Bloomberg BNA

Federal Contracts Report™

Proposal Evaluations

Challenging Untimely, Unreasonable Past Performance Evaluations



BY ALAN PAMBERTON, JADE TOTMAN AND KAYLEIGH SCALZO

Government agencies have been told to ''[h]old[] contractors accountable for past performance.''[1] The Office of Management and Budget (''OMB'') has released three recent memoranda—dated March 6, 2013[2]; January 21, 2011[3]; and July 29, 2009,[4] respectively—exhorting agencies to produce more timely, complete, and accurate past performance evaluations. Unfortunately, though, assessing officials (''AOs'')[5] at some contracting activities have interpreted OMB's guidance as a mandate to dust off dormant contract files and reconstruct long-overdue performance evaluations. Lacking contemporaneous knowledge of the contractors, programs, and performance to be reviewed, some of these AOs are preparing their evaluations based on imperfect, unreliable hearsay and the reconstituted, hazy memories of their colleagues. The results are often the opposite of the timely, complete, and accurate evaluations that OMB has called for.

Many contractors incorrectly view a dispute of such an evaluation—either an appeal to the agency under the Federal Acquisition Regulation (''FAR'')[6] or a claim under the Contract Disputes Act (''CDA'')[7]—as a Hobson's choice. An agency-level appeal can fail because the ''ul-

[1] *Improving the Use of Contractor Performance Information*, MEMORANDUM FROM LESLEY A. FIELD, DEPUTY ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY (''OFPP'') (July 29, 2009), at 1 (''OMB Past Performance Memo #1''); *see also* Federal Acquisition Regulation 42.1501(a) (''Past performance information . . . is relevant information, for future source selection purposes, regarding a contractor's actions under previously awarded contracts . . . .'').

[2] *Improving the Collection and Use of Information About Contractor Performance and Integrity*, MEMORANDUM FROM JOSEPH G. JORDAN, ADMINISTRATOR, OFPP (Mar. 6, 2013) (''OMB Past Performance Memo #3'').

[3] *Improving Contractor Past Performance Assessments: Summary of the Office of Federal Procurement Policy's Review, and Strategies for Improvement*, MEMORANDUM FROM DANIEL I. GORDON, ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY, OFPP (Jan. 21, 2011).

[4] OMB Past Performance Memo #1.

[5] The AO is the employee designated by the contracting activity to prepare a performance evaluation. An AO can be the Contracting Officer, Contracting Officer's Representative, Contract Specialist, Program Manager, or the equivalent who is responsible for program, project, or task/job/delivery order execution.

[6] FAR 42.1503(d) (''Contractors shall be given a minimum of 30 days to submit comments, rebutting statements, or additional information.'').

[7] 41 U.S.C. §§ 7101-7109.

Alan Pemberton is co-chair of the government contracts practice at Covington & Burling LLP. Jade Totman and Kayleigh Scalzo are associates in the government contracts practice at Covington & Burling LLP.

 ISSN 0014-9063

timate conclusion'' remains with the contracting agency.[8] And even though the denial of a CDA claim can be appealed to a board or court, litigation is by nature adversarial, unpredictable, and expensive. Moreover, while the CDA claim is being litigated, the agency can still disclose the disputed, negative evaluation to source selection officials on current procurements. Any remedy might be too little, too late for some contracting opportunities.

Nevertheless, despite these obstacles, an aggrieved contractor should consider an agency-level appeal or CDA claim to challenge an untimely, inaccurate, or unreasonable evaluation when the circumstances so warrant.[9] Some important considerations for such challenges—to any unreasonable performance evaluation, timely or untimely—are set forth below.

Background. Past performance evaluations are electronically captured, kept, and communicated.[10] The process begins when an AO inputs adjectival ratings—Exceptional, Very Good, Satisfactory, Marginal, Unsatisfactory—and supporting narratives into a Contractor Performance Assessment Report (''CPAR''), which uploads to a database, the Contractor Performance Assessment Reporting System (''CPARS''). Data from CPARS and other reports of ''adverse actions''[11]—such as non-responsibility determinations and contract terminations—flow to a separate database, the Past Performance Information Retrieval System (''PPIRS''). Notably, CPARS and PPIRS data are not publicly available. They can be accessed only by source selection officials, for use in making award decisions. But the public can access a separate, final database: the Federal Awardee Performance and Integrity Information System (''FAPIIS''). FAPIIS contains ''adverse action'' reports from PPIRS, plus other information relating to ''business integrity,'' including listings on the System for Award Management, administrative agreements with Suspension and Debarment Officials, and records of certain criminal, civil, and administrative proceedings.

According to the FAR, a timely performance evaluation is prepared ''at the time the work under a contract or order is completed.''[12] Yet the government's CPARS Guidance Manual is more specific, stating that ''[t]he CPAR should be completed *not later than 120 calendar days* after the end of the contract or order evaluation period.''[13] Hence, OMB's recent memoranda emphasize timeliness, reiterating that ''it is essential that . . . information be provided *timely* and accurately.''[14] In February 2008, the Department of Defense (''DOD'') Office of Inspector General (''OIG'') highlighted the problem of untimely and incomplete past performance evaluations.[15] In its report, it advocated deadlines for registering contracts in CPARS and for completing performance evaluations, and also stressed the need to ''remove excess and outdated information from'' CPARS.[16] DOD responded to the OIG report in January 2009 with a memorandum that addressed ''[i]ncomplete, nonexistent, or untimely performance reports,'' which it agreed could ''negatively impact the source selection process.''[17] DOD required that ''contracting offices or activity CPARS Focal Points . . . register eligible FY2008 and first quarter FY2009 contracts into CPARS by February 28, 2009'' and that registered contracts receive completed evaluations ''within 120 days of the end of the evaluation period.''[18] DOD further mandated that ''excess and outdated information'' in CPARS be ''deleted.''[19]

Important Considerations for an Agency-Level Appeal. As noted, one option for challenging an untimely, unreasonable performance evaluation is an agency-level appeal—in effect, a prompt request that the agency reconsider its evaluation. Under the FAR, a contractor has ''a minimum of 30 days to submit comments, rebutting statements, or additional information'' to the AO.[20] Any remaining disagreement can be submitted ''for review at a level above the contracting officer,'' to a Reviewing Official (''RO'').[21] Of course, no matter the merits of the contractor's appeal, the ''ultimate conclusion'' on the propriety of an evaluation remains ''a decision of the contracting agency,'' which may be reluctant to change

[8] *See* FAR 42.1503(d).

[9] To be sure, an aggrieved contractor should immediately seek legal counsel, as the contractor's specific circumstances will determine whether a meaningful remedy is possible. The comments in this article are not intended to create or to constitute an attorney-client relationship, nor can they be relied upon as a substitute for obtaining fact-specific legal advice from a qualified attorney.

[10] There are exceptions. For example, paper copies are used for classified and special access program contracts.

[11] *See* FAR 42.1502(i) (''Agencies shall promptly report other contractor information in accordance with 42.1503(h).'').

[12] *Id.* 42.1502(a). Separate sections of FAR Subpart 42.15 emphasize timely performance evaluations, as well. For example, an agency can use data in PPIRS for only 3 years after the completion of performance. *Seeid.* 42.1503(g). This period is extended to six years for construction and architect-engineer contracts. *Seeid.* Additionally, source selection boards must consider the ''currency and relevance'' of past performance information. *Seeid.* 15.305(a)(2)(i).

[13] *Guidance for the Contractor Performance Assessment Reporting System (CPARS)*, available at http://www.cpars.gov/cparsfiles/pdfs/CPARS-Guidance.pdf (Sept. 2013 ed.), at 11 (emphasis added); *see alsoFinal Evaluation*, U.S. DEP'T OF STATE FOREIGN AFFAIRS MANUAL VOL. 14, HANDBOOK 2, H-572 (''Evaluation is due within 120 days of completion.'').

[14] OMB Past Performance Memo #3 at 4 (emphasis added).

[15] *Contractor Past Performance Information, U.S. Dep't of Def. Office of Inspector Gen. Rep. No.* D-2008-057 (Feb. 29, 2008) (''OIG Report'').

[16] *See, e.g., id.* at ii, 17-18. The OIG report cites ''[a]s an example of the importance of untimely reviews'' that ''one Army contractor stated . . . that they did not understand why they received an assessment for an evaluation period that ended more than a year ago'' and that ''a more timely evaluation would have allowed [the contractor] the opportunity to correct the shortcomings identified in the past performance assessment report.'' *Id.* at 11.

[17] *Past Performance Assessment Reporting*, MEMORANDUM FROM JOHN J. YOUNG, JR., UNDER SECRETARY FOR ACQUISITION, TECHNOLOGY AND LOGISTICS (Jan. 9, 2009), at 1.

[18] *Id.* at 2.

[19] *Id.*

[20] FAR 42.1503(d). This 30-day period has the potential to become even shorter. The National Defense Authorization Act for Fiscal Year 2013 (''NDAA FY13''),Pub. L. No. 112-239, § 853(c)(2), 126 Stat. 1632, 1856-57, gives contractors only 14 days to respond to past performance information. That provision was not incorporated into the recently-revised version of FAR Subpart 42.15, *see* 78 Fed. Reg. 46783, 46789 (Aug. 1, 2013), but a report on its incorporation into the FAR—including a review of public comments and a draft final rule—was due on November 20, 2013.

[21] FAR 42.1503(d).

  FCR ISSN 0014-9063

its mind.[22] Still, this option has inherent advantages; for one, it stops short of litigation, and thus can be less adversarial and less expensive. Furthermore, mindful of a few important considerations, a contractor can achieve a successful business outcome.

To begin, the contractor must respond to an untimely, unreasonable evaluation immediately, diplomatically, and strategically. An immediate response is advisable in order to anchor the appeal within the 30-day window and limit any dissemination of the adverse performance information. In effect, the contractor should warn the AO, in writing, that it will dispute the CPAR and that it is preparing comments, rebutting statements, and other materials in response—but that it also hopes to resolve the matter informally and without the disclosure of any information that could be construed as adverse to either the contractor or the agency. The contractor should also request that the agency (1) extend the default timeframe for contesting the adverse CPAR (that is, extend the 30-day window), and (2) not make any of the relevant CPAR information available as source selection information until the dispute is resolved.[23] The extension of time should encompass the full term of the possible dispute, including, at a minimum, negotiations with and review by the AO and the RO. It should also anticipate the likely-nontrivial amount of time needed to assemble the performance record. Additionally, a contractor may ask for a separate level of review apart from and above the RO, such as with the agency's head procuring official or legal counsel—a step that the FAR neither provides for nor prohibits.

Next, within the timeframe approved by the agency, the contractor must prepare and submit its ''comments, rebutting statements, or additional information'' to challenge the CPAR. These comments should catalogue any substantive and procedural defects in the CPAR. Substantive defects may include incorrect ratings or incorrect definitions used by the agency, as well as conflicting or incorrect facts. Procedural defects may include an express violation of an agency's acquisition handbook or similar intra-agency rules. In the case of untimely or overdue CPARs, procedural defects may also include violations of FAR provisions or intra-agency rules pertaining to timeliness. For example, a contractor may argue that a CPAR was completed in violation of FAR 42.1502(a), which requires that ''[p]ast performance evaluations . . . be prepared . . . at the time the work under a contract or order is completed.'' That argument becomes even more persuasive if the CPAR was completed more ''than 120 calendar days after the end of the contract or order evaluation period,'' in contravention of the CPARS Guidance Manual and DOD policy.[24]

In support of its comments, a contractor may submit contemporaneous documents as exhibits or attachments. For instance, in challenging conflicting or incorrect facts in a CPAR, a contractor may illustrate the existence of this substantive defect with documentary evidence from the contract file correcting factual errors in the CPAR, or documents from contracting officials praising the same performance that a CPAR criticizes. Additionally, the contractor may wish to include affidavits or declarations from employees with firsthand knowledge, to rebut faulty information with primary, personal accounts of contract performance. Effective contractor comments may prompt the correction of a CPAR and eliminate the need for a CDA claim.

Important Considerations for a CDA Claim. Failing a successful resolution by way of an agency-level appeal, a contractor still can challenge an untimely, unreasonable performance evaluation by filing a CDA claim. As noted, a denial of a CDA claim can be appealed to an independent decision-maker, but doing so can be adversarial, unpredictable, and expensive. Thus a well-informed strategy is essential if a contractor is to mitigate these side effects and successfully challenge an untimely, unreasonable evaluation.

First, as a threshold matter, a contractor must prepare a claim that satisfies all CDA requirements and submit it to the Contracting Officer (''CO''), requesting a final decision under the CDA. To be sure, the CDA claim will probably be a repackaged—and enhanced—version of the agency-level appeal. Indeed, it may be based on many or all of the same arguments and identified substantive and procedural defects, and also incorporate any new factual or legal issues that arise during the agency-level appeal. The claim need be in writing and seek, ''as a matter of right,'' ''the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.''[25] It must be ''a clear and unequivocal statement that gives the contracting officer adequate notice of'' its basis and ask for relief independent from that available in an agency-level appeal.[26] Additionally, it should be addressed to the CO's particular ''discretion to reevaluate the . . . CPAR and correct the ratings and narrative,'' as opposed to the AO's first-line duties to formulate and render the CPAR.[27] Thus, the contractor and agency should have completed the process of negotiating the evaluation before a CDA claim is filed.[28] For instance, a contractor's letter sent as part of its required feedback on a performance evaluation is premature as a claim because, at that stage, the contractor and agency are still engaged in negotiations over the evaluation itself.[29] Similarly, a letter to the agency ''to offer a couple of observations relevant to the overall evaluation contained in the initial CPAR'' cannot constitute a claim, particularly where

[22] *Id.*

[23] It is important that a contractor affirmatively request that the contested CPAR not be used as source selection information. Recent guidance from the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (''FAR Councils'') explains ''that the existence of an appeal need not delay making a past performance evaluation available to source selection officials.'' 78 Fed. Reg. 46783, 46786. Moreover, the NDAA FY13 contains a provision requiring performance evaluations to be filed in the relevant database no more than 14 days after a contractor is notified of that new performance information. *See* Pub. L. No. 112-239, § 853(c)(3), 126 Stat. 1632, 1857. The FAR Councils are currently working on the implementation of this provision. *See supra* note 20.

[24] *See supra* notes 13, 18.

[25] FAR 2.101.

[26] *BLR Grp. of Am., Inc. v. United States*, 96 Fed. Cl. 9, 13, 14 (2010) (internal quotation marks omitted).

[27] *Kemron Envtl. Servs., Inc. v. United States*, 93 Fed. Cl. 74, 91 (2010); *see also BLR Grp.*, 96 Fed. Cl. at 14-16.

[28] *See GSC Constr., Inc. v. United States*, No. 11-407C, 2012 WL 3031284, at *3 (Fed. Cl. July 24, 2012).

[29] *See id.*

the final CPAR has not yet issued.[30] Once a CPAR has been issued, however, a CDA claim concerning the CPAR may present a new opportunity for the contractor and the CO to reach a final agreement on a revised evaluation.

Second, if its CDA claim is denied by the agency, a contractor can appeal that denial. Initially, in order for a contractor to bring the claim before an independent decision-maker, the CO must have denied the claim in writing (or have failed to issue a final decision within a reasonable period of time).[31] Then, the contractor must select the best forum to litigate. The CDA allows a contractor to appeal a CO's final decision to the appropriate Board of Contract Appeals (''BCA'') within 90 days of that decision, or to the U.S. Court of Federal Claims (''COFC'') within one year of the final decision.[32] For now, the COFC probably is the best forum for litigating these challenges. The COFC—in a decision affirmed by the Federal Circuit—has recognized jurisdiction over CDA claims challenging allegedly erroneous performance evaluations,[33] reviewing substantive defects for abuse of discretion and procedural defects under the CDA's de novo standard of review.[34] Until this seachange, however, jurisdiction over such claims was thought questionable because, among other things, a nonmonetary claim challenging a performance evaluation was insufficiently ''relate[ed] to the contract'' and because performance evaluations were designed to serve the government's, not the contractor's, benefit.[35] Although the BCAs have the same statutory appellate jurisdiction over claims as the COFC, the boards have to this point been less welcoming of performance-evaluation challenges.[36] Although the extent of court or board review in evaluation appeals remains an uncertain, developing area of law, a contractor's ability to have a CDA claim reviewed is unquestioned.

Third, the contractor must appreciate the scope of its possible remedies. For example, the COFC can issue declaratory judgments and orders remanding the matter with ''proper and just'' instructions to correct the CPAR, but it cannot affirmatively re-write the CPAR. In fact, in this regard, at least one COFC opinion has deemed declaratory relief to ''be meaningless'' because it would result in the court declaring only that ''the performance evaluation is not fair and accurate,'' but nothing more.[37] That opinion noted that a ''proper and just'' remand would go a step further and ''direct[] the agency's attention to matters the court believes require further action,'' even if it must stop short of an injunction.[38] But even with a ''proper and just'' remand, the COFC still cannot require that ''the agency assign a particular rating, withdraw a rating, or remove a rating from the prescribed database.''[39] Thus, although a contractor should request a declaratory judgment and a remand order with ''proper and just'' instructions, it should also strive to convince the agency to order corrective action that is more than cosmetic.

Lastly, a contractor must consider what types of challenges are likely to be most persuasive to the COFC or BCA. For one thing, if a contractor is challenging CPAR timeliness, it must demonstrate prejudice resulting from that procedural error in order to have standing to bring a claim (unless the alleged procedural error implicates a fundamental right, like the right to a hearing).[40] This means that a contractor cannot successfully challenge a CPAR based on sheer untimeliness; rather, it must allege that the CPAR would have been different but for the untimeliness.[41] Regarding substantive errors, blatant flaws—such as clear-cut factual inaccuracies and logically self-contradictory evaluations—are probably the most compelling, given the COFC's and BCAs' deferential standard of review. And for any type of error, a contractor's claim likely becomes more effective if linked to a patent violation of applicable rules, regulations, or policy. For instance, DOD has issued guidance in reconciling the Architect-Engineer Contract Administration Support System and Construction Contractor Appraisal Support System modules within CPARS. In an October 13, 2009 memorandum, it advised that evaluations ''now due or overdue'' should be belatedly completed, but, even then, only if the ''responsible'' AO for the period to be reviewed: (1) is available; (2) ''has sufficient knowledge of the contractor's performance''; (3) has documentation to support the evaluation; and (4) ''has periodically communicated with the contractor regarding'' its performance.[42] If a contractor can associate an untimely, erroneous performance evaluation with a violation of one or more of those four conditions, its case may become more persuasive be-

---

[30] *Kemron*, 93 Fed. Cl. at 88-89 (internal quotation marks omitted).

[31] *See* 41 U.S.C. § 7103(d), (f)(3), (f)(5); *Kemron*, 93 Fed. Cl. at 85.

[32] *See* 41 U.S.C. §§ 7104(b)(1), (3); 7105(a)-(b), (e).

[33] *See Todd Constr., L.P. v. United States*, 85 Fed. Cl. 34, 38 (2008), *aff'd*, *Todd Constr., L.P. v. United States* (*Todd Constr. III*), 656 F.3d 1306 (Fed. Cir. 2011).

[34] *Todd Constr., L.P. v. United States* (*Todd Constr. II*), 88 Fed. Cl. 235, 246-48 (2009), *aff'd*, *Todd Constr. III*, 656 F.3d 1306. The Armed Services Board of Contract Appeals (''ASBCA'') applies the same standard of review. *SeeVersar, Inc.*, ASBCA No. 56857, 12-1 BCA ¶ 35025 (Apr. 23, 2013) (explaining that appellant failed to ''show[] that its performance rating was arbitrary and capricious'').

[35] *See, e.g.*, *Todd Constr. III*, 656 F.3d at 1313-15 (internal quotation marks omitted).

[36] *See, e.g.*, *Colonna's Shipyard, Inc.*, ASBCA No. 56940, 10-2 BCA ¶ 34494 (June 24, 2010); *Versar, Inc.*, ASBCA No. 56857, 10-1 BCA ¶ 34437 (May 6, 2010); *cf. JRS Mgmt. v. Dep't of Justice*, CBCA No. 3053, 13-1 BCA ¶ 35235 (Feb. 15, 2013) (dismissing contractor's claims seeking, *inter alia*, adjustments of performance evaluations for lack of jurisdiction based on timeliness of appeal and identity of multiple claims, but not discussing propriety of jurisdiction over performance evaluation–based grievances). The two 2010 ASBCA cases predicated CDA jurisdiction on the existence of a link between the contractor's claim and a contractual provision. In light of *Todd III*, it is questionable whether the boards may continue to require such a link as a jurisdictional matter.

[37] *See Todd Constr. II*, 88 Fed. Cl. at 244.

[38] *Id.* at 245. The COFC has observed that is has no authority to award injunctive relief in this situation. *See Davis Grp., Inc. v. United States*, No. 12-275C, 2012 WL 2686053, at *2 (Fed. Cl. July 6, 2012); *Todd Constr. II*, 88 Fed. Cl. at 243; *cf. Todd Constr. III*, 656 F.3d at 1311 n.3 (declining to pass upon the availability of injunctive relief).

[39] *Todd Constr. II*, 88 Fed. Cl. at 249.

[40] *See Todd Constr. III*, 656 F.3d at 1315-16.

[41] *See id.* at 1316.

[42] *Contractor Performance Assessment Reporting System (CPARS)*, Memorandum from Shay D. Assad, Director, Defense Procurement and Acquisition Policy, Office of the Under Secretary for Acquisition, Technology and Logistics (Oct. 13, 2009), at 1-2.

  FCR ISSN 0014-9063

cause the COFC or BCA then has a benchmark—even if aspirational—against which to judge agency actions.

Conclusion. Unreasonable past performance evaluations are not a new phenomenon, but agency misreadings of OMB guidance have led to an increase in evaluations that are not only unreasonable but stale. Although an aggrieved contractor can challenge such an evaluation by filing an agency-level appeal or a CDA claim, its likelihood of success may depend on an appreciation of the considerations set forth above.