

888 17TH STREET, NW, 11TH FLOOR
WASHINGTON D.C. 20006

PHONE 202 857-1000

FAX 202 857-0200

WWW.PILIEROMAZZA.COM

October 7, 2013

VIA ELECTRONIC MAIL

Ms. Hada Flowers
General Services Administration
Regulatory Secretariat (MVCB)
1800 F Street NW, 2nd Floor
Washington, DC 20405-0001

Re: Comments on FAR Case 2012-028

Dear Ms. Flowers:

I. INTRODUCTION

Our firm represents small businesses that operate across the government contracting spectrum. On behalf of these companies, we are writing to submit comments on the Defense Department, the General Services Administration, and the National Aeronautics and Space Administration's proposed rule of August 7, 2013, regarding the comment period for contractor past performance evaluations. See FAR Case 2012-028; Contractor Comment Period-Past Performance Evaluations, 78 Fed. Reg. 48123 (August 7, 2013). Specifically, the following discussion addresses our concerns regarding the implementation of the proposed rule and its possible effects on small businesses.

II. COMMENTS ON PROPOSED RULE

The proposed rule, which implements section 853 of the National Defense Authorization Act ("NDAA") for Fiscal Year ("FY") 2013 and section 806 of the NDAA for FY 2012, stresses the need for procurement officials to have speedy access to past performance information. However, by emphasizing speed over completeness or accuracy, the proposed rule fails to account for the government's need for reliable information that fairly and accurately describes contractor performance. Moreover, the proposed rule overlooks the disastrous side effects that could befall small businesses when inaccurate past performance information is posted before the contractor is able to make comments. Procurement officials can be expected to immediately rely upon past performance information that has been made available to them despite the fact that it could be rife with errors or omissions that deprive the information of context – such as where a pending claim materially impacts a past performance evaluation. Regardless, even if small businesses are able to make comments quickly, their comments will not be instantaneous. Consequently, flawed past performance evaluations will be made available to procurement

Ms. Hada Flowers
October 7, 2013
Page 2 of 3

officials which, in turn, will cause contractors to lose contracts that would have been won but for the inaccurate past performance data.

FAR subpart 42.15, Contractor Performance Information, contains the rules that govern past performance evaluations. Evaluations are processed through the Contractor Performance Assessment Reporting System ("CPARS"), after which the evaluations are provided to the Past Performance Information Retrieval System ("PPIRS"). PPIRS, in turn, allows procurement officials to view past performance evaluations. As the rules currently stand, contractors are notified when evaluations have been submitted to CPARS, and those notifications mark the beginning of a 30-day minimum window within which contractors may supply their own comments and rebuttals regarding the information that will ultimately be posted to PPIRS.

The proposed rule would amend FAR subpart 42.15 by reducing the amount of time that contractors have to record comments on past performance evaluations from a minimum of 30 days to a maximum of 14 days. Such a reduction places the integrity of the PPIRS system at significant risk, as slicing the contractor response window in half cannot help but increase the likelihood that incorrect information will pass through the system and onto procurement officials. That likelihood, in turn, greatly increases the chances that important procurement decisions, decisions that obligate countless amounts of taxpayer dollars, will be based on information that is incomplete and ripe for challenge, either in federal court or the Government Accountability Office.

Reducing the comment period available to federal contractors could also place unfair burdens on small businesses that lack the administrative resources to quickly respond to negative evaluations in a condensed timeframe. Small businesses command an inarguably vital position in the American economy, but their resources are finite. While their larger peers may have sufficient personnel in place to meet both customer needs and defend against inaccurate past performance evaluations within two weeks, many small businesses are not similarly able. Indeed, while our small business clients have time and again proven their abilities to efficiently address the government's needs across the contracting spectrum, many would be stretched thin by the proposed rule. As a result, small businesses would have to siphon human resources from ongoing contracts to answer potentially-flawed past performance evaluations as quickly as possible or risk being inaccurately evaluated for new procurements. While this would obviously harm small businesses, it would also harm the government because ongoing contracts may not be performed as efficiently, and contracting officers will rely upon incorrect information when making new award determinations.

Aside from the clear harm to both contractors and the government, the idea that firms should have less time to defend the integrity of their businesses, a defense that could be integral to the company's survival and continued employment of its workers, is plainly unjust, particularly where small businesses are concerned. Small businesses of all kinds and varieties were hit hard by the recent recession, and the federal shutdown has only made the future look

Ms. Hada Flowers
October 7, 2013
Page 3 of 3

more uncertain. At this juncture, small businesses should not have to add drastically-reduced response times for past performance evaluations to their lists of concerns.

Lastly, while we approve of the mechanisms in the proposed rule for making changes to incomplete or inaccurate reports after they have been provided to PPIRS, such an opportunity would only come after the past performance information was released and the harm to small businesses would have already begun. Indeed, we believe the proposed rule, as written, ignores the fact that the publishing of inaccurate past performance information, even for a day, could be extremely damaging to the reputation of a small business. Thus, while facilitating the corrections of mistakes is commendable, we submit that a proposed rule that makes mistakes more likely from the outset should not be adopted as final.

III. CONCLUSION

We appreciate your attention to this matter and trust that you will carefully consider our aforementioned concerns. Please do not hesitate to contact us if you have any questions or concerns regarding our comments.

Sincerely,



Pamela J. Mazza
Antonio R. Franco