

## **Critical Concerns for Contractors – Improper Use of Past Performance Evaluations**

By James E. Krause, Attorney  
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Past Performance Evaluations (“PPE’s”) are one of the most critical factors affecting Federal contractors today. A PPE assesses a contractor’s performance and provides a record, both positive and negative, on a Federal contract. Source selection boards are required to use performance evaluation material in determining award on most Federal contracts based upon prior history. Each evaluation is supposed to be based on objective facts and supported by contract management data, such as contract performance elements that evaluate quality, timely performance, effectiveness of management, and compliance with contract terms, labor standards, and safety requirements.

The FAR obligates the Government to issue performance evaluations in an “accurate and fair” manner at “the time of final acceptance of the work.”<sup>1</sup> The need for accuracy and fairness of the information stored in the government databases cannot be overstated – it is very unlikely for contractors with unsatisfactory or marginal performance evaluations to receive Government contracts in future proposals, even when the evaluations have an explanation or are simply incorrect.

When an Agency deviates from the regulatory guidelines to inject personal opinions and agendas into the evaluations, the result is the Contractor not receiving a fair or objective rating. The personal opinions of Agency employees do not meet the established rating criteria set by the regulations and requirements, are not part to the performance evaluation process, and they cannot serve as the basis for improper ratings and remarks associated with the evaluation. CO statements such as: In Our Opinion; It Appeared; We Believe; We Did Not Like; and We Think; should signal a serious concern for contractors.

Simply put, Marginal and Unsatisfactory Evaluations can destroy a contractor’s ability to receive a federal contract for years. Unfortunately, over the last two years this office has seen contracting officers misread or misapply the FAR and their own regulations<sup>2</sup>, with the result of unintentionally or intentionally misusing this tool that was originally meant to be a valuable resource for federal contracting. Contractors must understand their rights in the process, respond immediately to incorrect information, and be prepared to actively defend their rights to the Agency, and if necessary, by judicial review.

### **What is an improper or unfair performance evaluation?**

As with most Federal contracting issues, there are two sides to the story. First, the Government’s side: Past performance evaluations provide important information to other contracting officials and source selection authorities about a contractor’s performance. Like a report card in school, it encourages contractors to remain attentive and active on a Federal contract during the performance and closeout period. Unfortunately for contractors; performance evaluations have a serious potential for abuse due to miscommunication and personality conflicts, and can harm a contractor’s ability to obtain Federal contracts; they stay in the Government databases for years; and they have the potential for use as a club in negotiating final amounts due the contractor. These evaluations are shared not only within the generating

<sup>1</sup> On contracts exceeding certain monetary limits. *See*, 48 CFR § 36.201(a)(2) and (b)(2003).

<sup>2</sup> The NAVY also has information on PPE’s at NAVFAC Guidance NAVFACENGC MINST 4335.4, whereas the USACE Guidance is the ER 415-1-17.



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agency, but also placed in Federal databases for use by other agencies and are an important factor in the contractor's success in obtaining awards during Federal source selection<sup>3</sup>.

The Courts have recently begun hearing PPE claims. The Court of Federal Claims has stated that the contractor “is legally entitled to a fair and accurate performance evaluation.” *BLR Group of America, Inc. v. U.S.*, P. 641, 84 Fed.Cl. 624 (2008). In other words, the Contractor must be graded according to the published ratings pursuant to the Solicitation or Contract, or the applicable Government regulations. The GAO has identified, “the critical question in our review of an agency’s past performance evaluation ‘is whether the evaluation was conducted fairly, reasonably, and in accordance with the solicitation’s evaluation scheme, and whether it was based on relevant information sufficient to make a reasonable determination of the offeror’s past performance.’” *The Emergence Group* B-404844.7 2012.

Where problems occurred on a project, the Contractor should timely identify and implement corrective action. When that corrective action is accepted by the Agency, the PPE must reflect those actions. Any inaccurate interim evaluation ratings must then be changed to meet the CCASS guidelines. See the *Construction Contractor Appraisal Support System (CCASS) Policy* - at <https://www.cpars.gov>. The evaluations provided by the Government personnel did not meet the established rating criteria for performance evaluations stated by the Federal Regulations and CCASS.

#### **What should the Contractor do if they receive an improper unsatisfactory or marginal evaluation?**

- Try to get an interim evaluation and handle all issues at the lowest level possible.
- Recognize and admit if they made an error; immediately take corrective action and fix the problem. Document all actions to resolve the matter and request Agency to accept the action.
- If not contractor error, attempt to resolve all misunderstandings or miscommunications at the lowest level.
- Elevate to higher level only when there is no resolution obtainable at field level.
- Meet with CO prepared with all documentation proving the rating definition was not proper and the regulations were not followed.
- As a last defense, always be prepared to seek judicial review.

The Contractor must actively defend its rights and should challenge improper evaluations. Allege arbitrary and capricious actions by the Government personnel in assigning an inaccurate and unfair performance evaluation, as well as breach of the covenant of good faith and fair dealing in filing an unfair and inaccurate performance evaluation. The Court of Federal Claims clarified that the “Contractor can show prejudice through the identification of specific instances where the Government improperly alleges unsatisfactory performance, with the facts attached to each performance evaluation category that solely and substantially demonstrates how the Government’s decisions are either incorrect or that the Government had approved specific performance by Contractor and now attempts to allege unsatisfactory performance.” Additional arbitrary and capricious Government actions arise from specific violations of improper reading and application of the rules defining how performance evaluation scores must be developed. *Todd Const., LP v. U.S.*, P. 1316, 656 F.3d 1306 (2011).

When inaccurate information, personal information, or evaluations that do not conform to the ratings requirements are inserted in the PPE, the Contractor must claim that the Agency did not follow the required procedures in preparing and filing a Performance evaluation in the CCASS as noted above. In

<sup>3</sup> The Department of Defense uses the Contractor Performance Assessment Reporting System (CPARS), which has connectivity with the Federal Past Performance Information Retrieval System (PPIRS). PPIRS is the system used to collect and retrieve performance assessment reports from Federal agencies.



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the case of an improper evaluation, if the Agency had followed the required procedures and used the proper ratings as identified in the regulations and solicitation, the Performance Evaluation score would have been different, and the Contractor would not have been damaged by the Government's actions.

Finally, the contractor must be fair and reasonable, and determine if the evaluation is correct. If the Agency has identified a problem caused by the contractor, the contractor must immediately take responsibility, respond and take corrective action, then request the Agency review and accept that action.

This information is a brief sampling of the information Contractors must be aware of when contracting with the Federal Government, regarding Past Performance Evaluations. For additional information, please contact Jim Krause at (904) 353-5533 or [jimkrause@krauselaw.net](mailto:jimkrause@krauselaw.net).



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