

## CLIENT ALERT

### SBA to Implement New Methods for Evaluating Expanded Sources of Small Business Past Performance

July 28, 2022

Major changes to the way small business contractors obtain, and agencies evaluate, past performance references are set to arrive on August 22, 2022. On July 22, 2022, the Small Business Administration (SBA) published a final rule implementing provisions of Section 868 of National Defense Authorization Act for Fiscal Year 2021. The rule provides two new methods for small business contractors to obtain past performance ratings upon which they may then rely when submitting offers on prime contracts with the Federal Government.

*First*, a small business offeror may rely on the past performance of a joint venture of which it is a member, as long as the small business was involved in performance of the joint venture's contract(s). To that end, when submitting a proposal, the small business must: (1) identify the joint venture; (2) specify the joint venture's contract(s) the small business elects to rely upon; and (3) detail the duties and responsibilities the small business carried out as part of the joint venture. Provided these requirements are met, the procuring agency shall (per 13 C.F.R. § 125.11) consider the past performance of the joint venture when evaluating the past performance of the small business concern.

*Second*, small business offerors can also use past performance obtained when performing as first-tier subcontractors. The provision also applies to small business members of a joint venture where the joint venture performed as a first-tier subcontractor. Reliance is limited to instances where the subcontractor performed under a prime contract with a subcontracting plan.

This subcontractor past performance provision contains a unique wrinkle – the prime contractor (as opposed to the contracting agency) is responsible for assigning the subcontractor's past performance rating. The final rule explains that the small business may request a rating of its subcontractor past performance from the prime contractor within 30 days after the completion of the period of performance for the prime contractor's contract with the Government. Once the subcontractor has submitted a request, the prime contractor must provide a rating to the subcontractor within 15 calendar days. This requirement is incorporated into the prime contractor's subcontracting plan, and mandates that the prime contractor's rating include, at a minimum, an evaluation of the following factors: (1) Technical (quality of product or service); (2) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements); (3) Schedule/timeliness; (4) Management or business relations; and (5) Other (as applicable). The ratings must follow the five-scale rating system in FAR 42.1503 (Exceptional, Very Good, Satisfactory, Marginal, and Unsatisfactory). SBA is imposing this requirement on contractors via 13 C.F.R. § 125.3; it is currently unclear if the FAR clause on small business subcontracting plans, FAR 52.219-9, will be updated to reflect this requirement. Prime contractors should plan ahead and be prepared for subcontractor requests in order to comply with these new obligations in both collecting the performance information and reporting the ratings.

The final rule also implements consequences for prime contractor failure to provide requested subcontractor ratings. In instances where prime contractors disregard their obligations to provide ratings, the prime contractors can be subject to a wide

range of penalties including: termination for default; withholding of award fees; lower past performance ratings; liquidated damages for failing to make a good faith effort to comply with subcontracting plans; and even debarment (if the failure is willful or repeated). 13 C.F.R. § 125.3(c)(1)(xii)(A). Because these consequences stem from a revision to the SBA's regulations, contractors should not wait to see inclusion of the requirement in FAR 52.219-9 before implementing a system to ensure compliance.

Beyond the regulations changes, there are numerous takeaways from SBA's responses to industry comments when issuing the final rule:

No Retroactivity: SBA explicitly stated that "the final rule does not make the rule retroactive." However, prime contractors can consider subcontractor requests submitted prior to the August 22, 2022 effective date. Note that there is a lack of clarity regarding at to what the effective date applies to – RFP issuance, contract award, subcontract award, or past performance evaluation request.

No Minimum Subcontract Value: There is no minimum contract value threshold. The rule applies to all eligible first-tier small business subcontractors performing on prime contracts with subcontracting plans.

No Distinction Between Prime and Subcontractor Past Performance: In issuing the final rule, SBA explained that it "does not agree that first-tier subcontractor past performance should be weighted differently than prime contractor past performance."

No Rebuttal Mechanism: The final rule does not contain a rebuttal mechanism allowing disappointed subcontractors to challenge the rating assigned by a prime. SBA explained that "subcontractors may be able to negotiate a rebuttal procedure as part of their subcontract." But, presumably, if the subcontractor receives unfavorable ratings with which it disagrees, it could choose not to include them in a past performance submission.

Biased Evaluations: Both the final rule and SBA's commentary are silent regarding the potential for biased evaluations from mentors or corporate affiliates. While two commenters suggested the government should provide regulatory guidance and procedures to ensure unbiased or consistent and fair assessments, the final rule does not include guidance or provisions affording offerors the ability to challenge biased evaluations. Accordingly, contractors may be rightfully concerned that mentors and corporate affiliates could wrongfully utilize the subcontractor review process to artificially inflate past performance scores.

This final rule marks a major step in leveling the playing field for small businesses seeking to win prime federal contracts. With that said, it imposes a number of new obligations on both contractors and contracting agencies. And, there are remaining ambiguities and important questions as to how bias (either positive or negative) will play a role in the ratings assigned and how they are considered by the procuring agency. As such, the new rule is likely to give rise to administrative challenges and protest allegations both in the pre and post-award context.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

**Amy Laderberg O'Sullivan**

Partner – Washington, D.C.

Phone: +1.202.624.2563

Email: [aosullivan@crowell.com](mailto:aosullivan@crowell.com)

**Olivia Lynch**

Partner – Washington, D.C.

Phone: +1.202.624.2654

Email: [olynch@crowell.com](mailto:olynch@crowell.com)

**Zachary Schroeder**

Associate – Washington, D.C.

Phone: +1.202.624.2676

Email: [zschroeder@crowell.com](mailto:zschroeder@crowell.com)