July 19, 2021

Barbara Trujillo
OUSD(A&S) DPC/DARS
Room 3B938
3060 Defense Pentagon
Washington, DC 20301-3060

Re: DFARS Case 2018-D055 - Past Performance of Subcontractors and Joint Venture Partners

Ms. Trujillo,

Thank you for the opportunity to comment on the proposed rule to the Defense Federal Acquisition Regulation Supplement to include past performance of subcontractors and joint venture partners (Proposed Rule). For years, Associated General Contractors of America (AGC) and the American Subcontractors Association (ASA) have worked with the Department of Defense (DoD) and other federal entities to ensure that our nation has the high-quality infrastructure it needs now and in the future. Federal investment in infrastructure can play an essential role in rebuilding our economy, strengthening national defense, and creating well-paying jobs for the American people.

AGC is a leading association in the construction industry representing more than 27,000 firms, including union and open-shop general contractors and specialty-contracting firms. Many of the nation's service providers and suppliers are associated with AGC and ASA through a nationwide network of chapters. AGC and ASA contractors are engaged in the construction of the nation's defense facilities, commercial buildings, factories, warehouses, highways, bridges, tunnels, airports, water infrastructure facilities, locks, dams, multi-family housing projects, and more. ASA, a trade association representing over 1,800 subcontractors and suppliers in the construction industry since 1966, works with ASA membership on improving the business environment in the construction industry, representing subcontractors at all branches of local, state and federal government.

AGC and ASA agree in part and disagrees in part with the Proposed Rule's amendment to the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 823 of the National Defense Authorization Act for Fiscal Year 2019 (NDAA).[1] AGC and ASA agree with the Proposed Rule's implementation to require performance evaluations in accordance with specified conditions for individual partners of joint ventures for DoD construction and architect-engineer services contracts with an estimated value of $750,000.[2] In many respects, much of this information about joint venture partners is already readily available to federal agencies. Prime contractors bidding as a joint venture must submit past performance evaluations as part of the bidding

[1] Pub. L. 115-232
[2] FAR 42.1502(e)

requirement.[3] Furthermore, joint ventures have a limited number of general contractors. In practice, joint ventures on federal construction projects typically do not exceed more than three prime contractors, are registered in System Awards Management (SAM) and have well-established past performance evaluations. This means federal agency personnel can easily pull each firm's past performance evaluations with minimal effort.

AGC and ASA disagree with on the Proposed Rule's extension of past performance evaluations down in accordance with specified conditions to major first-tier subcontractors, and the comments below focus wholly on these portions. It is important to highlight that the Proposed Rule is a significant change in defense contracting; that is requiring subcontractors to now have a performance evaluation with defense agencies. In the long history of federal contracting in general, and DoD contracting specifically, the federal agency procuring construction was limited to a direct interaction with the prime contractor—the entity it directly contracts to perform the work—and not with any subcontractor or supplier. As such, it is important that any new regulation or reporting requirement recognizes this and does not serve as a barrier to entry for subcontractors, many of which are small businesses

The Proposed Rule fails to perform key analysis and does not address critical questions—described in detail below—relevant to prime contractors, subcontractors, and federal agencies tasked with enforcing these new requirements. **In summation, AGC and ASA requests DoD delay implementing Proposed Rule's extension of past performance evaluations down in accordance with specified conditions to major first-tier subcontractors until more research is performed, the below questions are answered, revisions are made, and respectfully requests an additional public comment period on any revised proposal rule.** Conversely, AGC and ASA do not see any need to delay the Proposed Rule's revisions to reporting requirements for partners in a joint venture.

In the event that DoD does not accept AGC and ASA's proposed revisions and concerns, DoD should not implement this rule until after the end of the next full fiscal year in order to minimize the impact on federal agencies and the construction industry. The end of the federal fiscal year is often characterized by a surge in spending to avoid "use it or lose it" budgets. Studies of federal spending have shown that roughly a third of all federal contract dollars are awarded in the last quarter of the fiscal year, including out of every nine dollars in federal contracts last week alone.[4] Enforcing a rule that requires significant new reporting requirements—especially on certain first-tier subcontracts without experience in past performance evaluations—would be unduly disruptive.

An outline of AGC and ASA's recommendations are as follows:

[3] 13 CFR § 125.8
[4] Office of Management and Budget. *The Budget of the United States Government: Budget for America's Future*. February 2020.

I. Background on Current Performance Reporting System

Generally, the purpose of the past performance evaluation is to better inform government acquisitions of goods and services from contractors. While not stated anywhere in the Proposed Rule, the past performance evaluations will almost certainly be accomplished through a Past Performance Questionnaire (PPQ) or by an existing Contractor Performance Assessment Reporting System (CPARS).[5] A PPQ is essentially a reference check by the federal government for contractors to establish its ability to perform a future contract. The more established CPARS is a governmentwide evaluation reporting tool for all past performance reports on contracts and orders in which the federal government critiques contractor performance and records that data for six years allowing the government to improve future source selection decisions. Consequently, these evaluations are critical to contractors in their pursuit of future contract awards and the ratings and narratives government representatives include on them are closely scrutinized.

That stated, past performance evaluations—no matter the reporting system—face inherent problems that stem, in large part, from subjectivity, miscommunication and lack of communication during the review process. AGC and ASA has long worked with federal agencies to reduce subjectivity in these reports to the greatest extent possible. The Federal Acquisition Regulations (FAR) terms used in CPARS are meant for government acquisitions of any good and/or service. Thus, such terms and definitions are not written with just the construction industry in mind. For these reasons—and others—the terms are, consequently, broad and extremely subjective definitions that can have different meanings to different people. In large measure, this is a significant factor for the greatest cause of inconsistencies among evaluations from Division to Division, District to District and Area Office to Area Office.

Additionally, construction projects can last for multiple years. Government staff—such as an Assessing Official—on the project may move on to other details, projects or opportunities. The transition in government staff should not change the expectations set forth when the project began. Nevertheless, such a shuffle in staff can often lead to different opinions from the staff that initiated the project. When this happens, there is an increased chance for unexpected surprises, miscommunications and strained relationships when performance evaluations are issued that can negatively influence remaining project delivery time.

II. More Research is Needed on the Analysis of the Public Burden

AGC and ASA agrees with the Proposed Rule's assertion that it may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.[6] AGC and ASA believes the public burden of collecting this information is significantly more than is concluded in the initial regulatory flexibility analysis. Specifically, the number of impacted subcontractors is likely dramatically more than stated in the analysis and the time required for the review of past performance evaluations are significantly higher.

The Proposed Rule's analysis of its applicability to contracts is problematic because it fails to perform an analysis for subcontracts performing over 20% of the contract value. As a result, it underestimates the number of subcontractors performing the work in accordance with the specified conditions. Specifically, the Proposed Rule estimates approximately 822 contracts, task orders, and delivery orders over $750,000 would be applicable, each of those awards is estimated to have two to

[5] FAR 42.1501
[6] 5 U.S.C. 601, et seq.

four subcontracts, for a total of 2,121 subcontracts that would require performance evaluations, and ultimately 1,208 of those subcontracts were awarded to small entities which would receive a performance evaluation as a first-tier subcontractor. **While the Proposed Rule provides an analysis on contracts over $750,000 it fails to provide any analysis for contracts where subcontractors perform more than 20% of the total contract value. Additionally, the Proposed Rule's analysis for the estimated number of first-tier subcontractors over $750,000 is significantly undercounted.** The estimated two to four subcontracts used appears to be an arbitrary number chosen. For perspective, $750,000 is only 0.75% of a $100 million construction project. A prime contractor could very well have 25-30 subcontractors on a $100 million project. It is not uncommon for a mega project, such as a $500 million defense installation project, to have potentially 85% of the work performed by subcontractors. This one mega project could generate dozens or even a hundred past performance evaluations to review. **For these reasons, AGC and ASA recommends further research be performed on the number of subcontractors performing work that would be affected in accordance with the specified conditions.**

Additionally, the Proposed Rule's analysis of its applicability to contracts is problematic because it undercounts the burden of reviewing the past performance evaluations by a contractor representative. Of the dozens of federal contractors consulted in preparation of this comment letter, none believed the approximate one hour for a contractor representative to draft, review, comment, accomplish senior level concurrence, and return past performance evaluations was an accurate estimate. Consequently, the cost for review—a de minimis amount of $56.76—is therefore inaccurate. AGC and ASA are concerned that the sheer volume and time needed to process the evaluations risks straining both federal agency and industry resources resulting in project award delays.

The Proposed Rule is unclear who the "contractor representative" is, whether this is a government official or private contractor. Assuming the contractor representative is a construction contractor, a more realistic estimate is at least 4-5 hours to prepare a past performance evaluation. The contractor must cite the relevant data, find the appropriate contact, solicit that contact to fill out the past performance evaluation, track and obtain the evaluation, then format it into the proposal. This assumes that the past performance evaluation does not include project data sheets that would need to be developed. None of this includes the time necessary for respondents to fill out the past performance evaluation, or government reviewer time taken to review each evaluation. As an example, a $100 million procurement—as the rule is currently written—would likely add hundreds of hours per bidder just to draft a past performance evaluation. This is a large and significant burden on the public, especially on federal contractors who may bid multiple projects each month. Further, it is unclear how long prime contractors will need to retain this information for recordkeeping purposes. Similarly, a government contractor representative would spend significant time reviewing and verifying such immediate information on the relevant subcontractor's past performance evaluations. **For reasons such as these the Proposed Rule undercounts the burden on reviewing the past performance evaluations by a contractor representative and AGC and ASA recommends further research be performed to accurate quantify the significant burden before the Proposed Rule is finalized.**

III. More Research is Needed to Understand the Impact on Business Participation

Transparency and clear requirements are important to providing for free and open competition to our nation's businesses and accountability to the American people. However, unpredictability and vague reporting requirements will undermine any infrastructure investments and will preclude many

of businesses from participating in the federal market. It is important to note that the federal construction industry has long been a well-regulated industry, ensuring that workers are safe, taxpayer dollars are properly spent, and the environment is protected. Businesses of all types—especially small businesses—are confronted with an unparalleled crisis that threatens them both financially as well as the health, safety, and welfare of themselves and employees. These businesses should not be burden or distracted with vague regulations and reporting requirements, especially during current crisis brought about by the COVID-19 pandemic.

Federal construction contracting in general—and defense construction specifically—is a challenging market to participate. Businesses participating in this federal area must comply with numerous regulations, reporting requirements, security clearances, small business participation plans, cybersecurity requirements, and so on. It is important to ensure that federal regulations do not create unnecessary barriers for businesses, especially for small businesses with limited resources. As such, it is concerning that the Proposed Rule fails to provide any analysis on the impact to small prime contractors and small subcontractors.

Despite the admission that the Proposed Rule "…may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act", little research has been done on the estimated 1,208 subcontracts—a number AGC and ASA questions for the reason stated previously—awarded to small entities that would be affected. Likewise, nothing suggests that the U.S. Small Business Administration was consulted in the drafting of the Proposed Rule despite a significant number of small businesses impacted. **AGC and ASA encourages DoD to collaborate with the U.S. Small Business Administration to better analyze any potential impact to our nation's small businesses.**

Federal agencies, including DoD, have small business participation goals which generally requires a certain percentage of the total value of all small business eligible prime contract awards to small businesses. According to a recent report by the Congressional Research Services, federal agencies and prime contractors consistently have difficulty meeting the goals of 5% to Women-Owned Small Business (WOSBs) and 3% to Historically Under-utilized Business Zones Small Business (HUBZone).[7] Therefore it is important that any new regulation and reporting requirements does not discourage participation by small businesses, especially participation by WOSBs and HUBZones. AGC and ASA appreciates that the Proposed Rule does not require those affected first-tier subcontractors to register in SAM, unlike prime contractors.[8] However, there is little to no analysis on the impact to small business first-tier subcontractors—including any potential decline in participation—due to the cost and time of submitting past performance evaluations. Perhaps small business participation rate will increase, but it is impossible to know without more research. **Therefore, the Proposed Rule should be delayed until more research and analysis is preformed to understand its impact on business—especially small business—participation.**

IV. Change Wording to Clarify the Applicability of the Proposed Rule

In preparing comments for the Proposed Rule AGC and ASA consulted dozens of federal construction contractors. The overwhelming number of respondents expressed profound confusion with the Proposed Rule's wording—one large federal contractor described it as "frighteningly unclear" —used to describe its applicability. Specifically, applying to "…subcontractors performing a portion of a construction or an A&E services contract with an estimated value in accordance with

[7] For additional information, see CRS Report R45576, *An Overview of Small Business Contracting*, by Robert Jay Dilger.
[8] FAR 52.204-7(b)(1)

the threshold set forth in FAR 42.1502(e) (currently $750,000), or 20 percent of the value of the prime contract, whichever is higher."

For example, it is unclear whether every first-tier subcontractor performing 20 percent of any value below the $750,000—including below the simplified acquisition threshold—would be required to submit past performance evaluations. If so, the number of relevant subcontractors affected is significantly higher than the 2,121 cited in the analysis section. Likewise, it is difficult to discern when 20% is higher than $750,000 and vice versa. It is unclear whether a prime contractor will need to assess every subcontractor over $750,000 or only those that perform 20% of the work on a project over $750,000. Without greater clarity, the Proposed Rule's applicability risks causing confusion among federal agencies and construction contractors alike.

For the purposes of clarity and certainty, AGC and ASA recommends the Proposed Rule changing "or" to "and" and removing "whichever is higher." The new language would thus read "…subcontractors performing a portion of a construction or an A&E services contract with an estimated value in accordance with the threshold set forth in FAR 42.1502(e) (currently $750,000) *and* 20 percent of the value of the prime contract." **It should be clearly stated that in no case would the Proposed Rule apply for a first-tier subcontract valued at less than $750,000.** These simple edits will bring certainty to both government officials and industry partners, while maintain the congressional intent behind the law.

On many federal construction projects, a prime contractor will not know who its first-tier subcontractors are at the time of bid submission. For example, on design-build projects a prime contractor may have a few committed trade partners, but the design—and subsequent bid packages—will be completed post award. The problem is compounded on "hard bid" jobs, as prime contractors often receive late bids and proposal revisions right up until the time of bid. Even then, a prime contractor will often not make any commitments or decisions on its subcontractors until post-award. As such, the Proposed Rule requirements will be practically impossible for prime contractors and subcontractors to implement. **In addition to the above suggested edits—changing "or" to "and" and removing "whichever is higher"—the Proposed Rule should only require past performance evaluations for first-tier subcontractors and design partners who are committed to the prime contractor's team via its formal teaming arrangement.**

V. Clarify the Roles and Responsibilities of Prime Contractors

While the Proposed Rule discusses new reporting requirements for the relevant first-tier subcontractors, analysis of the roles and responsibilities of the prime contract is notably absent. It is difficult envision a scenario where the prime contractor is not involved, ultimately requiring an increase in administrative burden on the prime contractor. As such, it is important that a second iteration of the Proposed Rule is issued for notice and public comment in order to clarify the roles, responsibilities, and consequences to prime contractors.

While the Proposed Rule states that there are "no associated recordkeeping requirements" for the prime contractor, in practice this will quickly go by the wayside. Whether it is recordkeeping for the basis for any negative ratings in order to defend against potential litigation, keeping records to show consistency in how prime contractors are administering the process, submitting such information of the prime contractor's relevant first-tier subcontractors, providing supporting information to government officials explaining why the relevant subcontractor should be on a project, weighing in with the Assessing Official about the relevant subcontractor's

performance, administratively keeping separate records for such performance, ensuring subcontractors use the correct iteration of the performance evaluation for each agency, etc., more recordkeeping by the prime contract will inevitably occur. Again, there is little analysis given to evaluate the increased burden on prime contractors that is ultimately relevant in analyzing the public burden. Recognizing this, the Proposed Rule should also quantify how many years a prime contractor should keep the relevant records. **In summary, the Proposed Rule should analyze, quantify, and justify the real administrative burden on the Prime Contractor.**

It is within the authority of the Source Selection Committees (SSCs) to use past performance evaluations to justify disqualifying a prime contractor—if the prime contractor has a CPAR ratings—from successfully bidding on a project if it so determines. It logically follows from the Proposed Rule that the SSCs will have a new authority to disqualify a prime contractor's first-tier subcontractor. This could cause severe disruption to a prime contractor. A typical bid submittal on a federal project costs a business's many thousands of dollars and requires dozens of hours to put together. **The Proposed Rule should clearly articulate what recourse a prime contractor has in the event the SSC disqualifies its first-tier subcontractor.**

Additionally, the Proposed Rule must clarify how a prime contractor's past performance rating will impact its first-tier subcontractor rating, and vice-versa. Curiously, the Proposed Rule states that reviewing officials "…will work to ensure the following: Consistency between prime and first-tier subcontractor rating information…". The Proposed Rule is silent about how this "consistency" will be applied. For example, if a prime contractor performs well, with high marks and overcomes the poor performance of a subcontractor, what kind of performance rating will the prime contractor receive? The same can be asked about a well performing first-tier subcontractor and an underperforming prime contractor. It is reasonable to read this section of the Proposed Rule that either the prime or first-tier subcontractor would be rated poorly in order to be consistent with the poor performance of the first-tier subcontractor or prime contractor regardless of any remedial actions taken. **The "consistency" in performance evaluations requirement in Proposed Rule is vague and will cause inequity among businesses that would otherwise pride themselves on overcoming the issues of a poorly performing prime contractor or fist-tier subcontractor.**

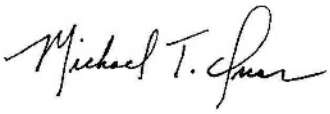
VI. Concern This Unfunded Mandate Will Drain Federal Resources

AGC and ASA are concerned that the Proposed Rule represents an unfunded mandate that will drain the resources of federal agencies and will diminish the economy and efficiency of many federal construction projects. As explained above the Proposed Rule will significantly increase the number of past performance evaluations—taking significant time to review—with little tangible benefit for the federal agency procuring construction services. AGC and ASA federal prime contractors currently experience difficulty in receiving performance evaluations in a consistently reasonable amount of time. Unless the relevant federal agencies increase the number of personnel to review the additional past performance evaluations for the relevant first-tier subcontractors, these delays will significantly increase. Nowhere in section 823 of the NDAA for Fiscal Year 2019 or accompanying laws provide for an increased funding for agency personnel. As a result, either past performance evaluations will be further delayed, or agency personnel will simply "check the box"—issuing "Satisfactory" since this rating does not require a written narrative by the government assessor to justify—resulting in evaluations that benefit neither the federal agency nor the contractor. **AGC and ASA are concerned that the Proposed Rule represents an unfunded mandate that will drain federal resources resulting in delays in past performance evaluations or evaluations that does little to inform federal decisionmakers.**

VII. Conclusion

AGC and ASA appreciate the opportunity to share our insight with you and help advance our common goals of rebuilding our economy, imp and creating well-paying jobs for the American people. AGC and ASA firmly believe that effective communication between the construction industry and DoD is necessary to ensure the safe and efficient delivery of high-quality facilities and infrastructure worthy of our national defense. If you would like to discuss this matter with us further, please do not hesitate to contact AGC and ASA.

Sincerely,



Jordan F. Howard
Director of Government Affairs
Federal & Heavy Construction Division
Associated General Contractors of America

Michael T. Oscar
Director of Government Relations
American Subcontractors Association