Defense Acquisition Regulations System
Attn: Ms. Barbara Trujillo
OUSD(A&S) DPC/DARS
Room 3B938
3060 Defense Pentagon
Washington, DC 20301-3060

July 19, 2021
Transmitted by email
www.osd.dfars@mail.mil

Subject: DFARS Case 2018-D055
Defense Federal Acquisition Regulation Supplement: Past Performance of Subcontractors and Joint Venture Partners

Dear Ms. Trujillo:

Please accept these favorable joint comments on the above captioned proposal by the Mechanical Contractors Association of America (MCAA), and MCAA's labor partners in the United Association of Plumbers and Pipefitters (UA). MCAA represents over 2600 high quality companies in the mechanical contracting and hvac and refrigeration and service industries nationwide, and the UA represents over 355,000 highly skilled building trades workers in the piping industry in the US who are deployed to Federal projects by MCAA members and properly classified as employees.

MCAA members and the UA skilled trades workers consistently and successfully compete for Federal construction and hvac service contracts in the Federal market for both defense and civilian agencies nationwide. MCAA represents responsible contractors in those markets that provide best value performance for our government clients. The MCAA and UA negotiate high standards labor agreements that provide substantial annual investments in joint registered apprenticeship and journeymen training programs, best-in-class pay and health benefits, and the highest workforce performance standards in the industry, all of which benefit our construction and service clients, including the Federal agencies and ultimately taxpayers.

1. Full support of Section 832 of FY 2019 NDAA and the proposed regulations – The MCAA and the UA are fully in support of the sound procurement policy enacted in Section 832 of the FY2019 NDAA and the consequent DFAR regulatory proposal. Public construction project owners should exercise much more discerning evaluation of first-tier subcontractors in project awards and past performance evaluations, as they are most often the predominate builders of the projects, and their performance often has the biggest impact on the successful completion of the agency project, program outcome and the taxpayers' interest in successful project completion.

When properly qualified and experienced, first-tier subcontractors have a major impact on ensuring successful execution of construction contracts in all vital areas of project delivery, including cost, schedule,

quality and safety. Conversely, flawed or inadequate performance by subcontractors can have disastrous effects on any project. In short, the quality, reliability and resourcefulness of subcontractors—especially at the first tier—can effectively make or break a project and it would be a mistake not to carefully evaluate the qualifications and capabilities of these firms.

Our comments focus mainly on the proposal as it pertains to first-tier construction subcontractors, as opposed to joint venture partner past performance evaluations, although we submit the policy is as advantageous to the government's interest in that aspect of the proposal as well. Our comments specifically address two technical aspects of the operation of the past performance evaluations of first-tier subs (Points 2 and 3 below), and then go on to more global suggestions for proposed revisions in the DFARS and FAR regulatory adaptations of this new and more discerning subcontractor performance evaluation and subcontractor review and selection policies.

2. Flow-down of FAR Subpart 42.15 Contractor Performance Information Procedures from the agency contracting authority and the prime contractor to the same process as between the prime and first-tier subcontractors is flawed in one key respect – The primary operation of the proposal is to superimpose the contracting agency evaluations of the prime contractor to an identical process as between the prime and affected first-tier subcontractors. The procedures for the review and comments by the prime contractor to the contracting agency are set out in 48 CFR Part 42.1503. However, these procedures do not transfer well in respect to disputes on negative evaluations between the prime contractor and first-tier subcontractor. For example, when contracting officers review prime contractor performance, prime contractors are afforded 14 days after notification of their review to submit comments, rebutting statements, or additional information that must be maintained as part of the performance evaluation process. After that, the procedures call for a review of any disagreements between the contracting officer and the prime contractor at a level above the contracting officer. The agency is responsible for the overall review.

Our concern is if the regulations are intended to establish a pass-through of this approach so that the prime contractor is required to conduct a performance evaluation of first-tier subcontractors in the same fashion as an agency's review of the prime contractor, then the new regulations should *expressly* provide: (a) that the subcontractor shall have the right and opportunity for dispute and to provide other comments on the findings in the evaluation report prepared by the prime contractor; and (b) the dispute/disagreement process shall be established that clearly spells out that any disputes regarding negative findings or comments between the prime contractor and the subcontractor shall be resolved by the contracting officer not by the prime contractor. It is important that the regulations make it clear that subcontractors will have the same remedy as prime contractors since the impact of a negative performance evaluation by the government will have the same impact on the subcontractors. Without these clarifications, the prime contractors would have complete and unchecked power in this context, and it should be obvious that such authority could be abused in various ways, none of which would benefit the client agency. In other words, the prime contractor would be entitled to play the role of judge and jury in the review process with respect to disputes between the prime contractor and the subcontractor concerning the subcontractor's performance evaluation.

Thus, under this new procedure, it is essential that subcontractors have the explicit right to respond to evaluations in writing, dispute material issues and submit other pertinent information regarding their

performance on the project. It is equally important that the regulations expressly state that the agency, not the prime contractor, shall be the final arbiter of the performance evaluation. These much-needed clarifications are critical if the new procedure is to achieve its goal of enhancing information and data collection and improving the contractor selection process. The reality is that any potential bias or other inappropriate conduct by the reviewing party, i.e., the prime contractor, could easily undermine and defeat the efficacy of new process. Moreover, the recommended approach here is supported by and consistent with the aspect of the new policy that requires the contracting officer to ensure that the rating of the first-tier subcontractor is not inconsistent with the contracting officer's assessment of the prime contractor on the project. The regulations should be more specific on this point and in so doing they will help ensure the intended policy goals are served.

3. New procedure to guard against use of performance rating authority in subcontract equitable adjustment or settlement negotiations must be adopted – The regulations should establish clear and adequate safeguards to prevent prime contractors from using the performance rating to leverage subcontractors in the resolution of unrelated business matters (*e.g.*, to negotiate lower recovery for contract changes or claims, or to force the resolution of disputes). Some contractor comments have noted the possibility for misuse of the rating authority in contract settlement negotiations between the prime contractor and the subcontractor. In furtherance of the same policy laid out in Point 2 above, the new regulations should include some added procedure that the past performance rating must be made after all contract claims and dispute negotiations are concluded; and the procedures might also include a required certification by the prime contractor that the assessment is made free and clear of any leverage attempts in post-contract claims or disputes settlement negotiations. The authority of the contracting officer to review the subcontractor performance rating for consistency with its rating of the prime contractor might also set out a review for any possible effect of settlement negotiation leverage in the process by way of a statement or certification by the prime contractor, or a bilateral statement of assent by both the prime and the subcontractor.

The following points call for discretionary regulatory changes under FAR authority in 48 CFR Part 1.502 Unsolicited Proposed Revisions that are germane to the issue of the instant statutory and regulatory policy change and possible DFARs Variations Under DFARs Part 201.

4. ***Davis Bacon, worker classification and OSHA compliance should be expressly listed as performance rating criteria in the review procedures*** – We request that the regulations – FAR or DFARS – spell out the elements of "integrity and business ethics" in 42.1501 General Provisions, and the examples in Part 42.1503 Procedures (b)(2)(vi) "Other" to include key performance standards that are most germane to Federal construction contract performance – that is, Davis Bacon/prevailing wage requirements compliance, OSHA compliance, and proper worker classification practices under Federal labor, employment and tax laws. These performance criteria should be specifically listed in the regulations as they are in the agency's direct proprietary interest of having high workforce performance indicators as a priority on the performance evaluation list. Subcontractors that violate wage or safety laws or related legal requirements can effectively undermine project performance and interfere with agency goals. For example, if a firm is paying only half the required wage, it is essentially committing fraud on the government since the appropriate wage rates are incorporated in the project specifications, which means the government is not getting what it is paying for. In addition, serious OSHA violations can lead to serious safety incidents, which of course can lead to

major project disruptions. None of this is helpful to the contracting agency nor are the time and administrative work (and headaches) required to address these types of problems. Further, any firm that "cuts corners" in these areas is obviously creating illegal and unfair competition for all the firms that play by the rules. Accordingly, the regulations should expressly require that these matters be addressed and evaluated and included in the performance evaluation reports.

5. ***First-tier subcontractor past performance ratings should be reviewed on both subsequent prime contract selection decisions and for routine evaluation of major first-tier subs under FAR Part 9.104-4(b)*** –It is an entirely logical extension of the policy enacted in Section 832 of the FY2019 NDAA to amend FAR Part 9.104-4(b) to require that past performance of first-tier subs be routinely reviewed by Contracting Officers in the contractor responsibility review process when those subcontractors are bidding for prime contract awards or are included in a prime contractor's bid or proposal under any selection process under FAR Part 14 low bidding, or Part 15 trade-off negotiations or low-price/technically-acceptable (LPTA) procedures. Routine evaluation of subcontractors in the evaluation of the prospective prime contractor's proposal is consistent with the policy in the new procedures to be more discerning in review, evaluation and selection of all significant parties performing significant aspects of agency projects. Obviously, if a first-tier subcontractor on one project seeks to bid on a subsequent project as a prime contractor, the information and data in these evaluation reports could be highly useful, whether for purposes of determining contractor responsibility or scoring performance in the context of negotiated or other best value evaluations. Likewise, if a first-tier subcontractor is proposed as one of the lead subcontractors in a future solicitation, this information could also prove critical for the same reasons. This is especially true in any best value context (design-build or otherwise). If a firm is performing the role of a first-tier subcontractor, it is clearly a major part of the overall contracting team. Thus, its qualifications (or lack thereof) should be fully considered to conduct an accurate best value assessment. In fact, we submit that a best value assessment cannot be properly conducted without having information on the performance capabilities and qualifications of first-tier subcontractors.

6. ***Ensure the veracity and accuracy of key performance information collected on prime subcontractors*** – As noted above, while the new process that would be established by the proposed regulation has substantial value for both the government and first-tier subcontractors, certain checks and balances are essential to prevent this process from being abused. To this end, we submit that prime contractors should be required to submit a certification with the final evaluation report wherein it certifies that all information and data therein is true, complete and accurate and that any comments from the evaluated subcontractor are included when it submits its evaluation report to the agency.

Respectfully submitted,

Armand Kilijian, MCAA President

Mark McManus, UA General President