

A Contractor's Guide to Mitigating Negative Past Performance Reviews

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Overview

- Intro to Past Performance in source selection
- Intro to CPARS
- Pre-award best practices to mitigate negative performance reviews
 - Framing and addressing in proposal
 - Discussion questions
- Post-awards best practices to mitigate negative performance reviews
 - CPAR Contractors Comments and Higher-Level Reviews
 - CDA Claim and Appeal to Board/COFC

Intro to Past Performance in Source Selections

- In most procurements it's the most important non-price factor
 - Mandatory evaluation factor in FAR part 15 procurements above the simplified acquisition threshold
 - It's the hardest factor to fudge
 - New trend in source selection → Best Value Trade-Off (Price/Past Performance) of Technically Acceptable Proposals
- Collection methods
 - PPQ
 - CPARS/PPIRS
- One Negative CPAR Can Cost You Millions (or Billions) of Dollars
 - Ex. CSAR-X Procurement

INTRO TO CPAR(S) AND CPARS

Key Terms

- CPARS = Contractor Performance Assessment Reporting System
 - Primary Purpose → to ensure that “current, complete and accurate information on contractor performance information” is utilized by agency source selection officials in awarding best value contracts and orders to contractors
- CPAR(s) = Contractor Performance Assessment Report(s)
- PPIRS = Past Performance Information Retrieval System

CPARS/CPAR(s)/PPIRS Basics

- Agencies “shall prepare evaluations of contractor performance for each contract that exceeds the simplified acquisition threshold.” FAR 42.1502(b)
- The FAR instructs that performance evaluations shall be entered into the CPARS and then automatically transmitted to the Past Performance Information Retrieval System (PPIRS), from which they can be retrieved by federal government agencies seeking information on contractor past performance. FAR 42.1503(f)
- Contractors may, after notification that their evaluation is ready, submit comments, rebut statements, or provide additional information in response to the contracting officer’s evaluation. FAR 42.1503(d)
- Any disagreements between the parties shall be reviewed at a level above the contracting officer, but “the ultimate conclusion on the performance evaluation is a decision of the contracting agency.” FAR 42.1503(d)

CPAR Evaluation – The Players

- Assessing Official (AO)
- Reviewing Official (RO)
- Designated Contractor Representative (CR)

CPAR Evaluation – The Evaluation Factors

- Technical (quality of product or service)
- Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements)
- Schedule/timeliness
- Management or business relations
- Small business subcontracting
- Regulatory Compliance
- Other factors

CPAR Evaluation – The Ratings

- Adjectival
 - AO is to provide an adjectival rating for each applicable factor
 - Exceptional, Very Good, Satisfactory, Marginal, and Unsatisfactory
 - Definitions and Guidance at FAR 42.1503, Table 42-1
 - <https://www.gpo.gov/fdsys/pkg/CFR-2013-title48-vol1/pdf/CFR-2013-title48-vol1-sec42-1503.pdf#page=3>
- Qualitative/Narratives
 - AO is to provide a narrative to support each rating given
- Recommendation
 - “Given what I know today about the contractor's ability to perform in accordance with this contract or order's most significant requirements, I ('would' or 'would not') recommend them for similar requirements in the future.”

CPAR Evaluation – Lifespan & Frequency

- Lifespan
 - CPARs effectively stay on your record for 3 years (6 years for construction or a/e contracts (FAR 42.1503(g)))
- Frequency
 - Interim
 - At least once every 12 months
 - Final
 - Once, upon contract completion
 - Agency compliance varies

Rate of Compliance with Past Performance Reporting Requirement as of April 2013 and April 2014 for Top 10 Agencies Based on Number of Evaluations Due

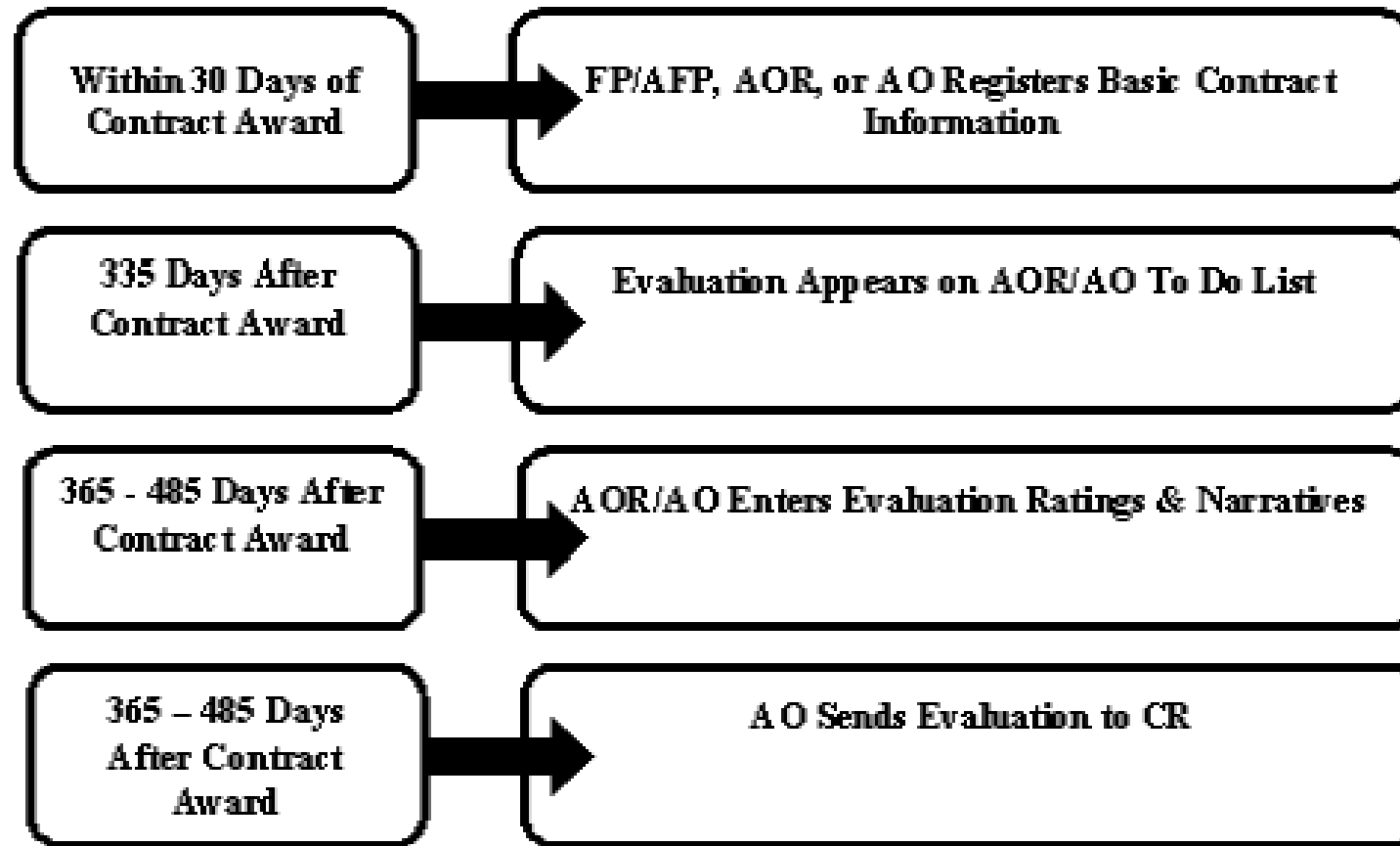
Agency	Compliance Rate as of	
	April 2013	April 2014
Defense	76%	83%
Treasury	47	71
Interior	15	51
Homeland Security	34	45
Justice	21	29
Agriculture	13	27
Veterans Affairs	4	25
Health and Human Services	10	24
State	3	15
General Services Administration	3	13
Other agencies	32	47
Total federal government	32%	49%

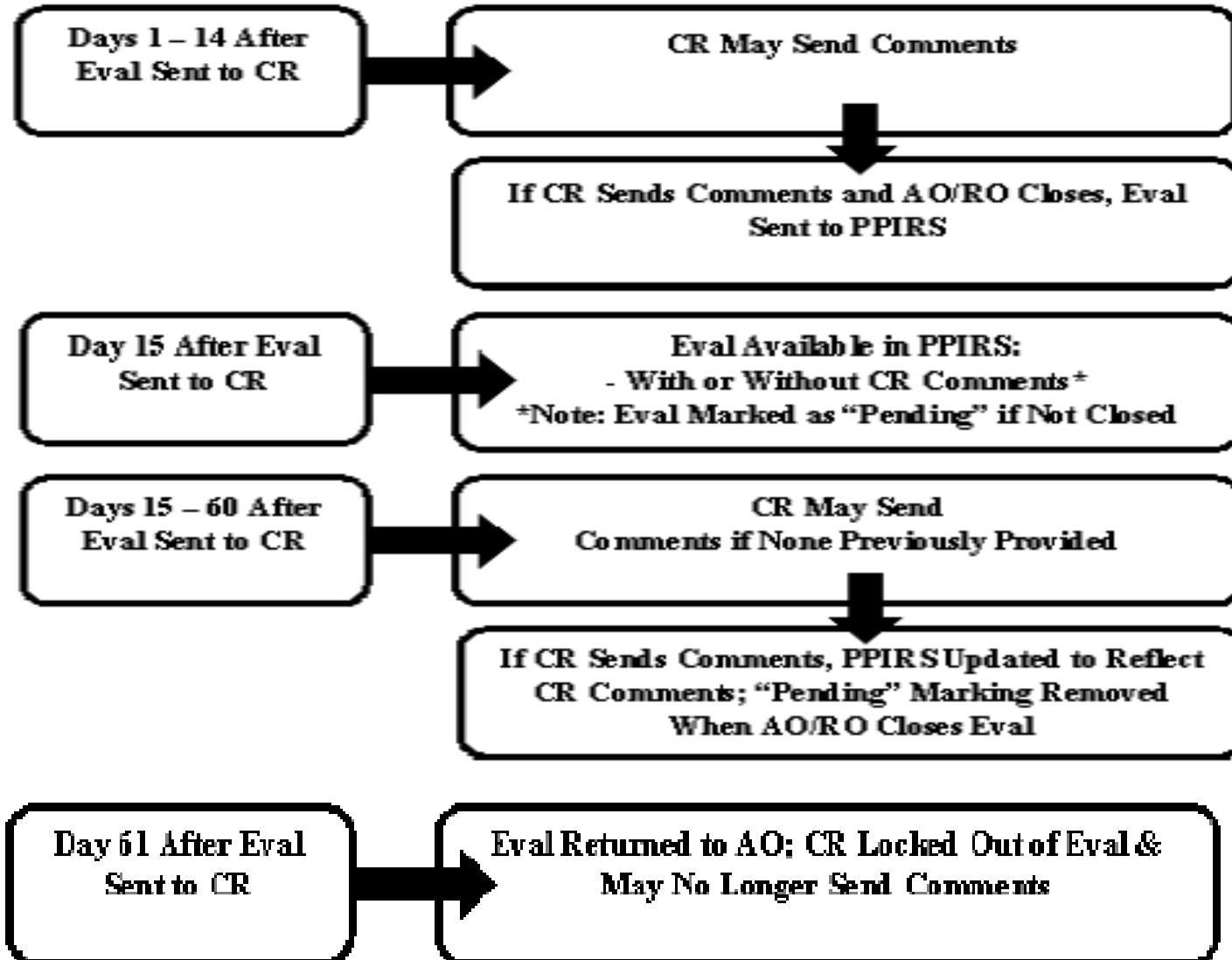
Source: Past Performance Information Retrieval System | GAO-14-707

CPAR Evaluation – Sample CPARs

- <http://www.thebluebook.com/inc/img/qp/2096306/onopa-services-llc-testimonial-letter.pdf>
- http://www.jsconstruction.com/files/ft_campbell_two.pdf
- <http://www.ortizgroup.com/pdf/ConPerfAsesRppt.pdf>
- http://recoveredenergy.com/wp-content/uploads/2016/07/CPARS_FAPIIS.pdf
- *Caution – don't put your CPARs on your website!!!*

Comment and Review Process





If CR Concluded:

**Day 61 After Eval
Sent to CR – Day
120 After End of
Period of
Performance**

If CR Did Not Conclude:

AO Must Either:

- **Close Eval (Eval Updated in PPIRS)***
- **Modify & Close Eval (Eval Updated in PPIRS)***
- **Send Eval to RO (Eval Updated in PPIRS as “Pending”)**
- **Modify & Send Eval to RO (Eval Updated in PPIRS as “Pending”)**

***Note: “Pending” Marking Removed When Eval Closed**

AO Must Either:

- **Send Eval to RO (Eval Updated in PPIRS as “Pending”)**
- **Modify & Send Eval to RO (Eval Updated in PPIRS as “Pending”)**

**Prior to Day 121
After End of Period
of Performance**

**RO Provides Comments & Closes Eval; Eval
Updated in PPIRS with "Pending" Marking
Removed**

**The entire CPARS evaluation process must be
completed within 120 days of the end of the period
of performance!**

PRE-AWARD BEST PRACTICES TO MITIGATE NEGATIVE PAST PERFORMANCE REVIEWS

1. Importance of a company-wide collection, database, and comment/response system for CPARS
2. Drafting proposals to mitigate or avoid negative CPARS
3. Addressing negative CPARS in pre-award (post-proposal) discussions

Best Practice: Company-Wide Database/Policy

- Company-wide policy for commenting on and responding to CPARs
- Company-wide past performance database and collection policy
- Catalog and organize projects
 - *Quality of ratings / type of project / type of contract / size of contract / duration and dates*
 - *People who were key personnel on the projects*
 - *Affiliate's projects*
 - *Key personnel experience while working on projects for other companies*
 - *Projects as a sub*
 - *Private projects, state and local projects*

Best Practice: Proposal Drafting to Mitigate CPARs

- Understand the government's approach for evaluating past performance factor
 - Sections L & M
 - Recent/Relevant criteria
 - Scope of information government may consider
 - Rating system being used
- Understand the distinction between Experience and Past Performance

Best Practice: Proposal Drafting to Mitigate CPARs

- To address or not address a negative and relevant past performance reference in your proposal?
- Avoiding negative affiliate past performance

Best Practice: Using Discussions to Address Negative CPARs

- If the Gov't asks you to explain a negative past performance review in discussions ...
 - Trying to avoid directly addressing won't do you any good
 - It's a sign the government thinks this is a problem
 - The government has likely already considered your CPAR comments

Best Practice: Using Discussions to Address Negative CPARs

- If the negative review is accurate...
 - Take responsibility for real problems, identify mitigating circumstances and corrective steps taken (or taking) to correct problems identified

Best Practice: Using Discussions to Address Negative CPARs

- If the Negative review is inaccurate ...
- DON'Ts
 - Don't allege bias
 - Don't make it personal
 - Don't rest on what's already in your CPAR Comments
- DOs
 - Point out facts not considered that would impact rating
 - Identify specific inaccuracies, misinterpretations or otherwise underlying the ratings – be very specific
 - Submit contemporaneous documentation that supports your position
 - Identify positions taken by agency during/after project that are inconsistent with the CPAR evaluation
 - Mention if matter is the subject of litigation (if it is) – results in litigation that support your position
 - Show you addressed concern of problems seriously, identify mitigating circumstances and corrective steps taken (or taking) to correct perception of problems identified

POST-AWARD BEST PRACTICES TO MITIGATE NEGATIVE PAST PERFORMANCE REVIEWS

1. Comment and Review of Negative CPARs
2. Challenging Negative CPARs – Claims and Litigation

Best Practice: Comment and Review of Negative CPARs

- Questions contractor should have in mind when reviewing CPARs
 - Do you agree with ratings? (too high and too low)
 - Did the agency assess all major areas of performance?
 - Did the agency interpret the contract requirements correctly?
 - Are the factual narratives factually accurate?

Best Practice: Comment and Review of Negative CPARs

- Submitting Comments
 - Respond to correct/complete *or* rebut the assessment?
 - Keep in mind your comments become part of the CPAR for use in future procurement past performance evaluations
 - Focus on underlying factual errors and omissions in narratives
 - Provide additional information
 - Rebutting the assessment

Best Practice: Comment and Review of Negative CPARs

DOs

- Point out facts not considered that would impact rating
- Identify specific inaccuracies, misinterpretations or otherwise underlying the ratings
- Identify if narrative/rating inconsistent with definition/rating
- Discuss strengths of performance
- Take responsibility for real problems, identify mitigating circumstances and corrective steps taken (or taking) to correct problems identified

DON'Ts

- Don't insult or make it personal
- Don't complain about ratings without attacking underlying findings (unless findings narrative doesn't match rating definition)
- Don't challenge Satisfactory ratings unless you have a very strong case
- Don't ignore bad narratives even if tied to good ratings

Challenging CPARs – Claims/Litigation

- Contract claims challenging negative CPARS
- Obtaining improved CPARS rating through settlements
- Challenging unfair CPARS at the ASBCA/CBCA and the Court of Federal Claims

Challenging CPARs – Claims/Litigation

- Jurisdiction
 - COFC and ASBCA/CBCA – YES
 - BUT properly asserted CDA Claim is a pre-requisite
 - GAO – NO

Challenging CPARs – Claims/Litigation

- What kind of errors can be reviewed
 - Procedural errors – failure to follow procedure preparing CPAR
 - *de novo* review
 - Substantive errors – disputing the accuracy of the CPAR
 - Alleged misvaluation rests on a dispute concerning the interpretation of a contract clause
 - accuracy and fairness of the CPAR – reviewed only for abuse of discretion
 - breach of implied duty of good faith and fair dealing
 - Must allege prejudice from errors
 - there must be some quantifiable prejudice to the contractor from the performance evaluation, meaning damage or detriment to one's legal rights or claims
 - procedural errors – tough to show prejudice – but for the procedural error, performance evaluation would have been any different
 - substantive errors – easy to show prejudice – disputed performance evaluation will have an effect upon future consideration for awards

Challenging CPARs – Claims/Litigation

- Specific Performance - NO
- Injunctive Relief – NO
 - *But possible COFC could issue injunctive relief if claim is also tied to a protest of a specific procurement*
- Declaratory Relief – YES
 - COFC and Boards can declare that rating is inaccurate
 - Contractual interpretation
 - Abuse of discretion
 - Breach of good faith and fair dealing
- Remand with instructions – UNCLEAR
- Monetary Relief – MAYBE

Challenging CPARs – Claims/Litigation

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- Monetary Relief – MAYBE
 - *Gov't Servs. Corp.*, ASBCA No. 60367, 16-1 BCA ¶ 36411 (June 20, 2016)

Best Practices: Challenging CPARs – Claims/Litigation

- File a detailed CDA Claim
 - Jurisdictional pre-requisite
 - Seek corrective and monetary relief in CPAR claim
 - Monetary relief provides real leverage
 - Include CPAR challenge in a related claim
- If CPAR claim is denied, file timely appeal at the Board or the COFC
 - Know time limits to appeal
 - Keep in mind the Board moves slowly
- Filing your Complaint at the Board or COFC
 - Should be heavy on the facts
 - Make broad and multiple requests for relief
- Resolve the CPAR claim in connection with negotiating a resolution of other monetary REA/Claim on the project

Resources

- FAR Subpart 42.15

https://www.acquisition.gov/sites/default/files/current/far/html/Subpart%2042_15.html

- FAR Subpart 15.3

https://www.acquisition.gov/sites/default/files/current/far/html/Subpart%2015_3.html

- GUIDANCE FOR THE CONTRACTOR PERFORMANCE ASSESSMENT REPORTING SYSTEM (CPARS) <https://www.cpars.gov/pdfs/CPARS-Guidance.pdf>

Questions?

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THE PROCUREMENT PLAYBOOK

LEGAL INSIGHT FOR GOVERNMENT CONTRACTORS

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