Past Performance & CPARS Evaluations

2019 National 8(a) Association Small Business Conference

Presented by:
Jon M. DeVore
jdevore@dc.bhb.com
(202) 659-5800
Part 1: Past Performance
Overview

Past Performance in the FAR
Claiming the Past Performance of Affiliates
What is past performance?

- Past Performance Evaluation: Is one of several comparative evaluation factors used to select best value contractor. FAR Part 15.

- When is past performance information utilized?
  - With a few exceptions, contractor performance must be evaluated for all contracts above $150,000 simplified acquisition threshold.
  - Past performance may be considered under FAR Part 8, including FSS contracts.
  - PPI evaluations apply to negotiated procurements (FAR Part 15).
    - They do not apply to sealed bids FAR Part 14, where the contract is awarded to the lowest, responsive, responsible bidder.
  - NOTE: Agency must define how past performance will be rated “unacceptable” in LPTA (lowest price/technically acceptable) RFPs.

- Agencies must consider Past Performance
  - FASA - Federal Acquisition Streamlining Act of 1994 requires the use of past performance as an evaluation criteria in competitively negotiated awards.
Responsibility determinations vs. past performance

- **What is Responsibility?** This binary assessment as to whether a contractor is responsible considers whether the contractor has the necessary financial resources, business integrity, etc. to perform the contract in question.

- **SBA’s Certification of Competency (COC) Process.** Negative responsibility determinations by Contracting Officers during the procurement evaluation process are referred to SBA for a determination under the Certification of Competency (COC) process.

- **COC is not Applicable to Past Performance Evaluations.** No right to COC process when a small business receives a poor rating based on past performance. They are separate concepts and processes.
What does the FAR have to say about Past Performance?
Past Performance in the FAR

Claiming Past Performance in Proposals

► FAR 15.305(a)(2) - Proposal Evaluation; Past performance evaluation

► (i) Past performance information is one indicator of an offeror’s ability to perform the contract successfully. The currency and relevance of the information, source of the information, context of the data, and general trends in contractor’s performance shall be considered. This comparative assessment of past performance information is separate from the responsibility determination required under Subpart 9.1.

► (ii) The solicitation shall describe the approach for evaluating past performance, including evaluating offerors with no relevant performance history, and shall provide offerors an opportunity to identify past or current contracts (including Federal, State, and local government and private) for efforts similar to the Government requirement. The solicitation shall also authorize offerors to provide information on problems encountered on the identified contracts and the offeror corrective actions. The Government shall consider this information, as well as information obtained from any other sources, when evaluating the offeror past performance. The source selection authority shall determine the relevance of similar past performance information.

► (iii) The evaluation should take into account past performance information regarding predecessor companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement when such information is relevant to the instant acquisition.
What past performance MUST be considered by Contracting Officers?

- **The Law:** FAR 15.305(a)(2)(iii): The evaluation *should* take into account past performance information regarding predecessor companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement when such information is relevant to the instant acquisition.

- Here, “should” has been interpreted as “must.”

- Under the FAR 15.305(a)(2)(iii), the Contracting Officer **MUST** consider past performance information regarding:
  - predecessor companies,
  - key personnel who have relevant experience, and
  - subcontractors that will perform major or critical aspects of the requirement.
Affiliated companies are not “predecessor” companies

► What is a “predecessor company”?
  ▶ No definition included in this specific provision of the FAR.
  ▶ GAO Bid Protest in Choctaw: “A predecessor company is plainly one that precedes and is replaced by a successor company.”

► Does a “predecessor” include affiliates? No, unless solicitation terms say otherwise.
  ▶ Choctaw Staffing Solutions, B-413434 (Oct. 24, 2016). Choctaw challenged the agency’s evaluation of its own past performance, arguing that the agency did not adequately take into account the past performance of its affiliated companies (which it claimed as “predecessors”) and key personnel. “Predecessor” was not defined in the solicitation terms.

► Takeaway:
  ▶ Affiliated companies are not “predecessor companies” under the FAR.
  ▶ The FAR does not mandate consideration of affiliates’ past performance as it does predecessor companies.
  ▶ Whether affiliates’ experience will be considered is a matter for solicitation terms and agency discretion. Read terms carefully.

Practice Tips

Practice Tip: Explain the Links to the Current Proposal. Be careful to include the required information for each type of past performance source to ensure past performance credit is not excluded/discounted.

- When claiming Predecessor company past performance, explain the link between the offeror and predecessor.
- When claiming past performance of key personnel, explain who has relevant experience and how that will be utilized on the proposal’s procurement.
- When claiming past performance of subcontractors, explain how that past performance will be brought to bear on the instant contract and how those aspects are “critical” or major aspects of the contract requirements.
- If “affiliated” companies information will be considered according to the solicitation, review the terms and make sure to explain how that affiliate (and its relevant experience) will be utilized on the present contract for the benefit of the government.
Past Performance of Joint Ventures

- SBA rules require agencies to consider past performance of
  - The joint venture itself, and
  - Work done individually by each JV partner.

- **13 CFR 125.8(e) Past performance and experience.** When evaluating the past performance and experience of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture established pursuant to this section, a procuring activity must consider work done individually by each partner to the joint venture as well as any work done by the joint venture itself previously.

- Other rules present for other types of SBA program procurement set-asides.

- **Practice Tip:** Cite the relevant SBA rule in the past performance section of your proposal to remind agencies of the special rule for SBA JVs.
Claiming the Past Performance of Affiliates
What past performance MAY be considered by Contracting Officers?

- **Look to the Solicitation Terms.** Contracting officers MAY consider past performance from other sources where the solicitation terms provide.
  - This could include affiliated companies (parent, sister, etc.).
- **Read solicitation terms carefully.**
  - MUST vs. MAY
    - Note that the solicitation terms might confuse this issue. The FAR requires consideration of the three groups (predecessor, key personnel, and subcontractors), regardless of “may” or other discretionary language in the solicitation.
    - Use of “may” is useful for including additional sources of past performance, but if the terms of the solicitation conflict with the FAR, the FAR will control and that would be grounds for a bid protest.
- **Practice Tips.**
  - **Explain Affiliate Involvement in Contract.** Failure to tie affiliate resources to the contract at issue has often resulted in Contracting Officers (COs) declining to give past performance credit for the affiliate’s experience. Refer to solicitation terms.
  - **Different Definitions of “Affiliate” for SBA Size and FAR Past Performance Purposes.** We would also be careful to note that “affiliates” for the purposes of past performance are not necessarily “affiliates” for purposes of size under SBA size regulations.
Past Performance of Affiliates and Subcontractors & the Ostensible Subcontractor Rule


- **Issue**: Does invoking and heavily relying on an ANC’s affiliate companies causes affiliation under the ostensible subcontractor rule?

  - SBA OHA Answer: No.  

    - No Affiliation for claiming experience of ANC-owned sister company subcontractor.
      - OHA: “TUVA and SAVA are part of an ANC family of companies, and TUVA’s reliance upon SAVA’s experience is an aspect of their common ownership and common management.”
    - No unusual reliance on affiliates’/subcontractors’ past performance in proposal.
    - Case addresses past performance by sister subsidiaries, the ostensible subcontractor rule and contract performance requirements.

- **Take-aways** -
  - Past Performance of Affiliates and Subcontractors May Be Considered without Violating the Ostensible Subcontractor Rule.
  - Look to the solicitation terms to see whether the agency is on record as stating it will (or may) consider the past performance of affiliates.
  - Prime contractors are not entitled to claim and receive past performance credit, but if they do so, it did not result in affiliation here thanks to the ANC/tribal affiliation exception for common management and ownership and a diversified portfolio of subcontractors.
Evaluating Affiliate’s Past Performance vs. Prime’s Dawson Enterprises, LLC, B-414591.2 (Jul. 24, 2017)

**Issue:** Dawson (an NHO) argued that the agency improperly evaluated its proposal and unreasonably eliminated it from the competition. Specifically, protester argued that it was improper for the agency to assign a significant weakness to Dawson’s proposal because the firm lacked experience, because, as a wholly owned subsidiary of an NHO, the firm could rely on the experience of its parent or affiliated companies.

- **Lack of Prime Experience:** While this bidder/protester received some benefit for claiming its affiliates’ experience, it was not sufficient to outweigh the negative factor of its own lack of experience.

- **Agency Is Not Required to Give Affiliate Experience Same Weight as Prime’s Own Experience.** The GAO clearly pointed out the difference between “may” and “must.”
  - While our Office has explained that an agency *may* consider the experience or past performance of an offeror’s affiliated companies where the firm’s proposal demonstrates that resources of the affiliated company will affect the performance of the offeror...we find nothing improper about the agency’s assignment of a significant weakness for Dawson’s lack of experience because the firm proposed to perform the contract using affiliated companies with relevant experience.

**Take-aways:**

- **Agency can still consider a prime contractor’s lack of experience as a weakness despite prime successful claim of a sister company’s experience.**

- **Significant agency discretion.** Agency has significant discretion regarding *when to give credit* and *how much credit* to give for affiliates’ experience.
  - While a contracting officer *may* consider the experience of affiliates, it may not be sufficient to win high experience or past performance ratings, especially when coupled with a Prime’s own lack of experience.
  - An agency is *not required* to consider an affiliate’s experience to have the same weight as if the prime contractor had the experience itself.
Part 2: CPARS

What to do to if you get a bad CPARS evaluation & how to avoid getting them in the first place
Overview

- Understand the CPARS Process, start to finish
- Proactively Manage Your Client Relationship
- Be ready to respond to a Negative CPARS Evaluation
- When all else fails...Consider Your Options for a Formal Legal Appeal of Your Negative CPARS Evaluation
Overall Practice Tips

» Evaluation Criteria & Rating. How are contractors evaluated?
  » READ YOUR CONTRACT. Know what the government expects on paper. It is imperative that you understand what the contract obligations are - what’s in writing will dictate much of how you are evaluated later.
  » Talk to your client & CO. What do they think the contract says?
    » Meet early and often with your client and CO to understand how they interpret the contract requirements. Often, people expect more (quality, response time, specificity) than is in the contract.
    » If the people expect more than is in the contract, figure out if that affects your bottom line and take steps to amend the contract to reflect those expectations or agree to a different interpretation.
  » Track Your Progress. Keep track of the contract requirements, whether/when they are met, and how (if applicable).

» Deadlines. Know and calendar your deadlines for CO’s and contractor responses

» Appeal Procedures & Options. Contractors should understand the CPARS process and their response and appeal options before anything goes wrong.
Step 1: Understanding the CPARS Process
Elements of the CPARS Program

- The Contractor Performance Assessment Reporting System (CPARS) is a web-enabled reporting system for Government Contracts.
  - CPARS evaluations assess a contractor’s performance, and provide both positive and negative feedback on a given contract during a specified time period.
  - Each are based on objective data supportable by program and contract management data.
  - It is designed with a series of checks and balances to ensure objective and consistent evaluations. (but inaccuracies and subjectivity still occur)
  - CPARS provides an opportunity for both the Government and contractor to review and comment on CPARS.
When are CPARS Required?

- FAR requires annual performance evaluation for all contracts/orders for all business sectors meeting the thresholds (these are interim evaluations). For contracts with a longer period, the evaluation must reflect evaluation of at least the first 180 days of performance up to 465 days.
  - For those less than 365 days a final report should be prepared.
  - Interim evaluations are limited to contractor performance after the proceeding evaluation.
  - Final evaluations should be completed upon completion or delivery of the final marker end item on the contract.
  - Addendum evaluations may be prepared after the “final” past performance evaluation to record the contractor’s performance relative to contract closeout etc.

- Protected/Source Selection Information. CPARS information is treated as source selection information at all times, and is protected in this manner.

- Evaluation are done for prime contractors only, not subcontractors. However, the prime’s evaluation does include information regarding the ability of the prime to manage its subcontractors.
General Rating System Grades

- **Exceptional**: The performance meets the requirements and exceeds them to the Government’s benefit. Few problems that were corrected effectively.
  - To demonstrate an exceptional rating, multiple significant events must be identified highlighting their benefit (on occasion one benefit will suffice if no weakness).

- **Very Good**: The performance met the contractual requirements, and exceed some areas to the Government’s benefits. Few minor problems that were corrected.
  - To justify this rating, a significant event must be identified and explain how it benefits the government. No significant weaknesses.

- **Satisfactory**: The performance meets the contractual requirements. Minor problems were satisfactorily corrected. Major problems were corrected without impacting the contract.
  - No significant weakness. If you perform beyond the requirements of the contract you cannot get less than satisfactory.
General Rating System Grades (cont’d)

- **Marginal**: The performance does not meet some contractual requirements. The element or sub-element being evaluated reflecting a serious problem proposed actions marginally effective or not fully implemented.
  - Justification requires a significant event in each category that the contractor had trouble overcoming, with supporting references.

- **Unsatisfactory**: The performance doesn’t meet contractual requirements and recovery is unlikely. Serious problems with the contractual performance, and corrective actions are ineffective.
  - Multiple significant events must be identified to justify an unsatisfactory rating.
  - Justification requires identifying a significant event that the contractor had trouble overcoming and how it impacted the contract. Needs to reference action or notice.

- **Note. Small Business Subcontracting Evaluation Factor.**
  - One general scale (above), with slightly different scale/definitions for the small business subcontracting evaluation factor, when 52.219-9 is used. (See FAR 42.1503(h)(4) Tables 42-1 and 42-2).
  - The second grading scale becomes relevant only if the prime contractor has a small business plan where upon the prime contractor is rated as to how well they adhered to the plan. But the grading elements are not significantly different.
## CPARS GRADING SCALE

<table>
<thead>
<tr>
<th>Rating</th>
<th>Contract Requirements</th>
<th>Problems</th>
<th>Corrective Actions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exceptional</td>
<td>Exceeds Many – Gov’t Benefit</td>
<td>Few Minor</td>
<td>Highly Effective</td>
</tr>
<tr>
<td>Very Good</td>
<td>Exceeds Some – Gov’t Benefit</td>
<td>Some Minor</td>
<td>Effective</td>
</tr>
<tr>
<td>Satisfactory</td>
<td>Meets All</td>
<td>Some Minor</td>
<td>Satisfactory</td>
</tr>
<tr>
<td>Marginal</td>
<td>Does Not Meet Some – Gov’t Impact</td>
<td>Serious: Recovery Still Possible</td>
<td>Marginally Effective; Not Fully Implemented</td>
</tr>
<tr>
<td>Unsatisfactory</td>
<td>Does Not Meet Most - Gov’t Impact</td>
<td>Serious: Recovery Not Likely</td>
<td>Ineffective</td>
</tr>
</tbody>
</table>
How the CPARS are Applied

- This information must be collected and evaluated for all contracts exceeding the simplified acquisition threshold.

- **Joint ventures.** A unique DUNS number is issued that is unique from the individual companies’ numbers. A single evaluation is given to the Joint Venture.

- **Teaming Agreements.** The evaluation is carried out for the prime contractor, other members are considered subcontractors.
  
  - When two or more companies form a partnership or joint venture to act as a prime contractor, or prime contractor agrees with other companies to have them act as its subcontractors under a specified Government contract or acquisition program. Evaluations are carried out by the team with most of the revenue.

- CPARS are automatically transferred to the Past Performance Retrieval System (PPIRS) including information submitted by the contractor as a means for evaluation of a contractor’s performance. Now CPARS/PPIRS systems are combined (as of July 2018).
Step 2: Proactively Manage Your Client Relationship
Client Relationship Management: Be Proactive With Agency *Before* the Initial CPARS Evaluation Is Submitted

- **Manage Your Client Relationship**
  - Be proactive, solicit feedback, check-in with all stakeholders regularly so there will be no surprises in the CPARS.

- **Document, document, document**
  - Communicate in writing as much as possible. If your (or your client’s) first inclination is to pick up the phone or meet in person, then send an email afterwards to document the conversation and discussion, asking the government stakeholders to reply with any additions or clarifications.
  - When should you document?
    - When things are behind schedule, requirements are unclear, requirements are contradictory, or government asks for something new, you must document.
  - What should you document?
    - The identification of the issue, including when and who identified the problem.
    - Document your response and way(s) you will fix/address the issue.
    - Document the government’s response, especially whether the government accepted responsibility for the issue, the delay, etc.

- The contracting officer shall make every reasonable effort to respond in writing to a small business concerns submitted in writing with respect to contract administration within 30 days. This does not apply to issues characterized as a decision related to a Contract Dispute. FAR Subpart 42.16.
Contractor Concern: We messed up, and I’m afraid it will result in a bad evaluation. Now what?

- **Mistakes will happen.** Know how to address them internally, how and when to inform the government, and make sure to meet the contract requirements to fix the mistake (if possible) before contract completion.

- **Evaluation Criteria.** Mistakes matter, but so do the type of mistake, magnitude of mistake, and Contractor’s response to address the mistake.
  
  - The CPARS evaluation criteria look at how well the contractor completed the contract requirements on time/quality/budget.
  
  - COs also must consider how the contractor addressed the mistake, delay, etc. If the mistakes are minor and well-addressed with little inconvenience to the government, then you can still achieve a high rating.
  
  - If mistakes are not well-addressed, the same mistake can result in a lower rating.
Step 3: How to Respond to a Negative CPARS Evaluation
14 Days to Submit Contractor Comments

- The FAR provides that contractors must be given 14 days to submit comments, rebutting statements, or additional information once they receive their CPARS evaluation.

- FAR 42.1503(d):
  - “…The contractor will receive a CPARS-system generated notification when an evaluation is ready for comment. Contractors shall be afforded up to 14 calendar days from the date of notification of availability of the past performance evaluation to submit comments, rebutting statements, or additional information. Agencies shall provide for review at a level above the contracting officer to consider disagreements between the parties regarding the evaluation. The ultimate conclusion on the performance evaluation is a decision of the contracting agency. Copies of the evaluation, contractor response, and review comments, if any, shall be retained as part of the evaluation. These evaluations may be used to support future award decisions, and should therefore be marked “Source Selection Information”...
Steps to Take Following Receipt of a Negative CPARS

- Review the CPARS immediately upon notification.
- **Counsel Review.** If negative CPARS rating, arrange counsel review.
- Draft a response and upload to CPARS within 14 days.
- Consider following up with a letter to CO detailing your objections to all negative points in the CPARS and provide evidence of your good performance. Supporting documentation should include objective documents, government official’s emails commending your employees work/performance on the contract.
- Consider scheduling a meeting with the CO to review the CPARS.
  - Think of it as similar to a debrief when a contractor is lost.
  - Try to learn from client how to improve your performance next time.
  - Use the opportunity walk through issues, discuss the role of the government in those issues, and how that may have contributed to the low performance rating. Maybe CO will take the opportunity to reconsider with a better understanding of the “big picture.”
- **Request the CO elevate to supervisor.** If the CO is not receptive to your efforts, go one level above. The FAR requires agencies to provide for review at a level above the CO “to consider disagreements between the parties regarding the evaluation.”
Options to File a Formal Legal Appeal of a Negative CPARS Evaluation
Questions to Consider When Deciding Whether to Appeal Your CPARS

- **When to appeal? Questions & Issues to consider.**
  - Did the contractor suffer an unjust review?
    - Is the rating unsupported or incomplete?
    - Does the contractor have evidence to dispute the rating?
    - Do you know of any procedural mistakes in the process?
  - Did the reviewing official stray beyond the initial agency evaluation, include new grounds that are unsupported?

- **What disputes procedures apply?**
  - **No FAR procedures.** The FAR does not specify a special procedure for immediate appeal of the reviewing official’s final decision. Instead, contractors must use Contracts Disputes Act procedures.
  - **CDA Applies.** CDA allows appeals to the relevant Board of Contract Appeals (ASBCA or Civilian) or the Court of Federal Claims (COFC).
  - **Specific Contract Disputes Clause Applies**
Legal Challenges to CPARS

- In CompuCraft the Civilian Board of Contract Appeals held that a contractor “clearly [has] standing to sue [the government based on the substantive allegation that the [G]overnment acted arbitrarily and capriciously in assigning an inaccurate and unfair performance evaluation.” See *CompuCraft* Inc., CBCA No. 2017, Mar. 1, 2017

- However, the Board cannot “direct the Government to revise [a performance evaluation] in a particular way through some form of injunctive relief.” The Board held it lacked the jurisdiction to “remove entirely the evaluations from the CPARS website” or change each evaluative factor to exceptional.

- Similar cases in other courts came to the same conclusion that they can find the rating arbitrary and capricious, but cannot force the agency to change the CPAR.

- The best opportunity to change a CPAR is to use the 14 days to rebut the negative CPAR.
Tips & Pitfalls to Avoid

▶ **Stay on Top of Opportunities to Comment/Dispute.** Be sure to take advantage of CPARS and dispute clause mechanisms to dispute the claim.

▶ **Preserve Your CDA Rights.** To preserve your right to bring a CDA claim (standing), the contractor should submit a separate CDA claim that is distinct from any communications within the CPARS process.
  
  ▶ The separate CDA claim should challenge the reviewing officer’s decision and seek a final decision under the relevant contract disputes clause(s).
  
  ▶ Be prepared to appeal the decision if you ask for one.

▶ **Review CPARS Results with Counsel.** Once the initial review is available, the contractor should review the evaluation with counsel. The evaluation should identify and challenge any inaccurate or incomplete items.
  
  ▶ This is another opportunity to TRY to engage the evaluator in discussions to determine whether the initial evaluation can be revised.
Tips & Pitfalls to Avoid (cont’d)

► Time to Submit a Substantive Rebuttal. If unsuccessful, the contractor should submit a substantive, well-supported rebuttal challenging all factual errors, incomplete characterizations, and procedural errors. This should include supporting documentation and be submitted within 14 days.
  
  ▶ 14 days is not a long time, especially to compile information and arguments on complex contracts. Document performance as you go and maintain a performance file that could be used to produce responses with short “turn-around time.”

► Protect Existing Proposals. If any federal proposals are under review while the CPARS is under dispute, the contractor should consider asking any agencies reviewing the proposals to refrain from relying on the data in PPIRS and/or ask them to take the rebuttal into consideration.

► Last Resort - Consider Formal Claims. Finally, if nothing else is successful, meet with counsel to determine whether the reviewing official’s decision was improperly reached.
Questions?

Jon M. DeVore
jdevore@dc.bhb.com
(202) 659-5800