

# **National 8(a) Association Winter Conference February 12, 2014**

Donald J. Carney  
Richard W. Oehler  
Perkins Coie LLP

# Perkins Coie

- With more than 900 lawyers in 19 offices across the United States and Asia, Perkins Coie represents great companies across a wide range of industries and stages of growth-from start-ups to Fortune 50 corporations.
- Listed on Fortune magazine's "100 Best Companies to Work For" for eleven consecutive years (2003 – 2013)
- Ranked as a leading firm in Chambers USA.
- Law 360 Award for Top Government Contracting Firm.
- Extensive SBA Knowledge.

# Past Performance: What You Need to Know

Don Carney  
Rick Oehler

February 12, 2014

# What is Past Performance?

- Relevant information, for future source selection purposes, regarding a contractor's actions under previously awarded contracts or orders
- Recording Past Performance Info – FAR 42.15
- Past Performance in Source Selection - FAR 15.3

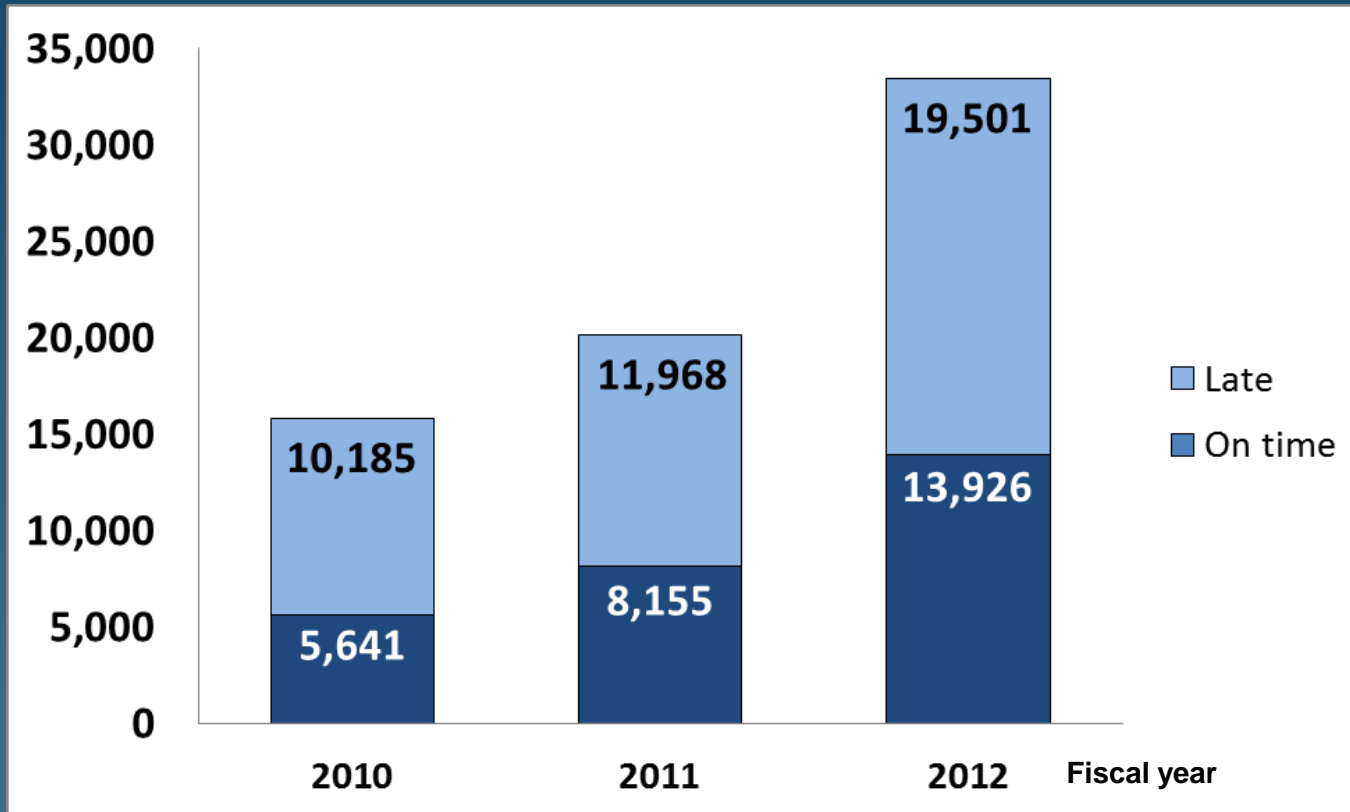
# Why Does Past Performance Matter?

- Government emphasizing its importance
- It affects your ability to get future contracts
- You may need to challenge your assigned ratings
- It may affect your assessed “responsibility”

# Past Findings Regarding Government Completion of Past Performance Reports

- 2009 – GAO Finding - DoD had completed less than 50% of assessments
- 2011 – OFPP Finding - assessments lacked narrative
- DoD completion rate is improving - up from 56% (2011) to 74% (2013)

# Number of Past Performance Assessments



# OMB Emphasis on Past Performance

- Past Performance is “critical to informing source selection and award decisions and [building] relationships with high-performing suppliers.”
- Agencies “must take bold steps to ensure that all critical past performance information is made available in the” PPIRS

OMB Memo (Mar. 6, 2013)





# When Does the Agency Have to Report on Past Performance?

- Evaluations at least annually
- Upon contract completion
- Performing entity, division, or unit
- Note – performance on Small business subcontracting plan must be reported, if applicable

# Past Performance Reporting Thresholds

- $\geq \$30,000$  – Architect/Engineer
- $> \$150,000$  – FSS Orders; Certain TO/DOs, Catch-all
- $> \$500,000$  – Ship Repair/Overhaul (DoD)
- $\geq \$650,000$  – Construction
- $> \$1,000,000$  – Services and IT (DoD)
- $> \$5,000,000$  – Systems and Ops Spt (DoD)

# What Procedures Do Agencies Follow in Evaluating Past Performance?

- Input from technical, contracting, program management, QA and end users
- Reflect how contractor performed
  - Clear, relevant information
  - Based on objective facts supported by program and contract data
- Adjectival Rating for each factor
- Supporting Narrative
- Fee Information

# What are the Past Performance Evaluation Categories?

- Technical
- Cost Control
- Schedule/Timeliness
- Management or business relations
- Small business subcontracting
- Other – nonpayment to subcontractors, trafficking violations, tax delinquency, failure to submit required reports, defective pricing, terminations, suspension and debarment, etc.

# What Are Examples of Past Performance Information?

Whether a Contractor:

- Conformed to requirements / standards of good workmanship
- Forecasted and controlled costs
- Adhered to schedules, including the administrative aspects of performance
- Behaved in a reasonable and cooperative manner and was committed to customer satisfaction
- Reported into databases
- Had integrity and business ethics
- Had a business-like concern for the interest of the customer

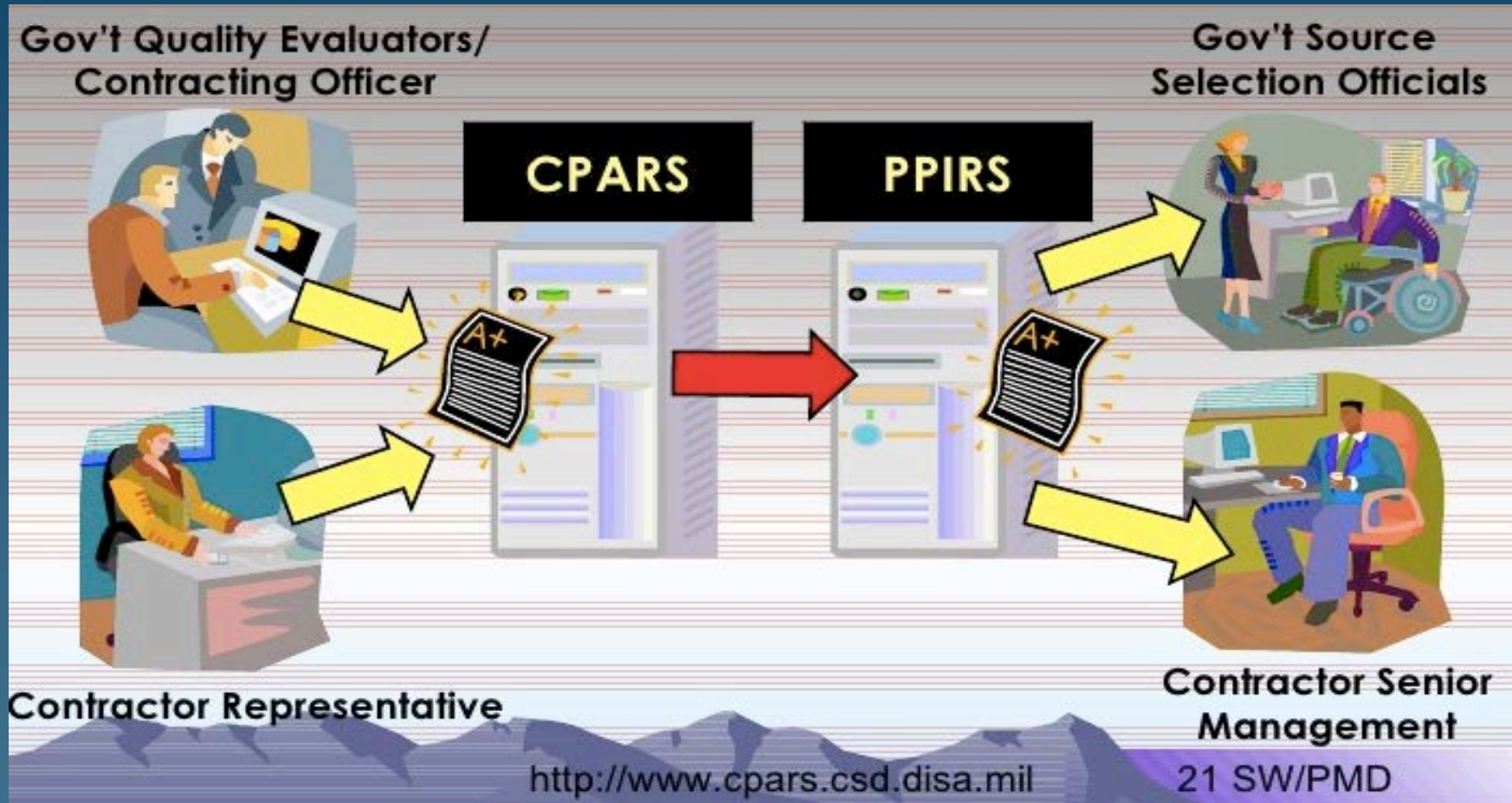
# What Are the Past Performance Ratings?

Rating	Contract Requirements	Problems	Corrective Actions
Exceptional	Exceeds many; Gov't benefit.	Few minor	Highly Effective
Very Good	Exceeds some; Gov't benefit.	Some minor	Effective
Satisfactory	Meets all	Some minor	Satisfactory
Marginal	Does not meet some.	Serious; Recovery still possible	Marginally effective; Not fully implemented.
Unsatisfactory	Does not meet most	Serious; Recovery not likely	Ineffective

# How is the information recorded?

- CPAR – Contractor Performance Assessment Report
- CPARS becomes part of consolidated PPIRS
- Agencies shall use PP information in PPIRS
  - Within 3 years of completion of evaluated contract/order
  - Within 6 years for construction and A/E contracts
- PPIRS also includes:
  - Non-responsibility determinations
  - Contract terminations

# CPARS and PPIRS (Government Only Databases)





# Do Agencies Protect Information in Past Performance Evaluations?

- Agencies shall mark evaluations “Source Selection Information”
- Not released to other than Government personnel and subject contractor
- Disclosure could harm both Government’s commercial interest and contractor’s interest in its competitive information
- Contractor also cannot use for advertising or promotion

# What Steps Should Contractors Take to Avoid Past Performance Problems?

- Communication
- Performance
- Prompt reaction to evaluation

# Do Contractors Review Agency Evaluations of Their Past Performance?

- Agency to complete reports within 120 days – (CPARS Guidance)
- Agency evaluations should be provided to contractors ASAP after completion
- Contractors have minimum of 30 days to provide comments, rebutting statements, or add'l info
- Contractor response period to be reduced to 14 days
  - Required in Defense Authorization Acts

# What If A Contractor Disagrees with the Agency's Past Performance Evaluation?

- Agencies shall provide for review at next level to consider disagreements
  - Reviewing official
- Ultimate conclusion is agency decision
- Copy of final evaluation to contractor
- Agency review may be best opportunity for meaningful relief
- Copies of eval, response, review retained as part of evaluation

# Contractor Steps to Object to Past Performance Reports at Agency Level

- Timely, written response
- Request defer finalization of CPAR
- Effective rebuttal or additional information
- Potential arguments:
  - Inaccurate
  - Unreasonable
  - Untimely

# Can A Contractor Contest the Agency's Decision outside of the Agency?

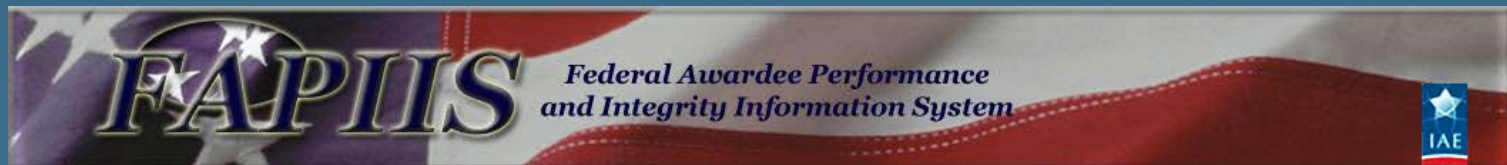
- Trend of performance evaluation disputes as “claims” under the Contract Disputes Act
- Submit CDA-compliant “claim” re performance rating dispute
- If denied, sue in Court of Federal Claims
- Or appeal to Board of Contract Appeals
- Scope of potential relief

# PPI Is Also Relevant to “Responsibility”

- Responsibility determinations
  - May be questioned for seriously deficient performance
- Suspension or debarment possible for willful failure to perform or a history of failure to perform

# Publicly Available FAPIIS Database

- Legally mandated integrity and performance
- Contractor-provided data
- Excluded parties list information
- Administrative agreements
- Par FAR Part 42, agency report into FAPIIS within 3 days:
  - Determination of defective cost or pricing data
  - Final termination for cause or default notice
  - Conversion of T4C to T4D





# Summary of Past Performance Reporting Issues

- Timely and effect response to past performance reports, if necessary
- Monitor Government databases

# Use of Past Performance Information in Procurements

- FAR Subpart 15.3 – Source Selection
- Evaluation Factors and Significant Subfactors
  - FAR 15.304
  - Past Performance is a mandatory evaluation factor in all negotiated competitive acquisitions expected to exceed the SAT

# Use of Past Performance Information in Procurements

- Proposal evaluation
  - FAR 15.305
  - Past performance – FAR 15.305(a)(2)
- Exchanges and communications with offerors regarding past performance

# Past Performance & Protests

- Protest is where a disappointed bidder challenges the agency's source selection activities
  - GAO is a common protest forum
  - This issue also can arise in SBA size protests
- Past performance has become a significant evaluation issue which also has made it an increasingly important issue in bid protests

# Protests – GAO Review Standard

- Agency has broad discretion in evaluating past performance including the relevance and weight to give to each reference
- GAO may sustain protest if agency's evaluation was unreasonable, inconsistent with terms of RFP, ignored information close at hand or was not adequately documented

# Unreasonable Evaluation

- Protests sustained where agency weighed relevant and nonrelevant performance equally
- Protests sustained where agency evaluated past performance too mechanically
  - Agency only considered the number of past performance problems reported without evaluating the number of transactions at issue

# Evaluation Consistent With Terms of RFP

- The agency's evaluation must be consistent with the terms of the solicitation
- Key issues cited by GAO:
  - Relevance of past performance information
  - Quality of past performance information
  - Source objectivity of past performance information

# Relevance of Past Performance Information

- Agency must determine degree of relevance of the past performance information to the contract requirements at issue
- “Same or similar”
  - Agency must determine if the reference is same or similar in size, scope and complexity to the current contract
  - Date of Past Performance – agency can consider how recent is the past performance
  - Duration of Past Performance



# Relevance of Past Performance Information

- “Same or similar” (cont.)
  - Geographic location of past performance – agency can consider if reasonable
  - Different technical approach – should not affect relevance of past performance
  - Unless the solicitation provides to the contrary, agency does not need to consider all references submitted by the offeror

# Quality of Past Performance

- Agency must first consider relevance; then, quality of the past performance can be considered
- Quality factors include
  - Timeliness of performance
  - Cost control
  - Customer satisfaction
  - Performance trends (improving vs. getting worse)

# Objectivity of Past Performance

- Agency should consider the source of past performance information to determine its objectivity
- Agency can consider negatively the fact that prime contractor furnished the ratings for its proposed subcontractors

# Past Performance of Affiliates

- IAP World Services, Inc. (July 2013)
  - Bidder may rely upon past performance of affiliate only when the bidder's proposal demonstrates that the affiliate's resources will be provided or relied upon for contract performance
  - So, the affiliate's experience must bear on the likelihood of successful performance by the offeror
  - On this basis, GAO found that agency improperly credited the bidder with past performance of two affiliates based on review of the proposal

# Past Performance of Subcontractors and Key Personnel

- GAO upheld a RFP that stated that agency would not consider past performance of subcontractors or key personnel
- Seems contrary to FAR 15.305 (evaluation should take these factors into account)
- Decisions have upheld relying upon the experience of subcontractors, key personnel and predecessor companies when there is no RFP language to the contrary

# Evaluations Must Be Documented

- Evaluations must be documented
  - Protest sustained when agency could not explain how it evaluated relevance of bidder's past performance
  - Protest sustained when no documentation of oral discussions or unidentified written documents that evaluators claimed to rely upon
  - Unreasonable evaluation where there was no evidence that agency analyzed strengths/weaknesses of bidder's past contracts

# Sources of Past Performance Information

- Evaluator can rely upon extrinsic evidence; in fact, it might be improper to ignore such evidence
- Evaluator can rely upon personal knowledge in evaluating offeror's past performance

# “Close at Hand” Decisions

- Agency must consider outside adverse information when the information is “too close at hand” to be ignored
- In some cases, an evaluator cannot ignore relevant past performance information within evaluator’s personal knowledge



# “Close at Hand” Decisions

- Protester has to prove that the source selection officials were aware or should have been aware of the adverse information
- Limits to this doctrine
  - May be limited to (1) contracts for same services with same agency or (2) information personally known to evaluators

# Lack of Past Performance

- Must result in a Neutral rating
- Neutral rating, however, is usually equated with an unknown level of risk
- A bidder's lack of relevant or available past performance means that the bidder cannot be treated favorably or unfavorably
- But an agency may in a price/technical tradeoff reasonably determine that a high rating is worth more than a neutral rating

# SBA Size Decisions

- A bidder's use of the past performance of a large business subcontractor potentially may be considered by SBA to evaluate the size of the small business offeror under the ostensible subcontractor rule.
- SBA has held that an ANC rely upon its parent's experience to allay concerns of undue reliance upon a large subcontractor

# SBA Size Decisions

- Using past performance of an ANC affiliate should not raise an affiliate issue based on the ANC exception in 13 CFR 121.103(b)(2)(i), (ii)



# Questions or comments, please call or email:

**Don Carney**  
**Perkins Coie LLP**  
**700 13<sup>th</sup> Street, NW, Suite 600**  
**Washington, DC 20005-3960**  
**(202) 654-6336**  
[DCarney@perkinscoie.com](mailto:DCarney@perkinscoie.com)



**Rick Oehler**  
**Perkins Coie LLP**  
**1201 Third Ave., 40<sup>th</sup> Fl.**  
**Seattle, WA 98101-3099**  
**(206) 359-8419**  
**(202) 654-6367**  
[ROehler@perkinscoie.com](mailto:ROehler@perkinscoie.com)

