entitled to equitable relief under the terms of the contract. Obviously, a contractor should not be penalized for submitting numerous change proposals if the Government has significantly changed the contract.

The Section recommends that, rather than focusing on the number of change proposals submitted (and on whether the contractor sought cost adjustments for those changes), the final draft focus instead on whether the contractor contributed to the efficient and effective administration of changes to the contract (e.g., timely notice of changes, timely and complete submission of proposals, timely definitization of change proposals). Emphasis on the procedural aspects of change administration covers matters within a contractor’s control and, unlike the number of changes to a contract, are an appropriate element in the evaluation of past performance.

Another fairness concern that the Section strongly believes should be addressed in the final draft relates to agencies’ obligation to share past performance information with other departments and agencies. The FAR requires agencies to actively participate in the use of past performance information in the source selection process:

Departments and agencies shall share past performance information with other departments and agencies when requested to support future award decisions. The information may be provided through interview and/or by sending the evaluation and comment documents to the requesting source selection official.

FAR 42.1503(c).

Unfortunately, agencies do not always honor this obligation; their failure to do so can result in offerors providing past performance references that do not respond when contacted by the source selection
evaluation members. Such failure to respond potentially deprives the offeror of any competitive advantage it may have attained through favorable performance on other Government contracts. It also undermines the credibility of the process and defeats the entire purpose of the past performance initiative.

The GAO addressed this issue in Advanced Data Concepts, Inc., B-277801.4, Jun. 1, 1998, 98-2 CPD ¶ 145. In that case, the offeror listed three references, two of whom were contracting officers within the procuring agency. When none of the references responded to the procuring agency’s questionnaires, the offeror received a “neutral” rating. The protestor argued that the agency’s failure to take steps to ensure that the references returned the questionnaires violated the letter and the spirit of FAR 42.1503(c). Although GAO held that the agencies in question were not subject to the FAR provision, it did state that the protestor was correct that FAR 42.1503(c) requires agency personnel to answer past performance inquiries. Id. at n.6.

Consistent with the letter and spirit of FAR 42.1503(c) and its interpretation by the GAO, the Section recommends that language be added to the final draft in two places to address this issue. First, on page 20, language should be added to numbered paragraph 14 requiring source selection evaluators to diligently pursue inquiries to listed references until a response is obtained (e.g., "If no response is received to a written survey or request for information, a member of the source selection team should diligently follow up with the non-responding agency until an adequate response is received.") Similar language should be added on page 23 in numbered paragraph 1.

The Section also recommends that language be added to the final draft on page 19, numbered paragraph 9, encouraging source selection evaluators to obtain information from references that is based on direct knowledge of the contractor’s performance. Simply contacting the Contracting Officer of a listed reference may result in third- or fourth-hand information being passed along, which may not be as meaningful as information based on direct knowledge.

The final draft states in two places, on pages 3 and 8, that agencies may use existing performance-evaluation systems and reports as the basis for the past performance evaluations required by FAR Part 42. For example, at page 3, the final draft states:

Agencies should make the performance evaluation process a seamless part of the normal contract administration process. Systems in place that meet or exceed FAR Part 42 requirement [sic] do not need to be changed. Reports prepared by award fee boards, from earned value management system reports or other similar contract administration records, may be used as the past performance record. Separate reports are not required. The additional work needed to make these reports formal performance reports is to include contractor discussion and comment on the evaluation, and file it for source selection use.

The Section agrees that past performance evaluations should be consistent with other contractor evaluations performed during contract administration. In addition, the Section agrees that using these other systems and records as a data source for the evaluations required by FAR Part 42 is good practice.

The Section disagrees, however, with the suggestion that, in many cases, these reports can serve as a substitute for the evaluation process required by FAR Part 42. The range of information needed to thoroughly assess a contractor’s past performance (e.g., the information required to complete the Sample Contractor Performance Report in Appendix I of the final draft) may not be available in existing systems and reports.

Thus, an agency that simply relies on existing systems and records, without a considered decision as to whether such systems and records provide all necessary information, may fail to create a past performance record that is current, accurate, and complete. In addition, because one agency may not be familiar with another agency’s internal systems and records, the use of existing reports -- without an attempt by the contracting agency to summarize the data or make qualitative judgments regarding the significance and meaning of the data -- may confuse and impede the source selection process.

The recommended use of "earned value management system reports" is illustrative of this potential
problem. Many contracts require the submission of contract status reports based on "earned-value" management systems, but neither these reports nor the agency's evaluation of such reports would be an adequate substitute for a thorough past performance evaluation. Thus, at a minimum, the term "earned value management system reports" should be defined more precisely to reflect the OFPP's intent in this area.

More broadly, however, the Section recommends that the OFPP make clear that agencies should use existing systems and records as a starting point or basis for preparing past performance evaluations, but should not use such reports as a substitute for the FAR Part 42 process. The past performance process can be fair and effective only if the "input" data are accurate and complete. Thus, the creation of "shortcuts" through the process--now matter how well-intentioned--threatens the integrity and effectiveness of past performance evaluations.

FAR 15.305(a)(2)(ii) requires solicitations to provide offerors an opportunity to identify past or current contracts or subcontracts with Federal, State, and local governments, as well as with private-sector companies. This guidance is reflected in the final draft at page 19 (numbered paragraph 6).

The Section recommends that OFPP consider adding guidance on the use of private-sector references when such references may have a conflict of interest. Such a conflict can arise where, for example, Company A lists Company B as a reference on a particular procurement, yet Company B is competing against Company A on the procurement. Obviously, the risk in such a case is that Company B's objectivity may be impaired and its evaluation of Company A may be unreliable.

The Section believes that source selection teams should be sensitive to such conflicts and should take action to ensure the reliability of any evaluation generated in such circumstances.

The Section recommends the following clarifications to specific passages in the final draft:

a. Page 11: The last sentence of the first paragraph on "End User Feedback" states, "The contract requirements may be changed, if reasonable." The Section suggests that this sentence be clarified to state, "The contract requirements may be changed, if reasonable, in accordance with the 'Changes' clause of the contract."

b. Page 13: The first sentence of the second paragraph states, "The complete evaluations may be filed in the contract file, in a separate file, or automated database where they can be readily accessed by contracting office personnel." The Section suggests that this sentence be clarified to state, "The complete evaluations, including any contractor response or rebuttal, may be filed in the contract file, in a separate file, or automated database where they can be readily accessed by contracting office personnel."

c. Page 21: The first sentence of the second paragraph on "Subcontractor/Team/Joint Venture Partner's Past Performance" states, "It is risky to rely on the past performance of a subcontractor/team/joint venture partner to downgrade the predicted performance of a prime contractor. Before downgrading based on the poor past performance of these entities, consider their contribution to the overall proposed effort and the likely impact of the predicted risky or poor performance." The Section suggests that the above quote should be clarified to note that the joint venture itself may be the prime contractor and, in that situation, the past performance of the participants in the joint venture should be considered.

Conclusion

Given the growing influence of past performance in federal procurement, and the significance that an adverse evaluation can have on a contractor's business prospects, the fair collection and use of past performance information is critical to the integrity of the acquisition process. The Section believes the foregoing recommendations balance the interests of both contractors and the Government in this regard. The Section encourages OFPP to periodically review and update its past performance guidance to continue refining and improving the process.

The Section appreciates the opportunity to provide these comments and is available to provide additional
information or assistance as you may require.

Sincerely,

Rand L. Allen, Chair

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