

CPARS – Maintaining a Satisfactory Past Performance Record

Presented by:

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Nothing in this document constitutes legal advice.

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FAR 42.1502 – Past Performance Policy

- Performance evaluations shall be performed for contracts that exceed the simplified acquisition threshold (except for construction and A/E contracts)
- Performance evaluations shall be prepared for each construction contract of \$700,000 or more, and for each construction contract terminated for default regardless of contract value.
- Past performance evaluations may also be prepared for construction contracts below \$700,000.
- Past performance evaluations shall be prepared for each architect-engineer services contract of \$35,000 or more, and for each architect-engineer services contract that is terminated for default regardless of contract value.
- Past performance evaluations may also be prepared for architect-engineer services contracts below \$35,000.
- For contracts exceeding one year, the Government must perform an Interim Past Performance Evaluation after one year, and a final evaluation upon completion of the contract. FAR 42.1502(a)

CPARS - Purpose

- Ensure the Current, Complete and Accurate Information is available on contractor performance for procurement source selection determinations.
- It is a centralized system available to all agencies *via* Past Performance Information Retrieval System (“PPIRS”)
- Past performance evaluations are common as agencies have transitioned to best value procurements.

CPARS – Assessing Official

- The Assessing Official is responsible for evaluating past performance. The Assessing Official can be the Contracting Officer, Contract Specialist, Program Manager or equivalent individual.
- Must complete CPAR within 120 days after completion of contract.
- Evaluation factors for each assessment shall include, at a minimum, the following:
 - (i) Technical (quality of product or service);
 - (ii) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements);
 - (iii) Schedule/timeliness;
 - (iv) Management or business relations;
 - (v) Small business subcontracting (as applicable);
 - (vi) and other applicable factors.
- The Assessing Official must adhere to the ratings and definitions of each rating. This ensures accuracy and consistency on past performance evaluations.

CPARS – RATING METRICS

Rating	Definition	Note
Exceptional	Performance meets contractual requirements and exceeds many to the Government's benefit. The contractual performance of the element or sub-element being evaluated was accomplished with few minor problems for which corrective actions taken by the contractor were highly effective.	To justify an Exceptional rating, identify multiple significant events and state how they were of benefit to the Government. A singular benefit, however, could be of such magnitude that it alone constitutes an Exceptional rating. Also, there should have been NO significant weaknesses identified.
Very Good	Performance meets contractual requirements and exceeds some to the Government's benefit. The contractual performance of the element or sub-element being evaluated was accomplished with some minor problems for which corrective actions taken by the contractor were effective.	To justify a Very Good rating, identify a significant event and state how it was a benefit to the Government. There should have been no significant weaknesses identified.
Satisfactory	Performance meets contractual requirements. The contractual performance of the element or sub-element contains some minor problems for which corrective actions taken by the contractor appear or were satisfactory.	To justify a Satisfactory rating, there should have been only minor problems, or major problems the contractor recovered from without impact to the contract/order. There should have been NO significant weaknesses identified. A fundamental principle of assigning ratings is that contractors will not be evaluated with a rating lower than Satisfactory solely for not performing beyond the requirements of the contract/order.

CPARS – RATING METRICS (CONT.)

Rating	Definition	Note
Marginal	Performance does not meet some contractual requirements. The contractual performance of the element or sub-element being evaluated reflects a serious problem for which the contractor has not yet identified corrective actions. The contractor's proposed actions appear only marginally effective or were not fully implemented.	To justify Marginal performance, identify a significant event in each category that the contractor had trouble overcoming and state how it impacted the Government. A Marginal rating should be supported by referencing the management tool that notified the contractor of the contractual deficiency (e.g., management, quality, safety, or environmental deficiency report or letter).
Unsatisfactory	Performance does not meet most contractual requirements and recovery is not likely in a timely manner. The contractual performance of the element or sub-element contains a serious problem(s) for which the contractor's corrective actions appear or were ineffective.	To justify an Unsatisfactory rating, identify multiple significant events in each category that the contractor had trouble overcoming and state how it impacted the Government. A singular problem, however, could be of such serious magnitude that it alone constitutes an unsatisfactory rating. An Unsatisfactory rating should be supported by referencing the management tools used to notify the contractor of the contractual deficiencies (e.g., management, quality, safety, or environmental deficiency reports, or letters).

CPARS – Opportunity to Respond

- FAR 42.1503 sets forth the procedures for evaluating past performance and gives the contractor an opportunity to respond.
- The Assessing Official shall promptly provide its evaluation of a contractor's performance, including both negative and positive evaluations.
- The contractor will receive a CPARS-system generated notification when an evaluation is ready for comment.
- Contractors shall be given up to 14 calendar days from the date of notification to submit comments, rebutting statements, or additional information. [CPARS Manual says contractors have up to 60 days to respond, but if they do not respond within 14 days, evaluation is sent to PIPRS as “pending” but can still be relied upon in source selection decisions].
- Assessing Official may revise his or her comments after receiving contractor’s response.

CPARS – Disagreements Between Contractor and Assessing Official

- If the contractor disagrees with the Contracting Officer, a Reviewing Official (person a level above the Contracting Officer) must consider any disagreements regarding the evaluation.
- The Reviewing Official is supposed to provide the “checks and balances.”
- The Reviewing Official must provide a narrative comment, sign CPARS and post it in the system. It is not “final.”
- Copies of the evaluation, contractor response, and review comments, if any, shall be retained as part of the evaluation.

CPARS - Retrieval in PPIRS For 3-6 Years

- The Government then prepares and submits the past performance evaluation electronically in the CPARS.
- This evaluation, plus any contractor comments, are automatically transmitted to Past Performance Information Retrieval System (“PPIRS”).
- The Government shall use the past performance information in PPIRS that is within three years (six years for construction and architect-engineer contracts) of the completion of performance of the evaluated contract or order, and information contained in the Federal Awardee Performance and Integrity Information System (FAPIIS) *e.g.*, terminations for default or cause.

Challenging a CPARS Evaluation in Litigation

- A contractor can request a final decision challenging a CPARS evaluation. *ABLR Group of America v. United States*, 94 Fed. Cl. 354 (2010)
- Contactor must submit a CDA claim challenging the CPARS evaluation and requesting a final decision. If the contractor fails to do this, the case will be dismissed for lack of jurisdiction *BLR Group of Am., Inc. v. United States*, *United States Court of Federal Claims*, 94 Fed. Cl. 354 (2010)
- Board of Contract Appeals do not have power to order agency to change CPARS ratings. However, they have the power to find that the Government's CPAR evaluation is "arbitrary, capricious or otherwise erroneous" or that the Government "breached the duty of good faith and fair dealing."
- This is tantamount 'ordering' the Government to change the CPAR -- even if the Board cannot directly order the Government to do so. *MicroTechnologies, LLC*, *ASBCA Nos. 59911, 59912* (September 30, 2015)

Bid Protests – CPARS Evaluation Challenges

- Agency must document or retain evaluation materials to support its source selection decision. *Navistar Def., LLC; BAE Sys., Tactical Vehicle Sys. LP, B-401865 et al., Dec. 14, 2009, 2009 Comp. Gen. Proc. Dec. P 258 at 13.*
- GAO will “question an agency's past performance evaluation where the record indicates that the agency either failed to evaluate, or otherwise unreasonably considered, the relevance of past performance references in accordance with the solicitation's stated evaluation criteria.” *Matter of: Al Raha Group for Technical Services, Inc.; Logistics Management International, Inc., B-411015.2, B-411015.3 (April 22, 2015)*
- Agency did not perform a proper past performance evaluation when it gave an exceptional rating based on contracts that were not recent or relevant to the subject procurement. *Id.*
- Agency’s evaluation of past performance includes relevance, scope, and significance of an offeror's performance history,. GAO will not overturn Agency’s evaluation “unless the agency's assessments are unreasonable or inconsistent with the solicitation criteria.” *Alcazar Trades, Inc.; Sparkle Warner JV, LLC, B-410001.4; B-410001.5 (April 1, 2015)*
- Even though contractor received a number of exceptional ratings in CPARS, a recent rating on a janitorial contract indicated that contractor’s performance had “materially declined.” GAO held that Government “average” past performance rating was justified even though most of CPARS prior ratings were “exceptional.” *Id.*

Strategies

- In your proposals, make Government generally aware that you achieved strong past performance ratings.
- When describing your projects under past performance section of your proposal, be responsive to the solicitation criteria. Provide a detailed summary of contract type, project description, agency and value.
- Ensure that the past performance evaluation factors benefit you, e.g. complexity, size and magnitude. This can be done *via* solicitation's Q&A period or a bid protest alleging that past performance criteria is "unduly restrictive."
- Do not fight about everything. Pick and choose your battles carefully.
- Treat the Government's concerns seriously and respond diplomatically.

USEFUL SOURCES

- www.cpars.gov
- <http://manfredonialaw.com/past-performance-cpars/>

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