

# Past Performance

## How to Use Yours, Benefit From Others', and Defend It From Attacks

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Samuel Finnerty

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PilieroMazza – a business law firm – serves as a strategic partner to government contractors and commercial businesses from across the United States.

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Samuel Finnerty represents clients in a wide range of government contracting and litigation matters. His experience includes representing federal contractors in bid protests before the Government Accountability Office (GAO) and the Court of Federal Claims (COFC), in size and status protests before the Small Business Administration (SBA), and in appeals before the Boards of Contract Appeals. Mr. Finnerty also counsels clients on claims, requests for equitable adjustment (REAs), government contract disputes, and business torts. In addition, he advises clients on matters of regulatory compliance arising under the Federal Acquisition Regulation (FAR) and SBA regulations, including implementing affiliation mitigation or avoidance plans, and maintaining size and socio-economic status.

In 2018, 2019, and 2020 Super Lawyers® recognized Mr. Finnerty as a “Rising Star” for his work with government contractors.

# Overview

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- General rules governing past performance evaluation
  - What is past performance?
  - When must agencies consider it?
- Different types of Past Performance Information (“PPI”) offerors can utilize
- Best practices for obtaining positive CPARS ratings
- How and when to challenge negative CPARS ratings
  - Where is past performance reported?
  - How is past performance evaluated?
  - When can you challenge negative past performance?
  - What relief is available for a past performance challenge?

# What Is Past Performance?

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- **“Past performance”** refers to performance on “active and physically completed contracts” and certain orders under existing contracts
- Past performance on contracts of similar size and scope is considered a predictor of your capability
- Agencies are generally required to evaluate past performance and consider PPI when making source selection decisions in negotiated procurements and determining whether prospective contractors are “responsible”

# Past Performance v. Responsibility

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- **Responsibility:** Yes/No assessment as to whether a contractor has the requisite financial resources, business integrity, etc., to perform the contract. FAR Subpart 9.1
  - Being terminated for default could result in non-responsibility determination
- **PPI Evaluation:** One of several comparative evaluation factors used to select best value contractor. FAR Part 15
- PPI evaluations apply only to negotiated procurements (FAR Part 15), and not to sealed bids (FAR Part 14) where award goes to the lowest priced responsive, responsible bidder

# General Rules for PPI Evaluation

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- Negotiated Procurements - FAR 15.305(2)
  - Agency **should** consider PPI from predecessor companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the work when such information is relevant to the instant acquisition
- IDIQ Contract Ordering - FAR 16.505
  - FAR 15.3 does not apply
  - Agency **should** consider past performance on earlier orders under the contract, including quality, timeliness and cost control
- Schedule Procurements - FAR Part 8
  - Agency **may** consider past performance
  - Does not explain what PPI agency should or has to consider

# When Can Offeror Use Subcontractor PPI?

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- Depends on the type of procurement and solicitation terms
  - FAR Part 15 - agency may consider subcontractor PPI where the subcontractor will perform a substantial portion of the contract
  - FAR Part 8 procurement – no defined rules
  - Atlantic Systems Group, Inc., B-413901 (Jan. 9, 2017) - appears to establish two separate default rules – i.e., rules that apply where a solicitation is silent on the issue:
    - (1) **FAR Part 15 procurements:** agency must consider past performance references submitted for proposed subcontractors, at least for major subcontractors or subcontractors that will perform critical aspects of the requirement
    - (2) **FAR Part 8 procurements:** agency has discretion to disregard subcontractor references – offerors should not assume that a subcontractor’s past performance will be considered

# When Can Offeror Use Subcontractor PPI?

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- Key Takeaways

- Seek clarification if a solicitation is not clear regarding whether subcontractor PPI will be considered
- If you plan to rely on subcontractor PPI, proposal should articulate the name of the subcontractor or teaming partner and what major work/critical aspects of the project the subcontractor will be doing
- Some solicitations provide that subcontractor PPI will be “given weight relative to the amount of effort under the solicitation that the subcontractor is proposed to perform”
  - Puts burden on bidder to tell government what percentage or level of effort the subcontractor will perform
  - Consider breaking down the level of effort by each section in the statement of work

# When Can Offeror Use Key Personnel PPI?

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## ■ FAR 15 Procurements

- The evaluation **should** take into account PPI regarding key personnel who have relevant experience
- GAO has held that solicitation that expressly prohibits an agency from considering key personnel PPI does not violate the FAR
- **But** GAO has also held that where solicitation provided for consideration of past performance of offerors' management team, agency was required to consider past performance of offerors' managers
- Consider seeking clarification if solicitation is not clear regarding whether key personnel PPI will be considered

# When Can Offeror Use Affiliate PPI?

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- GAO has held that an agency **may consider PPI of an affiliate** so long as it is not explicitly forbidden by solicitation and offeror's proposal represents the affiliate's resources – e.g., its workforce, management, facilities or other resources – will be provided or relied upon for contract performance, such that **affiliate will have meaningful involvement in contract performance**
- “Meaningful involvement” is determined on a case-by-case basis, and merely identifying affiliate in proposal is not enough
- Consider how you can use affiliate to support contract performance (e.g., as a major subcontractor or resource for key personnel)
- Consider submitting bid with affiliate as a joint venture
- Consider seeking a clarification if a solicitation is not clear regarding whether affiliate PPI will be considered

# When Can Offeror Use Affiliate PPI?

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- **Pro Tip For Tribally-Owned Companies:**
- Use caution when relying on affiliate PPI
  - Tribally owned concerns receive a broad exclusion from affiliation for 8(a) procurements – but may be found affiliated for other reasons under small business set-asides
  - As such, these concerns should be cautious when relying on PPI from their “exempted” affiliates when bidding on such procurements, because reliance on such information could, for example, be a piece of additional evidence to support a finding of general affiliation

# When Can Joint Venture Use Member PPI?

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- The FAR provides little guidance
- **But**, GAO has historically upheld crediting JV with past performance of the JV partners
- SBA's joint venture regulations were revised in 2016 to **require** agencies to consider PPI from each JV partner, as well as any work done by JV itself
- However, when JV is between an SBA-approved mentor and its protégé, agency can limit the amount of mentor PPI to be considered
- Agency can consider each JV member's relative level of effort as part of its past performance evaluation
- Agency may still require joint venture to submit past performance of its own

# When Can Offeror Use PPI of a JV in Which It Was a Member?

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- Only clearly permitted when offeror was managing member/50% partner
- Offeror can rely on PPI of JV it controlled under rules for affiliate PPI
- OHA announced that “where an offeror relies on past performance of the firm as a participant in a joint venture, the agency **may consider the performance on the basis that the offeror had a sufficient role in the joint venture to make the performance relevant.**” Paragon Sys., Inc., B-414515 (June 29, 2017)
  - Unclear what “sufficient role” means
  - GAO has compared the analysis to that of an affiliate. See Al-Razaq Computing Servs., B-410491 (Jan. 7, 2015)

# What About Contractor Teaming Arrangements (“CTAs”) Established Under GSA Schedules?

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- A CTA is a written agreement between two or more schedule contractors to work together to meet an agency’s requirements
- Unlike a traditional prime/subcontractor, each CTA member: (1) is responsible for its duties; (2) has privity of contract with the government; and (3) must have a GSA schedule contract
- Argument can be made that agencies should allow CTA offerors to rely on PPI of all CTA members because of privity of contract.
- If reliance on CTA member PPI is unclear, offerors should consider seeking clarification or protest solicitation as unduly restrictive

# When Can Offeror Use Acquired PPI?

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- FAR Part 15 says agency **should** rely on PPI of a predecessor company
- A predecessor is as an entity that is replaced by a successor
- A successor is an entity that has replaced a predecessor by acquiring the assets and carrying out the affairs of the predecessor under a new name (often through acquisition or merger).
  - Does not include new offices/divisions of the same company or a company that only changes its name. FAR 52.204-20

# When Can Offeror Use Acquired PPI?

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## ■ Novation

- Requests government to recognize a third party as a “successor in interest”
- When contracts are novated, they are assigned the CAGE code of the successor entity. As such, after the novation is complete, the predecessor’s contracts should all show up in CPARS under the successor’s CAGE code
- However, novation alone does not require an agency to attribute PPI of predecessor to successor. Sevatec, Inc., B-406784 (2012) (“**Neither the express terms of the[novation] agreement, nor any other authority of which we are aware, provides for the legal fiction that Sevatec was entitled to claim as it [sic] own the experience of another unrelated entity.**”)
- “The key consideration is whether the experience evaluated reasonably can be considered predictive of the offeror’s performance under the contemplated contract.” Davis Strategic Innovations, Inc., B-413305 (2016)

# When Can Offeror Use Acquired PPI?

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## ■ Successful Use of Novated Contract

GAO has upheld an agency's past performance evaluation, which relied on novated contracts, where the "successor in interest" under the novation agreement is essentially the same entity.

- In Davis Strategic Innovations, Inc., B-413305 (2016), GAO found that an agency properly may consider the relevant past performance of predecessor companies where such experience is useful in predicting an offeror's performance under the contemplated contract
- In Dyncorp Int'l LLC, B-411126.4 (Dec. 20, 2016), GAO found that **where contract performance is continued** on novated contracts, then it is reasonable for the procuring agency to consider those novated contracts in evaluating experience and past performance.

# Best Use of PPI

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- Try to shape RFP requirements to fit your needs
  - Informal dialogue, comments to draft solicitation, Q&A
  - Protest unduly restrictive or ambiguous RFP language – once bids are submitted, it's too late to challenge evaluation criteria
- Provide PPI tailored to the RFP's evaluation factors
- Monitor sources of information for your PPI
  - CPARS/FAPIIS/PPIRS
  - Ask clients what they have heard about your PPI
- Participate in debriefings
- Examine subcontractor/teammate PPI

# Protesting RFP's Past Performance Language

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## ■ Unsuccessful Protests:

- Valor Constr. Mgmt., LLC, B-405365 (2011) (RFP **not unduly restrictive** where it limited consideration of team member's experience and past performance to firms with which the offeror had **contractual privity** for purposes of performing the contract)
- Olympus Bldg. Servs., Inc., B-282887 (1999) (RFP **not unduly restrictive** where it indicated that past performance evaluation will consider only corporate past performance and not past performance of **key personnel**)
- Technology & Mgmt. Servs., Inc., B-240351, et al. (1990) (solicitation **not unduly restrictive** where it did not provide for inclusion of subcontractor's experience under corporate experience, because it was necessary for contractor to possess relevant corporate experience in order to assure satisfactory performance of the contract)

# Protesting RFP's Past Performance Language

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## ■ Successful Protests:

- Total Health Res., B-403209 (2010) (solicitation requirement for specific experience on the part of the prime contractor was **unduly restrictive** of competition where agency did not show that its needs could not be satisfied by a **subcontractor** with relevant experience)
- Iyabak Constr., LLC, B-409196 (2014) (Solicitation is **unduly restrictive** where it provides that experience and past performance of **affiliates** will not be considered, even for proposals that demonstrate affiliates will participate meaningfully in contract performance)
- Navajo Nation Oil & Gas Co., B-261329 (1995) (solicitation **clause requiring specific experience applicable only to fuel dealers**, and not refiners or manufacturers, **unduly restricts competition**, where agency makes no showing and record provides no reasonable basis for agency's determination that the restriction reflects agency's minimum needs)

# Optimizing Performance

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- Vet your quality assurance plans and performance schedules
- Keep track of kudos and immediately rectify issues as they arise
- Continuously assess whether you are on track to meet performance milestones
- Know the PPI rating justifications and stay within the contract's period of performance

# Defending Your Past Performance

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- Agencies must consider past performance and report in CPARS
- The FAR requires agencies to monitor compliance with past performance evaluation requirements and enter PPI in CPARS. FAR 42.15
- CPARS is tied to other databases, such as the Federal Awardee Performance and Integrity Information System (“FAPIIS”)
  - CPARS is usually the primary source relied upon by source selection officials
- Evaluations must include a clear nontechnical description of the contract and “**clear relevant information** that accurately depicts the contractor’s performance and be **based on objective facts** supported by . . . performance data.” Agencies must use certain prescribed evaluation factors, including quality of the product or service, cost control in cost contracts, timeliness, management and small business subcontracting. FAR 42.1503(b)

# CPARS Evaluations

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- **Interim Evaluations:** All annual evaluations, except the evaluation completed at the end of the contract/order. For contracts that have a period of performance greater than 365 days, the first interim evaluation must reflect evaluation of at least the first 180 days, and may include up to the first 365 days or performance
  - Also required at least every 12 months
  - Limited to contractor performance occurring after preceding evaluation
- **Final Evaluation:** Completed upon contract/order completion
  - A final report should be prepared following completion of performance under the last option period which was exercised
  - Does not include cumulative information, which is limited to the period of contractor performance occurring after the preceding evaluation
- PPI is valid for 3 years (6 for construction/architect-engineer contracts)

# Thresholds for When CPARS Are Required

Agency	Contract Dollar Threshold
Civilian Agencies:	
• Systems and Non-Systems	>Simplified Acquisition Threshold (250k)
• Architect-Engineer	\$35,000+; all TforD's
• Construction	\$700,000+; all TforD's
DoD Services & Agencies	
• Systems	>\$5,000,000
• Non-Systems	
• Operational Support	>\$5,000,000
• Services/IT	>\$1,000,000
• Ship Repair/Overhaul	>\$500,000
• Architect-Engineer	\$35,000+; all TforD's
• Construction	\$700,000+; all TforD's

# CPARS - Ratings and Narratives

## Rating Definitions (FAR 42.1503 Table 42-1)

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 - Gov't Impact	Serious; Recovery Still Possible	Marginally Effective; Not Fully Implemented
Unsatisfactory	Does Not Meet Most - Gov't Impact	Serious; Recovery Not Likely	Ineffective

# Responding to a Negative CPARS

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- CPARS shall be provided to the contractor as soon as practicable after completion of the evaluation
- Contractors have **14 calendar days** from the date of notification to submit comments, rebutting statements, or additional information
- After **14 days**, the CPAR is automatically published on PPIRS, together with comments by the contractor
- On **day 15**, evaluations are accessible to source selection officials through PPIRS, with or without the contractor's response
- CPARS Guidance permits contractors to submit comments **up to 60 days** after notification to the contractor and allows these comments to be included in PPIRS once submitted

# Responding to a Negative CPARS

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## ■ **Drafting a rebuttal**

- Address both procedural and substantive deficiencies in the evaluation, i.e., any failure to follow the requirements of the FAR and any mistakes in the facts supporting the evaluation
- Include copies of supporting information, including records, notes, contemporaneous emails from the agency, and other documentation that contradicts the conclusions drawn by the agency

## ■ **Pending proposals?**

- Consider asking the procuring agency not to rely on any negative past performance evaluations at least until such time as the reviewing official has issued a final decision
- Agency can still rely on such information, but may be persuaded that reliance would be unfair and prejudicial without the benefit of the reviewing official's consideration of the contractor's rebuttal

# Can You Avoid Publication?

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- Government is not required to wait, but may be persuaded
- Try to set up a meeting with the evaluation team and/or contact government counsel to initiate negotiations in an effort to stop publication during the dispute process
- The Courts and the Boards have found that a CPARS challenge is a matter under the Contract Disputes Act (“CDA”) and, as such, there is **no injunctive relief** (i.e., a tribunal cannot direct the Government to revise, remove, or not rely on a CPAR). See Todd Const., L.P. v. United States, 88 Fed. Cl. 235, 243 (2009); See YRT Enterprises LLC, CBCA 5701 (2017)

# Challenging a Negative CPARS

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- Submission within 14 days of any disagreement triggers a review by a reviewing official at a level above the contracting officer. FAR 42.1503(d)
- The reviewing official **must issue a written decision**, which then becomes part of the evaluation and available on PPIRS
- The entire CPARS evaluation process, including the 60-day comment period and the reviewing official's final decision, must be completed within 120 days of the end of the contract period of performance
- The ultimate conclusion on the performance evaluation is a decision of the contracting agency

# Can You Appeal the Final CPAR?

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- No formal appeal process in the FAR
- Must look to the Contracts Disputes Act, 41 U.S.C. §§ 7101-7109 (“CDA”), and the Disputes clause of the contract
- CDA permits appeals to Board of Contract Appeals or Court of Federal Claims of final decisions of contracting officers in response to “claims” by a contractor
- **Must establish standing!**
- **Comments during evaluation process are not necessarily or automatically a claim** for CDA purposes. See *BLR Group of America, Inc. v. United States*, 96 Fed. Cl. 9, 14 (2010) (contractor's written objections to unfavorable CPAR did not constitute claim; CO reasonably interpreted them as comments pursuant to FAR § 42.1503(b))
- To ensure standing, contractor should submit a separate claim challenging reviewing official’s decision, and seeking a final decision under the relevant disputes clause

# CPARS Claim/Appeal: Timing/Venue

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- Claims must be filed with the CO within 6 years
- If CO fails to respond within required period you can deem it a denial and appeal
- If claim denied you can appeal to Board of Contracts Appeals or US Court of Federal Claims
  - 90 days to appeal to the Board of Contract Appeals
  - 12 calendar months to appeal to the US Court of Federal Claims
  - Once you chose venue you cannot switch!

# CPARS Claim/Appeal: The Process

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## ■ Potential Arguments:

- Agency misinterpreted and/or failed to follow contracts' performance evaluation provisions;
- Agency breached implied duty of good faith and fair dealing by doing incorrect performance evaluation;
- Agency did not act reasonably/was arbitrary and capricious/abused discretion in rendering evaluation.

## ■ Pleading Standard:

- Must plead facts which give rise to a plausible inference that the government abused its discretion in awarding the negative performance ratings. Todd Const., L.P. v. United States, 656 F.3d 1306 (Fed. Cir. 2011)

# CPARS Claim/Appeal: The Relief

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## ■ Declaratory Judgment

- An Order interpreting contract clauses and the parties' rights thereunder and deciding whether the agency **breached** its implied contractual **duty of good faith** and fair dealing and/or if the contracting officer was **arbitrary** and **capricious** in making the evaluation.
- Can use declaration to explain negative CPAR when bidding
  - BUT, negative CPAR could remain in CPARS and be erroneously used
  - If that happens, contractor could use the declaration to set the stage for injunctive relief in a bid protest. See *Itility, LLC v. United States*, 124 Fed. Cl. 452 (2015) (“a declaration that a CPAR was arbitrarily issued and contained inaccurate information could be communicated to procurement officials in subsequent contract competitions, and would set the stage for injunctive relief in a bid protest if that CPAR is relied upon to an offeror's prejudice.”)

# CPARS Claim/Appeal: The Relief

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- COFC also has authority to **remand** a matter to agency with specific instructions, but authority is not unlimited and does not trump the general prohibition on injunctive relief
- **May be able to recover monetary damage**, such as the costs to address the unfavorable review on future proposals with Contracting Officers, in the form of negotiations as well as protests. See Appeal of Government Services Corporation, ASBCA No. 60367 (2016)

# CPARS Claim/Appeal: Is it Worth It?

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- Most cases settle or are dismissed before a hearing on the merits
  - This makes sense given that contractors are unlikely to recover monetary damages and have little incentive to litigate
- Only 1 published Board decision addresses the merits of a CPAR– i.e., whether ratings were “fair and accurate” pursuant to FAR 42.15.
  - In PROTEC GmbH (ASBCA Nos. 61161, 61162), the Board analyzed a CPAR’s factual assertions, compared them to the parties’ evidence of contract performance, and held the CPAR was “fair and accurate” due to the contractor’s noncompliance and poor performance.
  - While this case was unsuccessful, it confirms that the Board can review CPARS and provides additional incentive for the agency to settle CPARS disputes, as they don’t want a tribunal looking over their shoulder

# CPARS Takeaways

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- Carefully and timely scrutinize all negative CPARS
- Proactively engage the contracting agency
  - Identify who will be contributing to the evaluation and discuss potential issues or concerns
- Once you receive the CPARS notice, carefully review with counsel and identify and challenge any inaccurate or incomplete items
  - If appropriate, see if initial evaluation can be revised and, if unsuccessful, submit a substantive rebuttal challenging all procedural deficiencies and factual errors, together with helpful supporting materials within 14 days of notice

# CPARS Takeaways

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- While the rebuttal is being reviewed, ask agencies to hold off on relying on the data in PPIRS and, if unsuccessful, ask them to take the rebuttal into consideration
- If, in conjunction with counsel, the contractor concludes that the reviewing official's decision was improperly decided, consider a claim and, if necessary, a CDA appeal

# Questions?

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