COUNSEL COMMENTARY

Speak Now or Forever Hold Your Past Performance

Small businesses can leverage favorable past performance regulations, but only if they enforce agency compliance before the proposal deadline.

BY STEPHEN L. BACON

In recent years, Congress and the Small Business Administration (SBA) have created a series of special rules that make it easier for small businesses to demonstrate past performance. These rules are intended to help small businesses that do not have an extensive track record of their own prime contract experience.

Although these rules can provide a significant advantage, small businesses should not assume that the rules will be automatically followed in every procurement where they should apply. Indeed, agencies frequently draft solicitations that violate or conflict with the regulations governing the evaluation of past performance.

In those situations, small businesses must take affirmative action to ensure that the solicitation is revised to conform to the applicable regulations. This may be accomplished either through the question-and-answer phase of the solicitation, or in a timely protest. Critically, bid protest timeliness rules mandate that any challenge to a conflict between a solicitation and applicable regulations must be filed prior to the deadline for receipt of proposals.[1]

This article addresses four distinct regulatory requirements that pertain to the evaluation of past performance for small businesses. Evaluation criteria should be closely scrutinized to ensure they align with the governing rules. As the cases illustrate, firms cannot take advantage of these requirements if they do not take prompt action to correct a solicitation that does not comply with the regulations.

Protégé Past Performance and Experience

The SBA has specific rules that govern the evaluation of mentor-protégé joint ventures. Specifically, 13 C.F.R. § 125.8(e) requires procuring agencies to consider the work and qualifications held individually by the mentor and protégé, as well as the work performed by the joint venture (JV) itself. Critically, the rule also provides that an agency "may not require the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally."[2]

This rule has been a frequent source of bid protest litigation. The decision of the Government Accountability Office (GAO) in *Innovate Now, LLC*, B-419546, April 26, 2021, demonstrates when and how to properly challenge a solicitation that conflicts with 13 C.F.R. § 125.8(e).

In that case, the U.S. Air Force issued a solicitation for engineering, professional, and administrative support services that required protégé firms to meet the exact same evaluation requirements as all offerors. GAO sustained the protester's challenge to the terms of the solicitation because 13 C.F.R. § 125.8(e) "imposes an unqualified requirement; protégé firms may not be held to the same evaluation standards as other offerors."[3]

Affiliate Past Performance Under DoD Contracts

Section 865 of the Fiscal Year (FY) 2024 National Defense Authorization Act (NDAA) directed the Department of Defense (DoD) to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to require contracting officers to consider relevant past performance of a small business offeror's affiliates. DoD implemented that mandate at DFARS 215.305(a)(2)(C), effective November 2024, which states: "When evaluating the past performance of a small business offeror in response to a competitive solicitation, contracting officers shall consider relevant past performance information provided for affiliates of the offeror." This requirement applies broadly to all "competitive solicitations," not just solicitations set aside for small businesses.

In *Tyonek Technical Innovations, LLC*, B-424364, B-424364.2, Jun. 30, 2026, the protester argued that the Air Force misapplied this regulation in its evaluation

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of past performance in connection with a cyber operations training support contract. But GAO did not ultimately interpret the meaning of DFARS 215.305(a)(2)(C) because it found that the protester did not timely challenge the terms of the solicitation.

The solicitation stated that affiliate past performance "will be considered, provided that sufficient documentation is included in the proposal" and the "prime contractor must demonstrate that the affiliate will perform significant and critical aspects of the contract if awarded."[4] The solicitation further noted that the past performance of each team member would be evaluated for relevancy and quality "based on their proposed portion of the effort."[5]

After initial proposal submissions, the Air Force opened discussions with Tyonek regarding its reliance on past performance of affiliates. Specifically, the Air Force directed Tyonek to explain how the affiliates would contribute to contract performance "in a meaningful way."[6]

In response, Tyonek filed an agency-level protest that "argued that DFARS 215.305(a)(2)(C) required the agency to consider the past performance of affiliates without any additional consideration, and that Tyonek did not have to demonstrate that the affiliates would be involved in performance of the contract in order for their past performance to be evaluated."[7] The Air Force dismissed the agency-level protest as untimely, and Tyonek subsequently filed its protest at GAO.

GAO ultimately agreed with the Air Force that Tyonek's protest was "an untimely challenge to the terms of the solicitation" because the evaluation criteria "made it unambiguously clear how the agency intended to treat the past performance information of affiliated companies."[8] In GAO's view, "the RFP made it clear that affiliate past performance would not be attributed to the offeror 'without exception.'" Thus, any alleged conflict between the solicitation and the regulation "was apparent from the plain language of the solicitation" and should have been challenged before the initial proposal deadline.[9]

Because the protest was dismissed as untimely, whether Tyonek's interpretation is correct remains an open question. To the extent that question is answered in a future bid protest decision, it will very likely be in a timely pre-award challenge to an agency's solicitation.

First-Tier Subcontract Past Performance

Section 868 of the FY 2021 NDAA included additional provisions that pertain to the evaluation of past performance for small businesses. The first provision, implemented under 13 C.F.R. § 125.11(c), requires contracting officers to consider the experience and past performance of small businesses earned as a first-tier subcontractor under certain conditions.

In accordance with this regulation, small businesses may request a past performance rating for their work as a first-tier subcontractor under any prime contract that includes a subcontracting plan. The subcontractor must submit this request to the prime contractor within 30 days of prime contract completion. Within 15 days of the request, the prime contractor must provide ratings to the subcontractor using the five-scale ratings system found in FAR 42.1503.

While 13 C.F.R. § 125.11(c) is a helpful tool for small businesses, there is no guarantee that every solicitation will permit submission of past performance examples earned as a subcontractor. Indeed, many solicitations expressly limit "relevant" past performance to contracts previously performed as the prime contractor.

For example, the solicitation at issue in *Highland Engineering, Inc.*, B-424183, B-424183.2, Apr. 6, 2026, included such a restriction. In that case, the protester submitted its past performance as a subcontractor, but the evaluators deemed it not relevant under the terms of the solicitation.

The protester objected to the agency's evaluation, arguing that the solicitation could be interpreted to permit past performance examples where the subcontractor "performed duties and responsibilities normally performed by a prime contractor."[10] GAO rejected this argument because it concluded that "[t]he most natural and plain reading of this solicitation language is that the work had to have been performed by the offeror who *was* the prime contractor on the effort."[11]

The protester in *Highland* was a small business and may have been able to take advantage of 13 C.F.R. § 125.11(c) if it had timely challenged the terms of the solicitation that excluded past performance earned as a subcontractor. If the protester had raised this issue in the question-and-answer phase, or a timely protest, the solicitation terms may have been revised to ensure that its subcontractor past performance would be credited in the evaluation of proposals.

JV Member Past Performance

Another provision added by Section 868 of the FY 2021 NDAA addresses past

performance earned as a member of a JV. As the use of JVs in government contracting continues to expand, particularly for small business set-aside contracts, this provision is becoming increasingly important.

Under SBA's implementing regulations at 13 C.F.R. § 125.11(b), a small business that has been a member of a JV "may elect to use the experience and past performance of the joint venture (whether or not the other joint venture partners were small business concerns) where the small business does not independently demonstrate past performance necessary for award."[12] A small business whose proposal relies on its past performance as a JV member must identify: (1) the relevant JV; (2) the contract(s) performed by the JV; and (3) the "duties and responsibilities the concern carried out or is carrying out as part of the [JV]."[13]

The third requirement—documenting the specific work the offeror performed as part of the JV—is critical. The regulation specifically emphasizes that "[a] business cannot identify and use as its own experience and past performance work that was performed exclusively by other partners to the joint venture."[14]

Small business offerors that might benefit from 13 C.F.R. § 125.11(b) should examine the solicitation for any indication that precludes use of JV member past performance. As with the regulations discussed above, any conflict between the evaluation criteria and § 125.11(b) must be raised in a timely protest.

Conclusion

The core lesson from the cases discussed above is that a favorable past performance regulation does not enforce itself. Rather, small businesses must take an active role in policing agency compliance with the applicable regulations.

The solicitation's terms should be reviewed closely against the governing regulation before drafting a proposal. If the solicitation violates the regulations, treat that as a defect in the solicitation that must be resolved prior to the proposal deadline.

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ENDNOTES

1 4 C.F.R. § 21.2(a)(1).
2 13 C.F.R. § 125.8(e).
3 Innovate Now, LLC, B-419546, Apr. 26, 2021, at 4.
4 Tyonek Technical Innovations, LLC, B-424364; B-424364.2, Jun. 30, 2026, at 2.
5 Id. at 3.
6 Id.
7 Id. at 4.
8 Id. at 5.
9 Id. at 6.
10 Highland Engineering, Inc., B-424183, B-424183.2, Apr. 6, 2026, at 6.
11 Id. at 7.
12 13 C.F.R. § 125.11(b).
13 13 C.F.R. § 125.11(b)(1)(i).
14 13 C.F.R. § 125.11(b)(1)(ii).