August 22, 2005

VIA E-MAIL AND FIRST CLASS MAIL

General Services Administration
Regulatory Secretariat (VIR)
1800 F Street, N.W., Room 4035
Washington, DC 20405
Attention: Lauricann Duarte


Dear Ms. Duarte:

On behalf of the Section of Public Contract Law of the American Bar Association (“the Section”), I am submitting comments on 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 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.

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 Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.1

The Section is concerned about the utility of the proposed change and offers the following background and observations. As proposed, the new provisions of FAR Subpart 42.15 would add a requirement for contracting officers on completion

1 This letter is available in pdf format at http://www.abanet.org/contract/Federal/regscomm/home.html under the topic “Performance Issues.”
of the work (i) to evaluate a contractor’s management of subcontracts, including
meeting the goals in its small business subcontracting plans, and (ii) evaluate past
performance on:

- contracts exceeding $100,000;

- orders exceeding $100,000 placed against a Federal Supply
  Schedule contract or a task-order contract or delivery-order contract
  awarded by another agency (i.e., Government-wide acquisition
  contract or multi-agency contract);

- orders exceeding $100,000 placed against single agency task-order
  and delivery-order contracts when such evaluations would produce
  more useful past performance information for source selection than
  that contained in the overall contract evaluation.

The Section’s focus in these comments is on whether additional emphasis
on past performance/subcontract management evaluation and reporting will redirect
scarce resources from prime contract management to the detriment of overall
contract performance. Although subcontract management logically appears to be
an essential element of successful program performance, past performance analysis
at the prime level would appear to adequately capture subcontract management.
Several DOD studies have validated this point. There is no indication that the
proposed change in FAR Case 2004-012 would be accompanied by authorization
for additional resources for affected government agencies or allowance for
increased payments to affected contractors. In fact, the proposal notes it is not a
significant regulatory action.

During the late 1980’s and early 1990’s the U. S. Air Force and U. S. Navy,
in conjunction with the Defense Contract Administration Services (“DCAS”), did
an extensive review of past performance evaluations and the role of subcontract
management concerning the Joint Cruise Missile program. This review was
prompted by subcontract problems on procurements critical to national security.
Included in this review were major weapon systems as well as small procurements
and GSA schedule procurements. The small procurement and GSA items served
essential interface requirements with the major weapon systems.

The Section understands that the result of this review provided critical
guidance on subcontract management. It showed that government emphasis on
past performance and subcontract management had actually resulted in reduced
quality and increased cost. This was because limited government and contractor
resources were diverted from other tasks. The increased emphasis on documenting
past performance and subcontract practices did not bring about increased resources for either government agencies or contractors in the tight competitive market. Hence, other tasks were sacrificed. It is unlikely that the proposed change in FAR Case 2004-012 would result in authorization for additional resources for affected government agencies or allowance for increased price for affected contractors. Additionally, the previous study showed that much of the past performance/subcontract data collected was incomplete and inaccurate, due to limited resources, resulting in more confusing past performance analysis.

The Air Force/Navy review recommended the following:

a. Limit evaluation of subcontract management to major systems as defined in 10 U.S.C. §2302d. The joint Government-contractor management teams are created to actively monitor subcontract activity. These are recognized and funded additional resources. DCAS established Contractor Performance Subcontractor Review teams for this purpose.

b. Focus of past performance evaluations on all other contracts should be on end-product quality, cost, and schedule. The procurements that showed the best overall results were those where the Government and contractor focused past performance on the end result--delivered quality, schedule, and cost.

c. In every case, the end-product quality, schedule, and cost were directly proportional to adequacy of subcontract management.

In the late 1990’s, the U. S. Navy and Hewlett Packard conducted another review of past performance and subcontract management data, this time of the TAC IV program. This review covered major competitive procurements, commercial off-the-shelf procurements, and GSA schedule procurements. The results of the TAC IV procurement review were entirely consistent with the previous review: Detailed past performance evaluations, including subcontract management, were only effective on “major system” procurements as defined in 10 U.S.C. §2302d where joint dedicated government/contractor program management teams were established. On smaller procurements, where detailed past performance-subcontract management data was required, quality and schedule were negatively impacted due to diverted resources. Also, the data collected was found to be incomplete and inaccurate confusing any past performance evaluation.

The results from these investigations and studies appear applicable to the FAR Case 2004-012 proposal. That is, limited government resources and
contractor personnel are most effective if past performance focuses on the end product—looking at delivered quality, meeting delivery schedule, and final cost—recognizing that if quality, schedule, and cost are acceptable, subcontract management must also have been acceptable.

We note also that FAR 9.104-3 requires the contracting officer to consider the contractor’s compliance with subcontracting plans under previous contracts when the contract at issue requires a subcontracting plan. If a concern that compliance with small business contracting plans is not being adequately monitored is prompting this proposed rule is, the answer is likely to be increased management emphasis rather than adding a largely redundant regulatory requirement.

If the Government still believes Far Subpart 42.15 should be revised, then carefully structured regulatory language should be promulgated. Detailed instructions should be carefully tailored to limit the effect on already tightly stretched government resources. It must also be structured so that contractors do not become overly focused upon documenting subcontractor performance to ensure the “next award” at the expense of quality performance on the present contract.

In this case, the Section recommends that the following regulatory language be included:

Although evaluation of past performance regarding subcontract management has been useful in some types of acquisitions, generally experience has shown that the focus should be on end-product quality, cost, and schedule. Therefore, on procurements over $100,000, evaluation of subcontract management shall be used as follows.

- If delivered quality, schedule, and cost have been in accordance with contract requirements and specifications, it may be presumed that past performance, including subcontract management, is acceptable.

- If there is a problem with delivered quality, schedule, or cost, then the Government will identify the cause of the problem as part of any past performance analysis, including subcontract management, if applicable.
The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

[Signature]

Robert L. Schaefer
Chair, Section of Public Contract Law

cc: Michael A. Hordell
    Patricia A. Meagher
    Michael W. Mutek
    Carol N. Park-Conroy
    Patricia H. Wittie
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    Council Members
    Co-Chairs and Vice-Chairs of the Acquisition
    Reform and Experimental Processes Committee
    David Kasanow