

CPARS Ratings Matter! Challenge Negative Ones Before They Hurt You

Litigation Alert

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Past performance evaluations entered in the Contractor Performance Assessment Reporting System (CPARS), commonly referred to as CPARS evaluations, are a key factor in agency source selection decisions. CPARS evaluations can be the difference between winning and losing new contracts, which means contractors should put a premium on making sure their CPARS-entered ratings and narratives are objective and warranted. *See* Federal Acquisition Regulation (FAR) 42.1501. But if you get an unfavorable or unfair CPARS evaluation, don't despair. You can fight it! The time to act is *before* it impacts you negatively in a future contract award decision.

CPARS Explained

The FAR requires agencies to record and maintain contractor performance information for a variety of reasons but primarily for use in future source selections. Mandatory use of the CPARS in collecting contractor performance information provides agencies tools and a common methodology to measure the quality and timely reporting of contractor performance information under previously awarded contracts or orders. FAR 42.1501(b). A CPARS evaluation must be prepared at least annually and at the time the work under a contract or order is completed. FAR Subpart 42.15. CPARS evaluations normally include a contractor's record of:

- Conforming to requirements and to standards of good workmanship
- Forecasting and controlling costs
- Adherence to schedules, including the administrative aspects of performance
- Reasonable and cooperative behavior and commitment to customer satisfaction
- Complying with the requirements of the small business subcontracting plan (*see* 19.705-7(b))
- Reporting into databases (*see* subpart 4.14 and reporting requirements in the solicitation provisions and clauses referenced in 9.104-7)
- Integrity and business ethics
- Business-like concern for the interest of the customer (FAR 42.1501(a))

Instructions for submitting past performance evaluations into CPARS – and CPARS information generally – are available at <http://www.cpars.gov/>.

How Important Are Past Performance Evaluations?

You don't have to take our word about how past performance evaluations can impact contract award decisions: just consider how many reported bid protest decisions reflect challenges to evaluations under past performance factors. Already in 2024, 10 protest decisions from the Court of Federal Claims (COFC) and 38 decisions by the Government Accountability Office (GAO) reflect past performance evaluation challenges. In 2023, it was raised in 16 COFC decisions and 52 GAO protest decisions. And in 2022, the issue was raised in 35 COFC cases and 61 GAO protest decisions. Clearly, an agency's evaluation of a contractor's past performance has great impact on the outcome of source selections and the need for unsuccessful offerors to challenge agency decisions. While a CPARS rating may not always be the instigator of a past performance evaluation challenge, it has significant

bearing in past performance evaluations. By the time a negative CPARS rating or narrative has tainted your past performance evaluation in an ongoing procurement, it's often too late to meaningfully correct a past CPARS to make any impact. That's why it's imperative to challenge an unwarranted negative CPARS evaluation quickly to protect future determinations about your past performance.

What Can You Challenge?

The FAR defines each rating (exceptional, very good, satisfactory, marginal, unsatisfactory) and explains what is needed for the agency to justify the rating it assigns. *See* FAR 42.1503 and Table 42-1. Contractors can challenge a negative rating – and underlying narrative – that does not meet the FAR's objective guidelines, for example, by relying on inaccurate, incomplete, inconsistent, or unsupported facts or statements. A challenge can also be raised if the agency failed to notify the contractor during performance of the deficiency that led to the unfavorable rating.

It is also possible to challenge aspects of a CPARS evaluation beyond the rating or narrative, as a recently decided case proved. In *Appeal of – Michael M. Tsontos, S.A. Chania Sucursala Bucuresti*, ASBCA No. 63595 (Oct. 30, 2024), a Greek contractor formed a Romanian division or branch to handle construction contracts in Romania for the United States Army Corps of Engineers (USACE). The contractor alleged that the government violated the CPARS "fair and equal" requirement by attaching the evaluations for the Romanian task orders to the Greek parent division. The Board rejected the government's argument that the Romanian and Greek divisions were a single legal entity, finding that issuing CPARS evaluations to the wrong branch violated FAR 42.1502(a), which says that past performance evaluations "are generally for the entity, division, or unit that performed the contract or order." Further, USACE's internal CPARS guidance called for the listing of the name and address of the "division or subsidiary of the contractor that is performing the contract/order." The Board granted summary judgment in favor of the contractor and remanded the CPARS to USACE to issue new evaluations in accordance with regulations.

Steps to Challenge a CPARS Evaluation

Contractors are entitled to comment, rebut, or submit additional information in response to unfavorable CPARS ratings and narratives within 14 days of being invited to respond. FAR 42.1503(d). If a contractor's concerns are not adequately addressed at the outset, agencies must provide for a review process at a level above the contracting officer (CO) by a reviewing official. If that higher-level review does not provide satisfactory resolution, the contractor may submit a claim in accordance with the Contract Disputes Act (CDA) to the CO for a final decision. While this step may seem superfluous, the submission of a claim demanding a final decision from the CO is a requirement under the CDA. *See, e.g., Kemron Envtl. Services, Inc. v. U.S.*, 93 Fed. Cl. 74, 93 (2010). Such a claim must be submitted to the CO within six years of the accrual of the claim, which is usually a denial by the reviewing official to provide the relief sought. Any delay in filing a claim undermines obtaining timely and meaningful relief. This is primarily because CPARS evaluations have a shelf life and agencies only utilize the CPARS information for a period of three years following completion of the relevant contract. FAR 42.1503(g).

If the claim to the CO is denied, a contractor may immediately file a complaint at the COFC within 12 months of the final decision or an appeal with the appropriate Board of Contract Appeals within 90 days (41 U.S.C. §§ 7104(a), (b)). Again, there is a significant risk that an uncured negative evaluation will harm a contractor's ability to compete for new contracts in the meantime and expeditious filing is critical.

Best Practices for a Successful CPARS Challenge

Here are some important reminders for government contractors considering whether, and how, to challenge a negative CPARS evaluation.

Act Quickly; After Losing a Bid for a New Contract Is Likely Too Late for Relief

The COFC and the Boards of Contract Appeals have repeatedly affirmed that they have jurisdiction to hear CDA claims that a CPARS evaluation is unfair or inaccurate. *See, e.g., Todd Construction, L.P. v. United States*, 656 F.3d 1306 (Fed. Cir. 2011);

Appeals of – Trident Eng'g & Procurement, P.C., ASBCA No. 60541, 2023 WL 3949887 (May 8, 2023); *Focused Mgmt., Inc.*, 22-1 BCA ¶ 38176 (Aug. 5, 2022). However, the COFC and Boards *do not* have bid protest jurisdiction to overturn an award of a contract on the basis that the award decision was influenced by erroneous CPARS information. *See, e.g., Bannum, Inc. v. United States*, 404 F.3d 1346, 1353 (Fed. Cir. 2005) (holding that "a bid protest is not the proper forum" to litigate performance assessments). So the proper time to challenge a prejudicial CPARS evaluation is *before* it impacts your company's ability to win new contracts.

Further, it is easier to convince the CO to change a CPARS rating or narrative with a timely challenge. In one case, the contractor waited more than five years to submit a certified CDA claim to the CO. The agency agreed to change all "unsatisfactory" ratings to "satisfactory" and to change the narratives for each rating, but then found that doing so was "no longer practical" and "administratively burdensome" because the evaluations had been automatically archived on the CPARS website. *Appeal of – Patricia I. Romero, Inc. d/b/a Pac. W. Builders*, ASBCA No. 63093, 2023 WL 3881420 (May 12, 2023).

Have Reasonable Expectations for Relief

Keep in mind that a successful CDA challenge may not automatically result in a favorable CPARS evaluation. The Boards of Contract Appeals "do not possess jurisdiction to order an agency to revise a CPARS rating." *Appeals of – Trident Eng'g & Procurement, P.C.*, ASBCA No. 60541. However, they can nullify the evaluation and send it back to the agency with instructions that the CO "follow applicable regulations and provide appellant with a fair and accurate performance evaluation." *Id.* They "may also identify inaccuracies in the current CPAR for the government's consideration." *Appeals of – O-Tech Sols., LLC*, ASBCA No. 61898, 23-1 B.C.A. (CCH) ¶ 38338 (Mar. 28, 2023). While that means a CDA challenge at the COFC or with a Board of Contract Appeals can't provide complete relief immediately, it's a necessary step toward correcting a negative evaluation where agency-level challenges failed. Moreover, it is possible to delete erroneous ratings and narratives while the agency reconsiders its CPARS entries. This can minimize impact to past performance evaluations in future procurements while an agency corrects its errors and complies with FAR Subpart 42.15.

Challenge Unfavorable Ratings Even if Explained by a Mitigating Narrative

It's important for contractors wishing to be competitive for future procurements to have *both* positive CPARS ratings and narratives. When making past performance evaluations for new procurements, agencies are free to consider or disregard any CPARS information they want. COFC has described the agency's decision-making process as deserving a "triple whammy of deference." *STG Int'l, Inc. v. United States*, 165 Fed. Cl. 577, 586 (2023), *quoting Commissioning Sols. Global v. United States*, 97 Fed. Cl. 1, 9 (2011). In one case, the COFC rejected a contractor's argument that the agency erred by only considering CPARS ratings and ignoring the mitigating factors explained in the narrative. *Crowley Gov't Servs., Inc. v. United States*, 158 Fed. Cl. 358 (2022). Since you may not be able to rely on an exculpatory narrative to minimize the damage done by an unfavorable CPARS rating, it is recommended to challenge any unwarranted part of an evaluation that reflects negatively on your company.

Consider the Viability of a Bad Faith Claim

When challenging a negative CPARS determination, always consider the viability of asserting a claim based on the breach of duty of good faith and fair dealing. The COFC and the Boards of Contract Appeals are hesitant to outright dismiss bad faith claims. A COFC case even found it had jurisdiction to consider a bad faith claim related to a CPARS evaluation as part of a bid protest. *Colonna's Shipyard, Inc. v. United States*, 146 Fed. Cl. 519 (2020). The bar for proving bad faith is high, but where a contractor can show that the agency's arbitrary and capricious performance evaluation breached the duty of good faith and fair dealing, the company may be entitled to relief.

The CPARS Recently Extended to AbilityOne Contractors

Last month, the General Services Administration (GSA) approved a class deviation from the FAR requiring GSA to evaluate AbilityOne contractors under the CPARS. Previously, FAR 42.1502(h) instructed agencies not to evaluate performance for contracts awarded under FAR subpart 8.7, Acquisition from Nonprofit Agencies Employing People Who Are Blind or Severely

Disabled. The Department of Defense (DoD) issued a similar class deviation to mandate the evaluation of past performance of certain FAR 8.7 contracts in 2013. According to GSA, evaluation under the CPARS will improve high-performing AbilityOne contractors' chances when competing for new contracts, as they were at a disadvantage when compared to other contractors who had the backing of favorable ratings. This recent action underscores the importance of CPARS evaluations to the contract award process.

If your company received an unfavorable CPARS evaluation, contact one of the attorneys below to consider whether a challenge is warranted and the best path to success. Don't wait until it damages your chance to compete for a new contract.

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