Sparring with CPARS: Some Tips on Avoiding and Curing Bad Past Performance Evaluations That Can Haunt and Jeopardize a Government Contractor's Business for Years

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Introduction

Contractor past performance evaluations are important factors in source selection decisions under Parts 8 and 15 of the Federal Acquisition Regulation ("FAR"), and they can easily make or break a contractor's federal customer base. Especially vulnerable are contractors competing in Lowest Price Technically Acceptable ("LPTA") procurements, where a bad past performance rating can make contractors ineligible due to an "unacceptable" technical rating even though they may offer the lowest price. The submission by Government contracting officials of a contractor's performance evaluation to the Contractor Performance Assessment Reporting System ("CPARS") is required in most instances; however, the contractor's remedies for correcting poor performance evaluations due to mistakes and material omissions by the evaluator are limited in both time and scope. And as the DoD's Inspector General ("IG") has repeatedly pointed out, most recently in its May 9, 2017 report, *Summary of Audits on Assessing Contractor Performance* (noting a large percentage of DoD performance assessment reports are late and not prepared correctly and accurately), mistakes often happen. Contractors looking to sustain their business in the federal marketplace need to be properly armed with the weapons available to challenge poor performance evaluations when the agency gets it wrong.

To facilitate the exchange of information among Government officials and to weigh risks when making acquisition decisions, agencies are required to report contractor performance information. CPARS provides a central, electronic tool for Government officials to report, obtain and use important past performance information. The system is tied to other databases, such as the Federal Procurement Data System ("FPDS"), Past Performance Information Retrieval System ("PPIRS"), and Federal Awardee Performance and Integrity Information System ("FAPIIS"). Quite often PPIRS is the primary source relied upon by source selection officials for evaluating past performance.

Yet, as the DoD IG has pointed out, despite the fact that the Government provides training courses, learning seminars and system guidance for Government officials, acquisition personnel consistently fail to comply with requirements for evaluating contractor performance – often leaving misleading and potentially harmful reports that are being relied on by source selection officials in making award decisions. If the Government fails to get it right, what can contractors do to protect themselves?

First, Understand the CPARS Process

The FAR, the Guidance for the Contractor Performance Assessment Reporting System (CPARS) ("CPARS Guidance"), and other manuals, instructions and polices established at the agency level set forth the procedures for the Government to evaluate a contractor's past performance and to make those evaluations available to source selection officials through CPARS and PPIRS. With limited exceptions, contractor performance must be evaluated for all contracts above the $150,000 simplified acquisition threshold, and evaluations must be prepared at least annually and at the time the work under a contract is completed.

The FAR requires agencies to marshal input from technical, contracting, program management and other contract stakeholders to effectuate the compilation of contractor past performance data. Evaluations must include a clear nontechnical description of the contract and "clear relevant information that accurately depicts the contractor's performance and be based on objective facts supported by . . . performance data." FAR 42.1503(b)(1). Agencies must, at a minimum, use certain prescribed evaluation factors, including quality of the product or service, cost control in cost contracts, timeliness, management and small business subcontracting. FAR 42.1503(b)(2).

Each factor must be evaluated with a supporting narrative and rated in accordance with a five-scale rating system (exceptional, very good, satisfactory, marginal and unsatisfactory) as defined in the FAR. FAR 42.1503(b)(4); FAR 42.1503, Table 42-1. Finally, agencies must tailor evaluations to the contract type, size, content and complexity of the contractual requirements. FAR 42.1503(b)(1).

When an agency completes an evaluation, the contractor receives a CPARS-generated system notification that the evaluation has been submitted and an opportunity to submit comments, a rebuttal or additional information. After 14 days, the evaluation is automatically published on PPIRS, together with comments by the contractor as of that date. This timeline for publishing was condensed from 30 days to 14 days in 2014, imposing a burden on the contractor to review its evaluation and develop a response very quickly if it wants its comments be included in the initial data published on PPIRS. On day 15, evaluations are accessible to source selection officials through PPIRS, with or without the contractor's response. Section 4.4 of the CPARS Guidance permits contractors to submit comments up to 60 days after notification to the contractor and allows these comments to be included in PPIRS once submitted.

FAR 42.1503(d) further provides that to the extent the contractor rebuts or disagrees with any aspect of the performance evaluation, the disagreement must be reviewed by a reviewing official at a level above the contracting officer. The reviewing official must issue a written decision, which then becomes part of the evaluation and available on PPIRS. If the contractor still disputes the reviewing official's decision, further steps can be taken to appeal the decision under the Disputes clause of the contract to the cognizant Agency Board of Contract Appeals ("BCA") or to the Court of Federal Claims ("COFC").

Second, Be Proactive With Agency Before the Initial Evaluation Is Submitted

The entire CPARS evaluation process, including the 60-day comment period and the reviewing official's final decision, must be completed within 120 days of the end of the contract period of performance. To meet this timeline, the CPARS Guidance instructs the Government to report evaluations "in a timely manner" after the period of performance ends.

While there is no requirement for the Government's evaluation team to meet with the contractor, there is also no prohibition on such a meeting. If a contractor anticipates a problem with its evaluation, it should contact the appropriate agency officials who would likely be contributing to the performance evaluation to discuss the findings. To the extent there is any confusion or misunderstanding that might result in a poor performance rating, this would be an opportunity to cure them. Discussions can continue or begin even after the initial notice is provided during the 14-day period before publication.

Third, Build a Case Through a Strong Rebuttal, and Ask Any Agencies Currently Reviewing Proposals to Hold Off on Relying on an Evaluation Until the Review Process Is Completed

When facing a poor performance rating that the contractor believes unjustified, the contractor should submit a timely and forceful rebuttal demanding review of the initial decision by the agency. The rebuttal should address both procedural and substantive deficiencies in the evaluation, *i.e.,* any failure

to follow the requirements of the FAR and any mistakes in the facts supporting the evaluation. For instance, if the agency provides no narrative for a factor with an unsatisfactory technical performance rating, the evaluation is incomplete and unsupported, in violation of the FAR 42.1503(b) requirements. The rebuttal should include copies of any supporting information, including records, notes, contemporaneous emails from the agency and other documentation that contradicts the conclusions drawn by the agency.

If the contractor has a proposal pending after the publication in PPIRS of the initial evaluation and rebuttal, it should ask the soliciting agency not to rely on any negative past performance evaluations at least until such time as the reviewing official has issued a final decision. Although the soliciting agency is not bound to refrain from using such information, a source selection official may be persuaded that reliance on the information without the benefit of the reviewing official's consideration of the contractor's rebuttal would be unfair and prejudicial to the offeror.

Finally, If Merited, Challenge the Final Decision Through a CDA Appeal

Should the contractor fail to persuade the reviewing official, it has not exhausted all its remedies, although the path forward will take more time and expense. A contractor suffering from an unjust past performance evaluation may indeed find an investment in the appeal of the decision of the reviewing official worthwhile. An appeal may be particularly appropriate if a reviewing official strays beyond the initial agency evaluation and includes new, unsupported grounds to which the contractor has not yet had an opportunity to respond.

There is no special procedure in the FAR for the immediate appeal of the reviewing official's final decision. Rather, contractors must look to the procedures established under the Contracts Disputes Act of 1978, 41 U.S.C. §§ 7101-7109 ("CDA"), and the Disputes clause of the applicable contract. The CDA permits appeals to the cognizant BCA or to the COFC of final decisions of contracting officers in response to "claims" by a contractor. Here, the contractor must be careful. In *BLR Group of America, Inc. v. United States*, 96 Fed. Cl. 9, 14 (2010), the COFC agreed with the Government that when the contractor is acting within the "confines of the FAR's performance evaluation procedures," the contractor's comments are not necessarily or automatically a claim for the purpose of the CDA process. Communications made for purposes of performance evaluation process pursuant to FAR 42.1503 have been distinguished as separate and distinct from a CDA claim. To ensure standing on an appeal, the contractor should submit a separate claim challenging the reviewing official's decision, seek a final decision under the relevant disputes clause and be prepared to appeal that final decision.

Conclusion

Because of the enormous impact a bad performance evaluation can have on a contractor's ability to get future awards – and in light of the propensity of agencies to perform poorly in making the evaluations – contractors should carefully and timely scrutinize all performance evaluations that may negatively affect the contractor.

1. As the contract is winding down and before the initial performance evaluation is submitted, proactively engage the contracting agency. The contractor should inquire as to who within the contracting agency will be contributing to the evaluation and should engage the evaluators in a discussion regarding any potential issues or concerns.

2. When the contractor receives the CPARS notice, the contractor should quickly and carefully review with counsel the evaluation, identifying and challenging any inaccurate or incomplete items. If appropriate, the contractor should again engage the evaluator in discussions to determine whether the initial evaluation can be revised and, if unsuccessful, submit a substantive rebuttal challenging all procedural deficiencies and factual errors, together with helpful supporting materials, no later than 14 days after receiving the notification.

3. While the rebuttal is being reviewed, the contractor should ask any agencies reviewing its other proposals to hold off on relying on the data in PPIRS and, if unsuccessful, ask them to take the rebuttal into consideration.

4. If, in conjunction with counsel, the contractor concludes that the reviewing official's decision was improperly decided, the contractor should consider a CDA appeal, making sure that it follows the correct procedural steps to perfect the appeal.