Dear Ms. Fudge:

On behalf of the American Bar Association (“ABA”) Section of Public Contract Law (“Section”), I am submitting comments on the Notice cited above.1 The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The views expressed herein are presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the position of the ABA.2

1 Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Marian Blank Horn, Kristine Kassekert, and Heather K. Weiner, members of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

2 This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic “Small Business and Socioeconomic Issues.”
I. COMMENTS

The Section is pleased to offer comments on the Small Business Administration (“SBA”) Subcontractor Past Performance Pilot Program. Some comments are specific to the Supplementary Information in the Notice, while others are specific to SBA Form 2465 version 4-18 (the “Form”). The Section believes that the Pilot Program is a great concept that could benefit small businesses, large businesses teaming with small businesses, non-traditional government contractors, and the Government as a whole. The Section provides comments concerning a few matters that SBA may want to consider in implementing the Pilot Program, together with some issues that, if clarified, would improve implementation.

A. Clarify in the Notice (or Regulations, if any) That the Subcontractor Should Suggest a Rating on the CPAR Form.

Consistent with 15 U.S.C. § 637(d)(17), the Form clearly states that the small business subcontractor should provide suggested ratings when applying for a Contractor Performance Assessment Report (“CPAR”) under the Pilot Program. The Notice does not refer to this instruction, however. If the SBA intends for the Notice to serve as the guideline for subcontractors applying to the Pilot Program, or if the SBA intends to issue regulations consistent with the Notice, the Section recommends revising the Notice or drafting those regulations to include the instruction to provide suggested CPAR ratings.

B. Provide a Process for a Subcontractor to Confirm that Its Subcontract Is Under a Covered Contract Before Applying to the Pilot Program.

According to the Form, Notice, and § 637(d)(17), to be eligible for the Pilot Program the subcontractor must be a small business performing a subcontract under a prime contractor’s contract requiring it to provide and comply with a small-business subcontracting plan (“Covered Contract”).3 However, a small business subcontractor may not know whether its subcontract falls under such a Covered Contract. The Section recommends that SBA provide a means by which a subcontractor can confirm that its subcontract is in fact under a Covered Contract.

Specifically, the Section recommends that SBA create a procedure by which a small business subcontractor can submit a request to the Appropriate Official (who would appear to be the person who must confirm a subcontractor’s eligibility) to confirm that the subcontract at issue is under a Covered Contract before the subcontractor submits the Form. This would avoid subcontractor and government efforts to pursue the application and review process for ineligible subcontractors.

3 The statute appropriately does not distinguish between those subcontractors that prime contractors choose to include in indirect costs applicable to the Covered Contract and subcontractors that prime contractors choose to bill directly to the Covered Contract; both are eligible under the Pilot Program.
C. **Clarify That a Procuring Authority May, but Need Not, Consider a CPAR Issued Under the Pilot Program.**

Section 637(d)(17) provides that “[a] small business subcontractor may use a past performance rating given under this paragraph to establish its past performance for a prime contract.” The Section recommends that SBA clarify whether procuring activities must consider small businesses’ CPARs issued under the Pilot Program when those small businesses compete for prime contracts (similar to 13 C.F.R. § 124.513(f)). Because a CPAR might not be relevant to the work solicited in a later competition, and because in some source selections agencies consider only past performance examples reflecting work as a prime contractor, the Section recommends that SBA clarify that consideration is not mandatory. This clarification will help avoid potential bid protests involving interpretations of this issue for prime contract procurements.

D. **Clarify That a Subcontractor Can Receive Multiple CPARs as a Subcontractor Under the Pilot Program.**

According to the Form, Notice, and § 637(d)(17), to be eligible for the Pilot Program the subcontractor must not have received a CPAR previously as a prime contractor. But none of these references state whether a subcontractor can receive multiple CPARs under the Pilot Program. In other words, the Form, Notice, and § 637(d)(17) leave open whether receiving a single CPAR under the Pilot Program makes that subcontractor ineligible to receive any more CPARs under the Pilot Program.

The statute itself does not seem to preclude the issuance of multiple CPARs under the Pilot Program. The Section recommends that SBA clarify in the Notice or any implementing Regulations, and on the Form, that a subcontractor can receive multiple CPARs under the Pilot Program. Without this clarification, there is a risk that some Appropriate Officials might be uncertain about whether multiple CPARs are permitted, leading some to deny small businesses the opportunity to help document a past performance history in a manner consistent with the statute. Providing this clarification will help ensure that the Pilot Program is implemented in a consistent and equitable manner across interested subcontractors.

E. **Clarify the Meaning of a Rating That is Neither Favorable Nor Unfavorable.**

According to the Form, Notice, and § 637(d)(17), if there is disagreement on the rating to be provided, the Appropriate Official is to enter a rating into the Contractor Performance Assessment Reporting System that is neither favorable nor unfavorable. But there is no guidance as to what rating would be given that would be neither favorable nor unfavorable. The Section recommends that SBA add a “Neutral” rating to the Form to serve this purpose, because a “Satisfactory” rating might be viewed as favorable by a source selection official, while a “N/A” rating might incorrectly indicate to a source selection official that the category did not apply to the subcontract at issue. A “Neutral” rating, in contrast, avoids these uncertainties.
F. Focus on Future Expansion to Small Business Subcontractors with a Previous CPAR as a Prime Contractor.

Although § 637(d)(17) limits the Pilot Program to small business subcontractors that do not already have a CPAR as a prime contractor, the Section recommends that SBA conduct the Pilot Program with an eye towards including small business subcontractors even if they already have a CPAR as a prime contractor. Past performance ratings in the Contractor Performance Assessment Reporting System are generally reliable and provide a somewhat uniform currency of reviews for source selection officials to consider. Further, in many procurements, the procuring official seeks more than one past performance reference. Small businesses often have fewer ratings in the Contractor Performance Assessment Reporting System, and thus source selection officials have less information upon which to base their past performance evaluations. Providing an opportunity for a small business to accumulate multiple ratings in the Contractor Performance Assessment Reporting System helps small businesses accumulate these ratings to establish their credentials, and it also allows source selection officials access to more information to enable them to make better informed decisions.

Furthermore, the fact that a small business subcontractor has a past CPAR as a prime contractor does not mean that it has an established past performance record with universal application, given that the CPAR is unlikely to be relevant to all work the small business intends to bid in the future. In the event the SBA determines that it is constrained by statute in this Pilot Program, the Section encourages SBA to plan for expanding the program’s reach after the initial pilot phase.

G. Publicize the Pilot Program to Ensure it is Fully Utilized.

The Section believes that this Pilot Program can benefit both the Government and contractors. But the Section is concerned that if SBA does not intend to issue implementing regulations, the Pilot Program will be underutilized for lack of awareness regarding the program. Accordingly, the Section encourages SBA to take active steps to publicize the Pilot Program both within SBA and in the contracting community.

II. CONCLUSION

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

Aaron Silberman  
Chair, Section of Public Contract Law

cc:  
Kara M. Sacilotto  
Linda Maramba  
Susan Warshaw Ebner  
Annejanette Heckman Pickens  
Council Members, Section of Public Contract Law  
Chairs and Vice Chairs, Small Business & Other Socioeconomic Programs Committee  
Craig Smith  
Samantha S. Lee