October 7, 2013

VIA REGULATORY PORTAL AND FACSIMILE

U.S. General Services Administration
Regulatory Secretariat Division (MVCB)
ATTN: Hada Flowers
1800 F Street NW, Second Floor
Washington, DC 20405-0001


Dear Ms. Flowers:

On behalf of the Section of Public Contract Law ("Section") of the American Bar Association ("ABA"), I am submitting comments in the above-referenced proposed rulemaking. 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. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.1

The Section is authorized to submit comments on acquisition regulations under special authority granted by the ABA’s Board of Governors. The views expressed herein 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 policy of the ABA.2

I. INTRODUCTION

The Section applauds the Federal Acquisition Regulation ("FAR") Council for issuing proposed regulations that afford the public the opportunity to provide comments

---

1 Sharon L. Larkin, Section Chair, Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, Jeri Kaylene Somers, Section Budget and Finance Officer, Candida S. Steel, and Anthony N. Palladino, members of the Section 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 under the topic "Performance Issues, Including Past Performance" at: http://apps.americanbar.org/contract/federal/regscomm/home.html.
on this important issue in advance of interim or final regulations. The proposed rule implements the statutory mandate to shorten the time period for contractors to submit comments on past performance evaluations from 30 to 14 days. As noted below, the Section is concerned that the proposed rule fails to make clear that the agency past performance evaluation will not be entered until after the contractor has an opportunity to submit its comments during the specified 14-day period, and it fails to set a deadline for the agency to update past performance information when contractor comments are submitted after the 14-day period. The Section believes that clarifying these ambiguities, to assure that agencies provide the contractor an opportunity to comment prior to the posting of the past performance evaluation in the system and that agencies update past performance information within a reasonable time period to include in the past performance databases any contractor comments provided after the 14-day period, will improve the reliability and relevance of past performance information used by source selection officials.

II. BACKGROUND

The proposed rule implements section 853 of the National Defense Authorization Act (“NDAA”) for Fiscal Year (“FY”) 2013, Pub. L. No. 112-239, and section 806 of the NDAA for FY 2012, Pub. L. No. 112-81. Sections 853 and 806 require revisions to the FAR and Department of Defense (“DoD”) FAR Supplement (“DFARS”) requiring that “contractors are afforded up to 14 calendar days . . . from the date of delivery” of past performance evaluations “to submit comments, rebuttals, or additional information pertaining to past performance” for inclusion in past performance databases. Sections 853 and 806 further provide that agency evaluations of contractor performance, including any information submitted by contractors, be “included in the relevant past performance database not later than the date that is 14 days after the date of delivery of the information” to the contractor.

The purpose of these new requirements, as described in the legislative history of the NDAA for FY 2012, is to “ensur[e] that timely, accurate, and complete information on contractor performance is included in past performance databases used for making source selection decisions.” H. R. Rep. No. 112-329, at 664; S. Rep. No. 112-26, at 137. The Senate Report for the NDAA for FY 2012 cited a January 2011 memorandum from the Administrator for Federal Procurement Policy, which highlighted the “need to improve the quantity and quality of information available [in past performance databases] so that source selection officials have greater confidence in the reliability and relevance of the information there.” S. Rep. No. 112-26, at 138.

The Senate Report also cited the February 2011 Interim Report of the Commission on Wartime Contracting in Iraq and Afghanistan, which found that agency failure to record contractor performance in official databases in a timely manner increases the risk of agencies’ awarding contracts to habitual poor performers. Id. According to the Report:

Federal past-performance policy provides for a lengthy comment, rebuttal, and review process, in which government officials and
contractors record their database input sequentially. To avoid the delays these policies and procedures can create, government officials sometimes make an unduly generous assessment—or no assessment at all—of the true quality of contractors’ performance.

Id. (quoting Commission on Wartime Contracting in Iraq and Afghanistan, Second Interim Report to Congress 46 (Feb. 24, 2011)).

III. COMMENTS

The proposed FAR rule and its congressional authority are well intentioned in their pursuit of more timely access to contractor performance information for source selection decisions. Two aspects of the proposed rule and its underlying statutes, however, could undermine their fundamental goal of ensuring that “timely, accurate, and complete information on contractor performance is included in past performance databases used for making source selection decisions.” H. R. Rep. No. 112-329, at 664; S. Rep. No. 112-26, at 137.

As stated in the proposed rule, past performance evaluations submitted by agencies to the Contractor Performance Assessment Reporting System (“CPARS”), “including any contractor-submitted information (with indication whether agency review is pending), are automatically transmitted to [the Past Performance Information Retrieval System (“PPIRS”)] . . . not later than 14 days after the date on which the contractor is notified of the evaluation’s availability for comment.” Proposed FAR 42.1503(f). The proposed rule also provides that “[t]he Government shall update PPIRS with any contractor comments provided after 14 days, as well as any subsequent agency review of comments received.” Id. Consistent with their statutory mandate, the proposed FAR revisions shorten the time period for a contractor’s submission of input on evaluations in CPARS from 30 to 14 days. Nevertheless, the proposed rule does not 1) make clear that the agency’s past performance evaluation will not be posted until the agency provides the contractor the opportunity to submit comments within 14 days; or 2) set a deadline for the agency’s update of the past performance information when contractor comments are submitted after the 14-day period. The proposed rule also does not require the Government to timely revise a past performance evaluation in PPIRS if the Government determines, after the 14-day period expired, that it was in error.

With regard to when the posting of the agency past performance evaluation will occur with respect to the stated 14-day period, the regulation is ambiguous. Under the prior regulation, the contractor was afforded at least 30 days to submit comments and the agency process permitted it the ability to wait to obtain, review and consider these comments before posting an evaluation. Proposed FAR 42.1503(f), providing that the agency post the evaluation “not later than 14 days after the date on which the contractor is notified” of the evaluation, creates a significant, and we think unintended, ambiguity as to whether the rule permits the agency to post its evaluation before receiving the contractor comments within this 14 day period. We recommend that the FAR Council
clarify the rule to ensure that contractors are afforded the opportunity to have their comments meaningfully considered before a performance evaluation is posted, and the agency is provided a date certain to post its evaluation. Specifically, the Section recommends that the FAR Council clarify the regulation to provide that the agency will not post the evaluation until it affords the contractor the opportunity to submit its comments within this 14 day period, or if no contractor comments are forthcoming, at the end of the 14 day period. This clarification will ensure that contractors have the opportunity to provide their input before an evaluation is entered, and it also will ensure that the agency has the benefit of receiving and considering these comments, at least on an initial basis, before it posts an evaluation for use in other procurements.

With regard to later contractor submissions, or agency revisions, we also recommend clarification of the regulation. While an agency update is pending—which time period could be unlimited in duration under the proposed rule—neither the contractor’s comments, its requests for higher level review, a meeting, or further submissions (submitted after the 14-day initial period), nor the agency’s review of such requests, comments or submissions will be noted or available in PPIRS. Consequently, source selection decisions that rely on evaluations in PPIRS during this time period may be compromised by incomplete and potentially inaccurate contractor performance information—precisely the situation Congress intended to avoid. Moreover, contractors may be subjected to an unfair competitive disadvantage if the past performance information used in the evaluation of offers does not include comments submitted by contractors after the 14-day initial period or Government updates based on such comments, because the agency has not promptly updated PPIRS.

To address this gap in the proposed rule, the Section recommends that the final rule include a deadline by which the Government shall update PPIRS with any contractor comments provided after the initial comment period, as well as any subsequent agency review of comments received, within 14 days of receipt of such additional comments. A 14-day deadline for agency updates to PPIRS would be reasonable, given the similar time period for contractor comments on the CPARS evaluations. In the alternative, the proposed rule should require that the Government update PPIRS to include the current status of the evaluation review process (e.g., to note that a contractor has submitted additional comments or requested higher level review) and to include the submissions and final evaluations “promptly” or “within a reasonable time.” In this way, source selection officials actually can “have greater confidence in the reliability and relevance of the [PPIRS] information,” S. Rep. No. 112-26, at 138, and contractors can be assured of the fair evaluation of their past performance information when competing for contract awards.
IV. Conclusion

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

Sincerely,

Stuart B. Nibley
Chair-Elect, Section of Public Contract Law

cc:
Sharon L. Larkin
David G. Ehrhart
James A. Hughes
Jeri Kaylene Somers
Council Members, Section of Public Contract Law
Chairs, Claims and Disputes Committee
Chairs, Acquisition Reform and Emerging Issues Committee
Kara M. Sacilotto
Craig Smith