



Column: New option for past performance ratings

by Patrick Rothwell, associate, PilieroMazza PLLC

The difficulties faced by new small businesses lacking past performance ratings in winning federal contracts are well-known.

For small businesses that lack past performance ratings as federal prime contractors, and that perform as first-tier subcontractors under federal contracts for which there is a required subcontracting plan, Congress has established a new "pilot program," under section 1822 of the recently-enacted 2017 National Defense Authorization Act (NDAA).

These subcontractors can obtain a past performance rating in the federal past performance system under the new program.

New pilot program

Technically, Congress established the pilot program as an amendment to Section 8(d) of the Small Business Act. It applies to civilian and military agencies. The Small Business Administration is charged with implementation.

Although it is unclear when this pilot program will begin, this new mechanism for obtaining past performance is a potentially promising way that a small business subcontractor can obtain a past performance rating for federal prime contracts. An added benefit is that the subcontractor also can propose the rating it believes it deserves.

Process for obtaining ratings

The NDAA describes the process by which a past performance rating may be established under the new pilot program.

Under the law, the pilot program applies to small business subcontractors that are without a past performance rating as federal prime contractors, and are working as first-tier subcontractors for a "covered contract," meaning a federal contract for which the prime contractor must submit a subcontracting plan.

These small business subcontractors may submit an application to an "appropriate official" for a past performance rating. The application must be submitted no later than 270 days after completing the work for which it seeks the rating, or 180

days after the prime contractor completes work, whichever is earlier.

An "appropriate official" is an SBA commercial market representative, another official designated by SBA, or the procuring agency's Office of Small and Disadvantaged Business Utilization (OSDBU), if agreed to by SBA and the agency head.

Request your own rating

Uniquely here, the application is to include both the written evidence of the past performance factors, and the subcontractor's own requested rating.

The appropriate official forwards the application to both the procuring agency's OSDBU and the prime contractor for review. The OSDBU and the prime contractor must respond to the appropriate official within 30 days.

If both the OSDBU and the prime contractor agree with the proposed rating, the appropriate official puts the rating into the government's past performance system. If the OSDBU or the prime contractor fails to respond-- but a party from the OSDBU or the prime contractor responds and agrees with the rating--the appropriate official inputs the rating into the government's system.

The small business subcontractor will be able to use this rating to establish its past performance for a federal prime contract.

Disagreement over rating

However, if the OSDBU and the prime contractor fail to respond within 30 days, or if they disagree with the proposed rating; or, alternatively, if (i) either the OSDBU or the prime contractor fails to respond and (ii) the responding person disagrees with the proposed rating, the OSDBU or the prime contractor must submit a notice to the appropriate official contesting the application. The appropriate official will, in turn, forward the notice to the small business subcontractor within 14 calendar days.

The subcontractor may submit comments, rebuttals or additional information within 14 calendar days

after receipt of the notice. The appropriate official will then enter a neutral rating into the past performance system, along with the application, responses from OSDBU and the prime contractor, and additional information from the subcontractor.

Negative information

Thus, should a subcontractor avail itself of this procedure, no negative past performance rating itself will result. However, it is possible that negative information regarding the subcontractor's past performance from the prime contractor or the OSDBU could be used by the government, along with the neutral rating.

By providing the small business subcontractor additional influence over how its performance will be portrayed in the past performance system, the pilot program may serve as an additional incentive for the subcontractor to put its "best foot forward" in the performance of its subcontract.

On the other hand, if there is a misunderstanding or conflict between the prime contractor and the subcontractor, the pilot program could be used as vehicle for the prime contractor to air those disagreements. The benefits of this program could be defeated if both OSDBU and the prime contractor are uncooperative or unreasonably dispute the subcontractor's requested past performance rating. It is not obvious what recourse might be available if that happens.

No deadline

The NDAA does not establish any deadline for launching the program, so it is unclear when it will begin. It was authorized for three years. The Government Accountability Office is required to perform regular assessments.

Small contractors that may benefit from this program are encouraged to keep apprised on further developments in the program's development and operations.

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