

NAVIGATING ADVERSE PAST PERFORMANCE EVALUATIONS

ACC GOVERNMENT CONTRACTORS FORUM

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Overview

- Importance of Past Performance Evaluations
- Past Performance Databases
- The Past Performance Evaluation Process
- Strategies for Responding to Adverse CPARs
- Challenging a CPARs
- Past Performance Evaluations in Bid Protests
- Implications for Mergers & Acquisitions
- Questions

Importance of Past Performance Evaluations

- It is crucial that contractors maintain their image
- Past Performance as an evaluation factor
 - FAR 15.3 – “shall” be evaluated in all source selections for negotiated competitive acquisitions exceeding the SAT
 - FAR Part 8.4 (Federal Supply Schedule)
FAR Part 16 (IDIQs)
- Also a matter of responsibility
 - Must have a “satisfactory performance record.” FAR 9.104-1(c)
 - Unsatisfactory performance of one or more contracts is grounds for debarment. FAR 9.406-2(b)(1)(i)(B)

Importance of Past Performance Evaluations

- The Federal Acquisition Regulation (FAR) requires that contractor performance information be collected (FAR Part 42.15) and used in source selection evaluations (FAR Part 15).
- The less definitive the requirement, the more development work required, or the greater the performance risk, the more past performance considerations may play a dominant role in source selection.

Government Databases

- Contractor Performance Assessment Rating System (CPARS)
- Agencies enter their contractor performance evaluations in the CPARS.
- Past Performance Information Retrieval System (PPIRS) - Contractor performance evaluations are uploaded into PPIRS after 14 days.
- Federal Awardee Performance and Integrity Information System (FAPIIS) - Repository for non-responsibility determinations, suspensions, debarments, and terminations for default.

The Past Performance Evaluation Process

- Agencies shall monitor their compliance with the past performance evaluation requirements (see 42.1502), and use the Contractor Performance Assessment Reporting System (CPARS) and Past Performance Information Retrieval System (PPIRS) metric tools to measure the quality and timely reporting of past performance information.
- Past performance information (including the ratings and supporting narratives) is relevant information for future source selection purposes regarding a contractor's actions under previously awarded contracts or orders.

The Past Performance Evaluation Process

- Under FAR 42.15, agencies are required to evaluate contractors' performance on contracts or orders at least annually and at the time the work under the contract or order is completed.
 - Required for contracts or orders that exceed SAT (currently \$150,0000).
 - Required for construction contracts > or equal to \$700,000.
 - Architect-engineer services contract > or equal to \$35,000 and for each contract that is terminated for default.

The Past Performance Evaluation Process

- Types of CPARs:
 - Interim - at least every 12 months throughout the entire period of performance of the contract/order.
 - Final - completed upon contract/order completion or delivery of the final major end item on the contract/order.
 - Addendum - to record the contractor's performance relative to contract/order closeout, warranty performance and other administrative requirements.

The Past Performance Evaluation Process

- Evaluation factors:
 - Technical (quality of product or service)
 - Cost control
 - Schedule/timeliness
 - Management or business relations
 - Small business subcontracting
 - Other (e.g., trafficking violations, tax delinquency, failure to report in accordance with contract terms and conditions).
FAR 42.1503(b)(2)

The Past Performance Evaluation Process

- Each factor is evaluated with a supporting narrative and rated in accordance with a five scale rating system (i.e., exceptional, very good, satisfactory, marginal, and unsatisfactory). FAR 42.1205(b)(4)
- The evaluation should
 - Include clear relevant information that accurately depicts the contractor's performance, and
 - Be based on objective facts supported by program and contract or order performance data. FAR 42.1205(d).

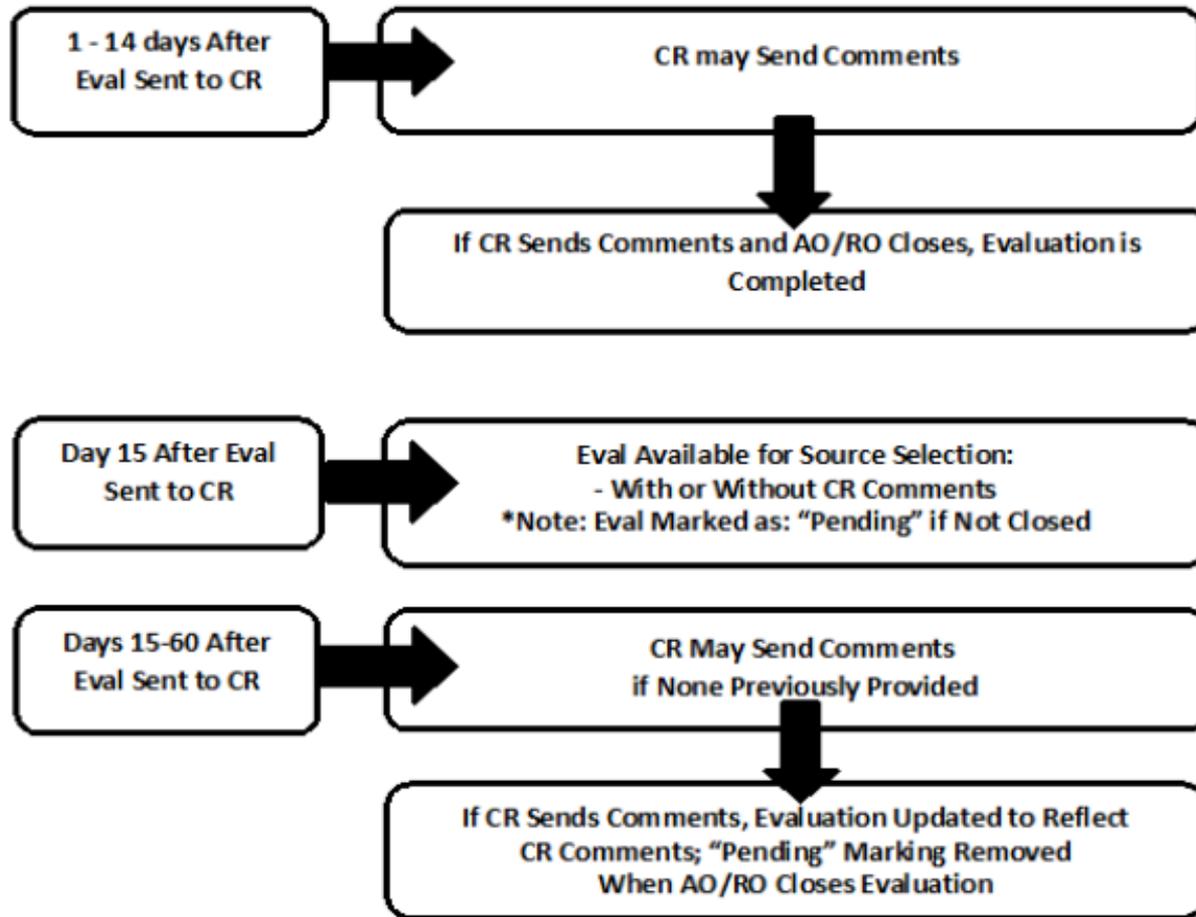
The Past Performance Evaluation Process

- Past performance evaluations should be marked “Source Selection Information”.
- “The completed evaluation shall not be released to other than Government personnel and the contractor whose performance is being evaluated during the period the information may be used to provide source selection information.” FAR 42.1503(d).
- But see *Torres Advanced Enter. Sols., LLC v. United States*, 135 Fed. Cl. 1 (2017) (court would not redact past performance information)

The Past Performance Evaluation Process

- Assessing Official (AO) - responsible for contracting or overall program execution and is responsible for preparing, reviewing, signing, and processing the evaluation.
- Designated Contractor Representative (CR) – person to whom the evaluations will be sent automatically and electronically.
- Reviewing Official (RO) - when there is disagreement between the AO and the contractor, the RO must review and sign the evaluation.

The Past Performance Evaluation Process



Strategies for Responding to Adverse Performance Evaluations

- Limited time to meaningfully respond
 - Within 7 days, request a meeting. This meeting will be held during the contractor's 60-calendar day review period. CPARS Guidance at 14.
 - Within 14 days, provide comments, rebutting statements, or additional information. FAR 42.1503(d).
 - On day 15, other evaluators and agencies will be able to access CPAR in PPIRS. CPARS Guidance at 17.

Strategies for Responding to Adverse Performance Evaluations

- Common areas of disagreement:
 - Failing to justify performance ratings – for example, “marginal” or “unsatisfactory” ratings do not match definitions
 - Flaw in relevant time period of CPARs
 - Agency issued the evaluation after the evaluation period ends
 - Use of addenda – addenda should only be used after the “final” CPAR regarding contract/order closeout, warranty performance and other administrative requirements.

Strategies for Responding to Adverse Performance Evaluations

- Common areas of disagreement (cont'd):
 - Cost control is being evaluated for FFP. FAR 42.1502(b)(2)(ii).
 - Evaluation references to pending investigations, claims or REAs.
 - No prior notice of perceived contractual deficiencies.

Strategies for Responding to Adverse Performance Evaluations

- Request review at a level above the CO (i.e., the RO) to consider disagreements
- Request a meeting
- Request that CPAR be reevaluated
- Request that CPAR be withdrawn
- If AO and RO will not withdraw the adverse performance evaluation or change the rating, consider filing a claim under the Contract Disputes Act

Challenging a Past Performance Evaluation

- Submit Claim(s) and Appeal(s)
 - Submit a claim under the Contract Disputes Act (“CDA”), 41 U.S.C. §§ 7101-7109, to the contracting officer containing a request for a final decision.
 - ◆ See FAR 2.101 for definition of “claim”
- Appeal denial of a claim to the Boards of Contract Appeals within 90 days of the date of the CO’s final decision or to the Court of Federal Claims within 12 months from the date of the CO’s final decision.

Using the CDA to Challenge Past Performance Evaluations

- *Todd Construction, L.P. v. United States*, 656 F.3d 1306, 1312 (Fed. Cir. 2011): Asserting jurisdiction over CPARs disputes under the CDA as issues relating to the performance of a contract.
- A claim is a jurisdictional prerequisite under the CDA:
 - A written claim must be submitted to the contracting officer seeking other relief arising under the contract.
 - Agency issuance of a final decision
- Expressions of frustration or disagreement with CPARs do not constitute claims under the CDA.

Remedies

- Declaratory relief
 - Is a declaration of rights sufficient?
- Remand to the agency with such direction as the Court deems “proper and just”
- Injunctive relief is not available.
 - See *ITility, LLC v. United States*, 124 Fed. Cl. 452 (2015).
 - Boards lack jurisdiction to grant injunctive relief. See *Versar, Inc.*, ASBCA No. 56857, May 6, 2010, 2010-1 BCA ¶ 34,437.

CPARs Decisions

- Decisions by the Court of Federal Claims and the Boards of Contract Appeals primarily focus on jurisdictional issues, not the merits of a claim.
- In *Public Warehousing Co. K.S.C. v. United States*, No. 07-366C (Fed. Cl. June 13, 2007), the Court of Federal Claims issued a TRO ordering the agency to comply with FAR 42.15, provide objective data about plaintiff's performance, and remove access to non-compliant CPARs. The TRO was subsequently vacated as a result of the parties' settlement agreement.

Bid Protests

- GAO does not hear substantive challenges to CPARs. See *Ocean Tech. Servs., Inc.*, B-288659, Nov. 27, 2001, 2001 CPD ¶ 193.
- Agency consideration of awardee's past performance was not consistent with stated evaluation criteria where agency failed to give proper consideration to adverse CPAR. See *DRS C3 Sys., LLC*, B-310825, B-310825.2, Feb. 26, 2008, 2008 CPD ¶ 103.
- Agency treated vendors disparately by considering protester's CPARs for projects in its quotation while considering the awardee's CPARs for other than projects in its quotation. See *CSR, Inc.*, B-413973, B-413973.2, Jan. 13, 2017, 2017 CPD ¶ 64.

Bid Protests

- However, GAO has held that an agency's past performance evaluation may be based on a reasonable perception of inadequate prior performance, regardless of whether the contractor disputes the agency's interpretation of the underlying facts, the significance of those facts, or the significance of the contractor's corrective actions. *See General Revenue Corp., et al.*, B-414220.2, et al., Mar. 27, 2017, 2017 CPD ¶ 106; *PAE Aviation & Tech. Servs., LLC*, B-413338, B-413338.2, Oct. 4, 2016, 2016 CPD ¶ 283; *Duluth Travel, Inc.*, B-410967.3, June 29, 2015.

Bid Protests

- Agency evaluation failed to consider the more recent CPAR evaluations or justify weight afforded to the more dated CPARs. *Best Value Tech., Inc.*, B-412624.3, 2017 CPD ¶ 50.
- An evaluation of an offeror's past performance is unreasonable if an agency disregards positive information relevant to an evaluation factor and focuses exclusively upon allegedly adverse information. *DKW Commc'ns, Inc.*, B-411182, B-411182.2, June 9, 2015, 2015 CPD ¶ 178.

Mergers & Acquisitions and Past Performance

- Buyers should consider whether any adverse past performance ratings of target companies will impact their ability to obtain future work.
- As a matter of due diligence, it is common to request CPARs or other performance assessments for contracts and seek representations and warranties regarding adverse past performance.
- Buyers should also discuss whether there are any performance issues with the government customers.

Mergers & Acquisitions and Past Performance

- An agency may attribute the experience or past performance of a parent or affiliated company to an offeror where the firm's proposal demonstrates that the resources of the parent or affiliate will affect the performance of the offeror. *Perini/Jones, Joint Venture*, B-285906, Nov. 1, 2000, 2002 CPD ¶ 68 at 4.
- To attribute past performance or experience of affiliate, resources of the parent or affiliated company (e.g., workforce, management, facilities or other resources) should be identified in proposals to show meaningful involvement in contract performance.

Mergers & Acquisitions and Past Performance

- In *IAP World Services, Inc.; EMCOR Government Services*, B-407917.2 et al., July 10, 2013, GAO sustained a protest because the agency unreasonably credited a joint venture awardee with the corporate experience and past performance of separate affiliates where the record did not show that the affiliates would provide resources or be relied upon for performance.
- In *Wyle Laboratories, Inc.*, B-408112.2, Dec. 27, 2013, GAO sustained a protest where agency's award decision was based on "old" SAIC's proposal even though the contract was to be performed by a new spin-off entity.

Questions?



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