November 5, 2012

VIA REGULATORY PORTAL AND FACSIMILE

General Services Administration, Regulatory Secretariat (MVCB)
ATTN:  Hada Flowers
1275 First Street NE., 7th Floor
Washington, DC  20417


Dear Ms. Flowers:

On behalf of the Section of Public Contract Law of the American Bar Association (“the Section”), I am submitting comments on the above-referenced Proposed Rulemaking: FAR Case 2012-009; Documenting Contractor Past Performance, 77 Fed. Reg. 54864 (Sept. 6, 2012) (hereinafter “Proposed Rule”). The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees have 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 Association’s Board of Governors. The views expressed herein have not been approved by the House of Delegates or the

¹ Jeri K. Somers and Sharon L. Larkin, Section Officers, and Elizabeth M. Grant and Candida Steel, 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.
Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.2

I. INTRODUCTION

As part of its ongoing effort to implement the recommendations from the Government Accountability Office (“GAO”) Report entitled “Better Performance Information Needed to Support Agency Contract Award Decisions,” GAO-09-374, and the Office of Federal Procurement Policy (“OFPP”) memorandum entitled “Improving the Use of Contractor Performance Information” (dated July 29, 2009), the FAR Council requested public comments on a proposal to remove the appeal process set forth at FAR 42.1503(d) “to improve economy and efficiency.” 77 Fed. Reg. 54865. In particular, the FAR Council requested comments on whether removing a contractor’s right to seek review of past performance ratings at a level above the Contracting Officer “would improve or weaken the effectiveness of past performance policies and associated principles of impartiality and accountability.” Id.

As discussed below, although the Section appreciates the FAR Council’s desire to increase economy and efficiency in the procurement process, the Section is concerned that the proposal to eliminate a contractor’s right to an administrative review of adverse past performance findings could have the opposite effect and may reduce economy and efficiency. It could also have unintended consequences that undermine the accountability, transparency, and fairness of the federal procurement process.

The current process under FAR Subpart 42.15 allows contractors to request an administrative review of adverse past performance ratings at a level above the Contracting Officer. It provides contractors a relatively expeditious, efficient, and low-cost mechanism to resolve disputes in a streamlined administrative process. The Section believes that the proposal to eliminate that process would increase the likelihood of costly and disruptive litigation, and undermine confidence in the past performance evaluation process among not only the contractor community but also within the Government. Furthermore, the proposed change likely would weaken the effectiveness of past performance procedures by reducing administrative oversight and accountability, which could in turn undermine the appearance of a past performance reviewer’s impartiality or make the past performance evaluation process vulnerable to abuse.

2 This letter is available in pdf format under the topic “Performance Issues, Including Past Performance” at: http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html.
II. COMMENTS

A. The Right To A Review At A level Above the Contracting Officer Is A Basic Best Practice For Good Contract Administration.

Under the existing FAR 42.1503(b), agencies are required to furnish evaluations of contractor performance to the contractor and provide an opportunity for the contractor to submit “comments, rebutting statements, or additional information.” In addition, “[a]gencies shall provide for review at a level above the contracting officer to consider disagreements between the parties regarding the evaluation.”

Various authorities, including the U.S. Court of Appeals for the Federal Circuit, have recognized that the administrative review process afforded by a review at a level above the Contracting Officer is a basic best practice in the federal acquisition process. The Section agrees with this view. During the course of contract performance, the contractor and the Contracting Officer may become entrenched in their views of how the contractor has performed under the contract. The current review procedures provide contractors a valuable avenue for recourse in cases where past performance evaluations include inaccurate or incomplete information, but the contractor is unable to resolve disputes directly with the Contracting Officer via comments, rebuttal statements, or submission of additional information. The review process also benefits the Government, allowing the Government a more impartial audience to hear both parties’ sides of the past performance story. Most important, the opportunity for streamlined internal higher-level agency review of disputed past performance evaluations helps contractors and the Government by avoiding other formal dispute resolution processes, such as litigating claims under the Contract Disputes Act (“CDA”). Litigation is not only costly and resource-intensive for all parties, it may also force the parties into hardened positions that prevent meaningful discussion of the facts or negotiated resolution of disputes.

In Bannum, Inc. v. United States, 404 F.3d 1346, 1351 (Fed. Cir. 2005), the Federal Circuit discussed the benefits of an internal agency review of past performance evaluations at a level above the Contracting Officer. The court emphasized that the reviewing official should be familiar with the contract, and capable of ensuring against mistakes or potential bias in the Contracting Officer’s evaluation:

The FAR specifically required the [agency] to “provide for review at a level above the contracting officer to consider disagreements between the parties
regarding the evaluation.” FAR § 42.1503(b). By its plain terms, a review “at a level above the contracting officer” contemplates review by a person with authority to direct the contracting officer’s response. [. . . ]

The regulation explains that the review is provided “to consider disagreements between the parties regarding the evaluation.” FAR § 42.1503(b). Since “[t]he ultimate conclusion on the performance evaluation is a decision of the contracting agency,” the review plainly is intended to account for any bias or mistake in the contracting officer’s review. But since the agency’s ultimate decision on any dispute necessarily involves evaluating the contracting officer’s review of the contract, the reviewing authority should be someone familiar with the contract, the history of its implementation, and the particular concerns of both the contracting officer and the contractor in performing the contract. Someone in a supervisory or decision-making role in relation to the contracting officer complies with this regulatory requirement.

This understanding comports with guidance from the Office of Federal Procurement Policy (“OFPP”) concerning the contractor’s right to have performance evaluations reviewed. In language that mirrors FAR § 42.1503(b), a 1992 Policy Letter explains that if evaluation is done by a contracting officer, contractors have a right to discuss such evaluation “with the head of the contracting activity.” [. . . ] In other words, the regulation specifies a supervisory role at least inasmuch as the reviewer has authority to settle disputes between the contracting officer and the contractor.

Id. at 1351-52 (emphasis added). 3 The Federal Circuit then cited Nash & Cibinic and other government contract authorities who favorably view the internal review

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procedure and equated the appeal procedure to prior government guidance calling “active dialogue” about a contractor’s ongoing contract performance a “basic best practice for good contract administration.” *Id.* at 1352 (quoting 68 Fed. Reg. 28095 (May 22, 2003)).

The Section concurs in the view that review at a level above the Contracting Officer facilitates active dialogue between a contractor and the procuring agency during contract performance and helps reduce disputes regarding past performance evaluations. The process gives contractors confidence that there is accountability and transparency in the evaluation process, and operates as a potential “check and balance” against those situations where a Contracting Officer may take a position that is unreasonable and inconsistent with a fair assessment of the contractor’s performance (or where a Contracting Officer may suffer from possible bias). For the Government, the process not only avoids disputes, it affords the Government more control over the evaluation process and ensures that the ultimate evaluation most accurately reflects the quality of the contractor’s performance so that the Government can rely on that assessment for future procurements. In short, the process improves the fairness, accuracy, and integrity of the past performance evaluation process, while avoiding potential disputes, through a timely, expedient, efficient, and low-cost review process.


As noted, the Section is concerned that removing an important “check and balance” in the past performance evaluation process could undermine contractor confidence in the fairness and impartiality of past performance evaluations and the contractor’s ability to have its concerns fairly heard and addressed in disagreements with the Contracting Officer. This could reduce transparency in the past performance evaluation process and increase contractor perceptions of Contracting Officer unfairness, partiality, or even bias.

Ultimately, one unintended consequence of eliminating the administrative review procedure at a level above the Contracting Officer may be an increase in contractor disputes under the CDA. Resolution of disputes through the CDA appeal process, as opposed to an administrative process within the agency at a level above the Contracting Officer, will inevitably result in more cumbersome, formal, time-consuming, and expensive dispute resolution for both contractors and the Government. In many cases, such litigation could involve routine past performance issues that are currently addressed internally by the agency during the review process under FAR 42.1503. To the extent that the FAR Council asked whether
removing the internal review process would improve “economy and efficiency,”
the Section is concerned that such a change would force contractors to pursue relief
under the CDA as their sole avenue for review, which would be impractical. The
Proposed Rule would require contractors and the Government to address past
performance evaluation issues in a litigation forum, using a process separate from
the ongoing contract administration process, and prevent real-time resolution of
contractor disputes over evaluations. Indeed, once litigation proceeds at a Board of
Contract Appeals or the Court of Federal Claims (“COFC”), the Contracting
Officer and the contractor may cede control of the dispute to litigation counsel, and
the Court or the Board may be the ultimate arbiter of the dispute, rather than the
procuring agency.

If contractors no longer have an opportunity to seek administrative review
of past performance ratings at a level above the Contracting Officer, they will likely
rely increasingly on the CDA to obtain judicial review of these disputes. In recent
years, both the COFC and the Boards have held that, under certain circumstances,
they have jurisdiction under the CDA to hear disputes related to past performance
evaluations. Indeed, the Federal Circuit has held that the COFC can hear such
challenges even if there is not a particular contract clause at issue. Specifically, in
Todd Construction, L.P. v. United States, 656 F.3d 1306 (Fed.Cir.2011), the
Federal Circuit affirmed the jurisdiction of the COFC to hear a challenge to a
negative past performance evaluation, treating such a challenge as a cognizable
claim under the CDA and the Tucker Act. The court held that performance
evaluations are intrinsic to the performance under the contract, and therefore
evaluations may be the subject of a claim whether or not the contract contains
explicit terms relating to performance evaluations. Since the court’s decision, other
contractors have pursued CDA claims at the COFC involving past performance
evaluations. Absent an administrative option at a level above the Contracting
Officer, the Section is concerned that such claims would proliferate.4

4 Likewise, contractors could also pursue CDA claims at the Boards with greater
frequency. Although for many years the Boards held that challenges to past
performance evaluations were not “claims” within the scope of the CDA, recent
decisions show that the Boards continue to examine this issue. For example, in
Sundt Constr., Inc., ASBCA No. 56293, 09-01 BCA ¶ 34084 (2009), the Armed
Services Board of Contracting Appeals held that the Board has jurisdiction over
CDA claims involving the alleged breach of a specific contract provision governing
performance evaluations. In light of the Federal Circuit’s decision in Todd
Construction, contractors may increasingly attempt to pursue CDA claims at the
Boards to resolve past performance evaluation disputes.
III. CONCLUSION

In sum, the Section is concerned that removing the contractor’s right to seek administrative review of past performance evaluations at a level above the Contracting Officer will decrease efficiency, transparency, impartiality, and accountability in the past performance evaluation process. The current review process is a common sense approach to resolving differences quickly and efficiently, akin to an administrative “appeal” directly to the Contracting Officer’s management. It invites objective evaluations and fairness throughout the evaluation process. Removing this avenue for administrative review, in the Section’s view, would be counterproductive and will remove a review process that helps build trust within both the Government and the contracting community that the review process is fair and impartial and produces reliable assessments of contractor performance.

The Section is available to provide additional information and assistance as the FAR Council may require.

Sincerely,

Mark D. Colley
Chair, Section of Public Contract Law

cc: Sharon L. Larkin
    Stuart B. Nibley
    David G. Ehrhart
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    Council Members, Section of Public Contract Law
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