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- Extensive SBA Knowledge.
Past Performance: What You Need to Know

Don Carney
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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

- **2010**:
  - Late: 5,641
  - On time: 10,185
- **2011**:
  - Late: 8,155
  - On time: 11,968
- **2012**:
  - Late: 13,926
  - On time: 19,501

Fiscal year
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

- ≥$30,000 – Architect/Engineer
- >$150,000 – FSS Orders; Certain TO/DOs, Catch-all
- >$500,000 – Ship Repair/Overhaul (DoD)
- ≥$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?

<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.</td>
<td>Serious; Recovery still possible</td>
<td>Marginally effective; Not fully implemented.</td>
</tr>
<tr>
<td>Unsatisfactory</td>
<td>Does not meet most</td>
<td>Serious; Recovery not likely</td>
<td>Ineffective</td>
</tr>
</tbody>
</table>
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)

Gov't Quality Evaluators/
Contracting Officer

Gov't Source
Selection Officials

CPARS

PPIRS

Contractor Representative

http://www.cpars.csd.disa.mil

21 SW/PMD

Contractor Senior
Management
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
- 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 effective 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)
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