



GOVERNMENT CONTRACTS

update

Past Performance Primer

Tim Noelker

Scott Lane

May 14, 2013

Overview

- Significance of Past Performance Ratings
- Past Performance Systems
- CPAR Details and Appeal Processes
- Tips for Ensuring a Meaningful Review with the Agency
- Options to Continue Disputing a CPAR
 - Contracting Officer's Final Decision
 - Court of Federal Claims
 - Board of Contract Appeals
 - Standard of Review
 - Remedies
- Competitive Strategies
- Bid Protest Implications

Significance of Past Performance Ratings – New Business

- Past Performance is Essential to Winning New Business.
 - FAR 42.1503 requires agencies to collect past performance information and submit the information to online databases.
 - FAR 15.304 requires that past performance be considered in all negotiated competitive acquisitions.
 - Even if past performance is not included as an evaluation factor, it will factor into the “responsibility” determination. FAR 9.104-6.
- Unsatisfactory past performance can also be cause for suspension and debarment. FAR 9.406-2(b)(1)(B).

Significance of Past Performance Ratings – Policy Implications

- As part of the Federal Acquisition Streamlining Act of 1994, Congress instructed the Office of Federal Procurement Policy (OFPP) to require consideration of past performance for source selection.
- Often publicized as enhancing the Government's ability to “protect taxpayers” from doing business with irresponsible contractors.
- It also promotes integrity and fairness of competition to the benefit of the Government and contractors.
- Generally, the significance of past performance in an evaluation should be greater where the procurement's requirements are less defined, but this varies considerably.

Past Performance Systems

- CPARS: Contractor Performance Assessment Reporting System
 - Online applications to input performance information.
- CPARS includes four separate applications:
 - CPARS is the input system for contractor performance assessment reports (CPARs).
 - CCASS is the input system for performance evaluations on construction contracts (DD Form 2626).
 - ACASS is the input system for performance evaluations on architect-engineer contracts (DD Form 2631).
 - FAPIIS is the input system for terminations for cause, defective pricing, non-responsibility determinations and administrative agreements.
- March 6, 2013, OFPP memo set targets for agencies to improve reporting performance and integrity information.

Past Performance Systems

- PPIRS: Past Performance Information Retrieval System
 - Online application to view performance information.
 - Weekly feed from all four CPARS applications.
 - Used for source selection purposes.
 - Retained in PPIRS for three years after contract ends.
- FAPIIS: Federal Awardee Performance and Integrity Information System
 - FAPIIS is a module within PPIRS that allows contracting officers to view information regarding contractor integrity from CPARS and SAM.gov.
 - The public version of FAPIIS excludes performance evaluations.

CPAR – Types and Timing

- Three types of CPARs: Interim, Final and Addendum
 - Interim reports are required every 12 months or upon a significant change in the agency after six months.
 - Final reports are at the end of the contract.
 - Addendum reports are optional and cover warranty and closeout management .
 - They are not supposed to include cumulative information.
 - They are encouraged to coincide with other reviews (award fees, milestone decisions, etc.).
- Reports are due 120 calendar days after each assessment period.

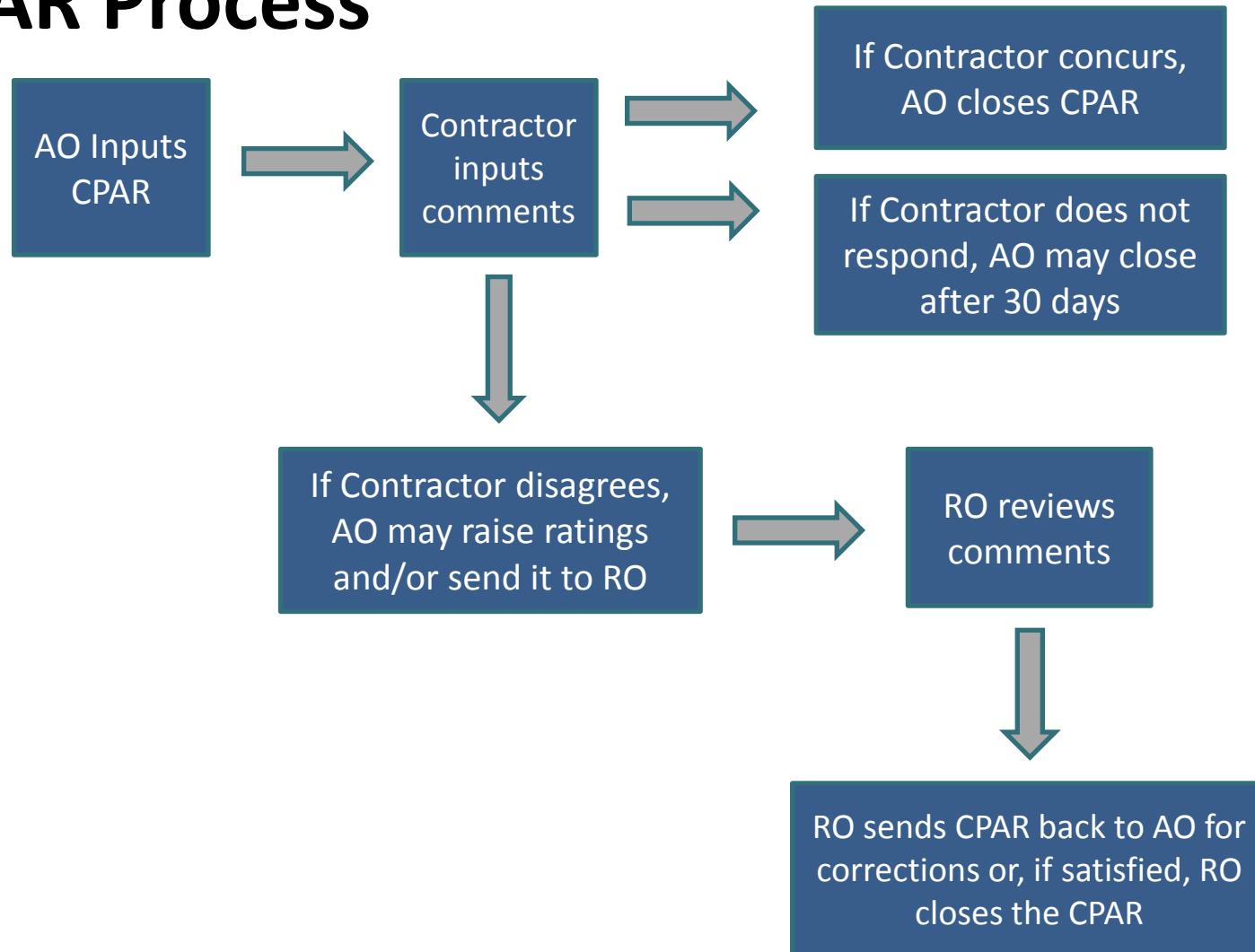
CPAR – Thresholds

- Thresholds:
 - A CPAR is required if the total potential value of the contract exceeds the simplified acquisition threshold (\$150K).
 - IDIQ orders are considered together for thresholds, but may be evaluated together.
 - FSS orders and BOA orders are considered and evaluated individually.
 - DoD maintains different threshold by business sector:
 - For systems and operations support, required if exceeds \$5M.
 - For services and information technology, required if exceeds \$1M.
 - For ship repair and overhaul, required if exceeds \$500K.
 - For health care and fuels, required if exceeds \$150K.
- The Government can report on contracts below the threshold in special circumstances (e.g., to help a small business, to document exceptionally good/bad performance, etc.).

CPAR – Key Roles

- Assessing Official (AO) – Program Manager, Contracting Officer, Contracting Officer’s Representative, IPT lead, etc.
 - Writes evaluation, reviews contractor comments.
 - Must be a Government employee.
- Contractor Representative – Someone involved in day-to-day performance
 - Reviews evaluation, writes contractor comments.
- Reviewing Official (RO) – One level above the Contracting Officer
 - DoD maintains separate review levels.
 - Reviews contractor comments, returns to AO for correction if necessary, inputs supplemental comments.
 - Must be a Government employee.

CPAR Process



Tips for Ensuring a Meaningful Review with the Agency

- During contract performance – maintain a repository of important events and feedback.
- Be aware of due dates for CPAR reports.
 - Ask the AO if you may see the Government's draft and provide informal comments before the draft is entered.
 - You may be able to help the AO document important events and project status upfront.
- Keep an open line with the AO and Contracting Officer.
 - After the draft is entered, request a meeting to discuss the CPAR face-to-face, if possible.
 - Request an extension of time, if necessary, to facilitate a meeting.

Tips for Ensuring a Meaningful Review with the Agency

- Do not let the 30-day deadline pass without obtaining an extension in writing or entering your comments.
- Counsel should be engaged if the CPAR will be disputed, i.e., before submitting your contractor comments.
 - This is the most cost-efficient and timely opportunity to resolve a potentially harmful dispute.
 - Counsel should remain behind the scenes, if possible, to avoid raising tension.

Tips for Ensuring a Meaningful Review with the Agency

- Contractor comments should make use of the rating definitions and notes from the DoD CPARS Guide to limit the subjective nature of the evaluation.
 - For example, a rating of “Unsatisfactory” generally requires having multiple significant events in the category that the contractor had trouble overcoming and that impacted the Government.

Tips for Ensuring a Meaningful Review with the Agency

- Contractor comments should reference objective metrics and specific feedback wherever possible.
- Contractor comments should reflect a sincere but respectful tone.
 - Remember, pursuant to FAR 42.1503(b) “[t]he ultimate conclusion on the performance evaluation is a decision of the contracting agency.”

Options to Continue Disputing the CPAR

- There have been several jurisdictional battles over the past few years regarding who has jurisdiction to consider disputes over performance evaluation ratings.
- The GAO will not hear any direct challenges to the ratings in the CPAR. Any such challenges would be dismissed summarily as matters of “contract administration.” See 4 CFR § 21.5; *Ocean Tech. Servs., Inc.*, B-288659, Nov. 27, 2001, 2001 CPD ¶ 193.

Options to Continue Disputing the CPAR

- Federal district courts do not have subject matter jurisdiction to consider disputes regarding performance evaluations. *See Public Warehousing Co. K.S.C. v. Defense Supply Center Philadelphia*, 489 F.Supp. 2d 30 (D.D.C. 2007).
- It has recently been established that challenges to performance evaluations fall within the purview of the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109.
 - This first requires a Contracting Officer's Final Decision.
 - Then, it may be appealed to the U.S. Court of Federal Claims (COFC) or Boards of Contract Appeals.

Contracting Officer's Final Decision

- A request for a Contracting Officer's final decision (or a “claim”) is a jurisdictional requisite to suing under the CDA.
- The claim also provides an opportunity to include the Contracting Officer in the discussions and to test his/her resolve.

Contracting Officer's Final Decision

- It is important that the claim be submitted after the CPAR has been closed by the reviewing official.
 - The COFC has held that contractor comments are insufficient to implicate the CDA process. *Kemron Env'tl. Servs., Inc. v. United States*, 84 Fed. Cl. 74 (2010).
 - The closed CPAR itself is not considered a final decision. *Konoike Const. Co.*, ASBCA No. 40910, July 2, 1991, 91-3 BCA ¶ 24170.
 - The claim must be sufficiently distinct from the CPAR review process. *BLR Group of America, Inc. v. United States*, 96 Fed. Cl. 9 (2010).

Contracting Officer's Final Decision

- The claim should identify substantive defects in the CPAR, as well as procedural defects, if applicable.
- Although the statute of limitations to bring a claim is six years, the impact of a negative CPAR can be immediate so claims should be brought forth quickly.
- The claim should demand a decision within 60 days; if no decision is issued within that time, it will be deemed denied.

Court of Federal Claims

- Appeals to the COFC must be made within one year of the Contracting Officer's final decision.
- Jurisdictional hurdles cleared:
 - *Todd Construction, L.P. v. United States*, 85 Fed. Cl. 34 (2008) – holding that FAR 36.201 (2006) entitled the contractor to a fair and accurate performance evaluation.
 - *BLR Group of America, Inc. v. United States*, 84 Fed. Cl. 634 (2008) – holding that contractors are legally entitled a fair and accurate performance evaluation pursuant to FAR 42.1502.
 - *Todd Construction, L.P. v. United States*, 656 F.3d 1306 (Fed. Cir. 2011) – confirming that FAR 42.1502 provides a cause of action to contractors because it was intended to directly and significantly benefit contractors.

Board of Contract Appeals

- Shorter timeframe to appeal to the Board of Contract Appeals – within 90 days of receiving a Contracting Officer's final decision.
- Historically, the boards denied to take jurisdiction of performance evaluation claims unless there was a specific contract clause that included a right to a performance evaluation. *See, e.g., Versar, Inc.*, ASBCA No. 56857, May 6, 2010, 10-1 BCA ¶ 34437.
- *Colonna's Shipyard, Inc.*, ASBCA No. 56940, June 24, 2010, 10-2 BCA ¶ 34494, expanded this practice by indicating that a breach of the duty of good faith and fair dealing may provide a sufficient relationship to the contract's terms.
- The Federal Circuit's rationale in *Todd Construction* seemingly extends to the Boards of Contract Appeals as well.

Standard of Review

- The FAR creates two distinct sets of requirements:
 - Following the requisite procedures.
 - Providing a fair and accurate performance evaluation.
- Procedural errors are reviewed *de novo*.
 - In order to avoid problems with standing and redressability, the complaint must tie specific procedural flaws to prejudice in the evaluation.
- Substantive errors are reviewed for abuse of discretion.
 - Must show arbitrary or capricious conduct by the Government.
 - Mere disagreement is insufficient.

Standard of Review

- For example:
 - Were contractor shortcomings excusable?
 - Did the Government share in fault?
 - Did the Government ignore/misstate significant facts or metrics?
 - Did the Government hold the contractor to requirements beyond those in the contract?
 - Has the Government identified a serious event and an impact to the Government in order to justify negative ratings?
 - Did factors outside contract performance influence the ratings?

Remedies

- Available Remedies
 - Declaratory judgment.
 - Remand order with proper and just instructions to correct the evaluation.
 - The court will not write the review itself.
 - EAJA costs, if applicable.

Remedies

- Other Remedies
 - Injunctive relief
 - Is categorically unavailable at the Boards of Contract Appeals.
 - May be available at COFC in very limited circumstances.
C.f., Todd Const., L.P. v. United States, 88 Fed. Cl. 235, 243, n.4 (2009); *Davis Group Inc. v. United States*, No. 12-275C, 2012 WL 2686053 (Fed. Cl. July 6, 2012).
 - No lost profits.
 - No defamation damages.

Competitive Strategies

- Negative performance evaluations are very detrimental to winning new business.
- Depending on the circumstances, it may be best to explain a negative evaluation in your initial proposal.
- FAR 15.306(d)(3) requires agencies to allow you an opportunity to explain adverse past performance information that you have not had an opportunity to respond to – but only if you make the competitive range.
e.g., Apptis, Inc., B-299457, May 23, 2007, 2008 CPD ¶ 49.
- Be careful about which contact persons are identified for your past performance information.

Competitive Strategies

- Keep a diligent record of your company's past performance.
- Check the available information on your company regularly.
- Perform due diligence on subcontractors, teaming partners and competitors.
- Each solicitation has different past performance evaluation factors; if you are concerned about the way past performance will be used (i.e., what is considered recent or relevant), then file protest before offers are due.

Bid Protest Implications

- Protests against solicitation terms must be filed before offers are due.
- The GAO will not consider protests that challenge CPAR ratings.
- The GAO will consider protests that a procuring agency unreasonably evaluated an offeror's past performance proposal.
 - The GAO will question an agency's evaluation conclusions where they are unreasonable, undocumented or not in accordance with law or the solicitation's evaluation scheme.
 - This includes whether the evaluation included relevant information close at hand or known by the contracting personnel awarding the contract.
 - *TriCenturion, Inc.*, B-406032, January 25, 2012 CPD ¶ 52.

Bid Protest Implications

- If the agency finds a contractor “nonresponsible” based on its past performance, the GAO and COFC afford the agency a wide degree of discretion.
 - *M. Erdal Kamisli Co. Ltd.*, B-403909.2, February 14, 2011, 2011 CPD ¶ 63 (GAO required protester to demonstrate bad faith or a lack of any reasonable basis for the determination).
 - *Afghan American Army Services Corp.*, 106 Fed. Cl. 714 (2012) (protester demonstrated that nonresponsibility determination was arbitrary and capricious).
- If an agency fails to consider adverse past performance information known about your competitors, it may be grounds for you to protest. e.g., *Contrack International, Inc.*, B-401871.5, May 24, 2010 CPD ¶ 126.

Thank You

Timothy F. Noelker
Thompson Coburn LLP
One US Bank Plaza
St. Louis, MO 63101
314.552.6091
tnoelker@thompsoncoburn.com
www.thompsoncoburn.com

Scott F. Lane
Thompson Coburn LLP
One US Bank Plaza
St. Louis, MO 63101
314.552.6535
slane@thompsoncoburn.com
www.thompsoncoburn.com