

LEGAL ADVISOR



A PilieroMazza Update for Federal Contractors and Commercial Businesses

GOVERNMENT CONTRACTING

New Pilot Program Will Give Certain Small Businesses New Option to Obtain Past Performance Ratings

By Patrick Rothwell



The difficulties faced by new small businesses lacking past performance ratings in winning federal contracts are well-known. Perhaps the most common approach by which new small businesses get their start in federal contracting is by working as a subcontractor to a federal prime contractor. Often this is accomplished

by working as a subcontractor under federal prime contracts that require the prime contractor to develop a subcontracting plan. For small businesses that perform as first-tier subcontractors under such federal contracts and lack past performance ratings as a prime contractor, Congress has provided for a new “pilot program,” under section 1822 of the recently-enacted 2017 NDAA. Under the pilot program, these first-tier subcontractors can obtain a past performance rating in the federal past performance system that they can use to obtain a federal prime contract.

Technically, Congress established the pilot program as an amendment to the Small Business Act and it will apply to civilian and military agencies. SBA is charged with implementation of the program. 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 and it also can designate the rating it believes it deserves.

The process by which a past performance rating may

be established under this pilot program is as follows: First, small business subcontractors described above (without a past performance rating as a prime contractor and which work as a first-tier subcontractor under a contract for which the prime contractor must submit a subcontracting plan to the federal government) may submit an application to an “appropriate official” for a past performance rating no later than 270 days after it completed the work for which it seeks a rating or 180 days after the prime contractor completes work on the contract in question, whichever is earlier. An “appropriate official” is an SBA commercial market representative, certain other officials designated by SBA, or a person from an agency’s Office of Small and Disadvantaged Business Utilization (“OSDBU”), if agreed to by SBA and the agency head.

Uniquely here, the application includes both the submission of written evidence of the past performance factors for which the contractor seeks a rating and the subcontractor’s own requested rating. The appropriate official will submit the application to both the procuring agency’s OSDBU and the prime contractor for review. OSDBU and the prime contractor are required to submit a response to the application no later than 30 days after receipt. If both the OSDBU and the prime contractor agree with the proposed rating, the appropriate official will submit the rating into the federal government’s past performance system. Likewise, if either the OSDBU or the prime contractor fails to respond, but one party responding to the application—from either the OSDBU or the prime contractor—agrees with the rating, again the appropriate official will submit the subcontractor’s requested rating into the federal government’s past

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

However, under the pilot program, if the OSDBU and the prime contractor fail to respond within 30 days or 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, who will, in turn, forward the notice to the subcontractor. The subcontractor may submit comments, rebuttals, or additional information related to the past performance. The appropriate official will then enter a rating that is neither favorable nor unfavorable, along with the application, any responses from OSDBU and the prime contractor, and additional information from the subcontractor. Thus, should a subcontractor avail itself of this procedure, no negative past performance rating itself will result from use of the pilot program. It is unclear, though, whether negative information regarding performance from the prime contractor or the OSDBU could be included along with the neutral past performance rating.

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By providing the subcontractor additional influence over how its performance will be portrayed in the government's 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 to the government its disagreements with the subcontractor. Likewise, 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 to the subcontractor if that happens.

The NDAA does not establish any deadline by which this pilot program is to be established, so it is unclear when it will begin. However, it will last for three years after the date on which the first applicant small business concern receives a past performance rating under this new program. The Government Accountability Office will be required to assess the operations of the pilot program starting one year after the establishment of the program and it is required to submit a report to Congress six months after beginning such an assessment. This report may give the contracting community a preliminary sense as to the value of the pilot program.

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

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