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# CONTRACTOR PERFORMANCE ASSESSMENT REPORTS:

## Past Performance Evaluations and What to do with Them

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Past performance evaluations have become critical in today's "best value" awards. So what do you do when you receive a negative past performance review that you feel is unwarranted?

**BY J. HATCHER GRAHAM**

**THOSE OF US WHO HAVE BEEN IN THE FEDERAL GOVERNMENT CONTRACTING COMMUNITY FOR MORE THAN 20 YEARS REMEMBER THE DAYS OF AWARDS TO THE LOWEST, RESPONSIVE, RESPONSIBLE BIDDER. WE ALSO REALIZE THAT THOSE DAYS ARE GONE FOREVER. BECAUSE A FEW AWARDEES DEFAULTED ON THEIR PERFORMANCES AND THEN WERE ABLE TO ACQUIRE OTHER CONTRACTS, THE GOVERNMENT CREATED “BEST VALUE” AWARDS. HERE, PRICE IS JUST ANOTHER FACTOR IN THE AWARD DECISION, AND USUALLY NOT THE MOST IMPORTANT ONE.**

This gave rise to “past performance” evaluations, which are usually a major evaluation factor. Every agency now has its own method for evaluating a contractor’s performance and a database where these evaluations can be found and resurrected to be utilized in determining an award. Most solicitations now require that the proposer provide a list of past contracts for the evaluation committee to contact to determine the proposer’s past performance score, which may doom a contractor’s chance for an award. This was recognized by the U.S. Court of Federal Claims when it stated:

*The Federal Acquisition Regulation [FAR]* requires all federal agencies to collect past performance information on contracts. CPARs [contractor performance assessment reports] contain information about a contractor’s performance and are used by procurement officials to determine a contractor’s “responsibility” when evaluating the contractor’s bid for work on a subsequent contract. The primary purpose of the [CPAR System] is to ensure that accurate data on contractor performance is current and available for use in source selections.... Performance assessments will be used as a resource in awarding best-value contracts and orders to contractors that consistently provide quality, on-time products and services that conform to contractual requirements. Thus...the content of a CPAR is “vitaly important to a contractor’s ability to win future government contracts.”<sup>1</sup>

So what happens when a contractor finds that it has received a low past performance score that disqualifies it for award and it disagrees with the past performance evaluation? If the contractor discovers this after award, its only recourse is a protest against an award. Generally, this will mean an expensive protest to the Government Accountability Office (GAO), as a protest to the same contracting agency that made the evaluation would be practically useless. However, even when a contractor challenges a past performance review after being rejected in a solicitation, the agency action is given the “greatest deference possible.”<sup>2</sup> Further, “[e]ven when the agency violates its regulations by assigning a lower past performance rating to a contractor that the contractor’s history actually warrants, the contractor must meet the high bar of being able to demonstrate specific prejudice resulting from the erroneous rating.”<sup>3</sup>

In a bid protest situation, the creation of mandatory performance reviews, databases archiving those reviews, and the requirement to consider those archived materials in future contract awards means that a negative review is potentially devastating to a contractor, who may have no, or very little, opportunity to mitigate the impact that the review will have on future awards. So what is a contractor to do when it receives a less-than-adequate performance review that it feels is either incorrect or the result of a contracting officer’s bad feelings?

This is not a farfetched example, since my firm is presently representing a contractor who was downgraded in its performance review because, among other similar items, it retained an outside consulting company to represent it in a modification dispute. A contractor has an absolute right to retain counsel or experts in a dispute with the government and should not be penalized just for proving the contracting officer incorrect; however, this generally happens when ego overrides responsibility.

All of the agency regulations requiring past performance reviews also require that the agency provide the contractor with a copy of the initial review prior to it being finalized and allow the contractor a chance to comment on the review. This is the contractor’s first chance to ensure that the past performance evaluation is accurate. It should be reviewed carefully and any real or perceived inaccuracies commented on. Make sure that the review accurately portrays the contractor’s performance. Remember, a “satisfactory” report can result in losing a contract award if all of the other proposers have been rated “outstanding.”

Let us assume that a contractor has determined that its past performance is not accurate for some reason. Some examples from actual cases include:

- A contractor being accused of delaying the project when it was delayed by the

government's slow approval of changes or unanticipated subsurface conditions;

- Defective specifications resulting in delays which are blamed on the contractor;
- Changes in contract administration, which resulted in inconsistent directives that were subsequently blamed on the contractor;
- Government changes in reimbursable items challenged by the contractor;
- The government micromanaged the project, resulting in delays that were blamed on the contractor; and
- A general evaluation that the contracting officer would not award to the contractor if he or she had a choice.

What does a contractor do if the contracting officer refuses to alter the evaluation and archives the evaluation with the negative information? Once the contractor has exhausted its administrative remedies, the only recourse now is litigation. But how does the contractor go about it?

Oddly enough, until 2007 there were no cases challenging inaccurate past performance evaluations. The contractors traditionally waited until they lost an award and then filed a GAO protest based on an inaccurate past performance evaluation. These were met with almost universal denials. However, the boundaries of the reach of the law are limited only by the imagination of the lawyers.

In 2007, a contractor was able to convince Judge Wheeler of the U.S. Court of Federal Claims to issue an injunction against the Department of Defense and the Defense Supply Agency restraining them from providing any details to inquiring agencies concerning a Justice Department investigation of the contractor.<sup>4</sup> This was followed by another case in which a contractor directly challenged a past performance review prepared by a U.S. Air Force contracting officer.<sup>5</sup> The contractor had taken the usual steps when it received a

negative CPAR by writing to the contracting officer with a detailed statement of why it thought the CPAR was inaccurate and what it thought the correct rating should be. The government refused to amend the CPAR and posted it to its online archives. The court's initial determination was whether or not the contractor had submitted a "valid claim." It stated that for the contractor to submit a valid claim, it must be seeking relief "as a matter of right" under the contract. The court stated:

Here, plaintiff seeks a fair and accurate CPAR and a properly formatted PPIRS [Past Performance Information Retrieval System] entry.... Specifically, plaintiff contends that its "written comments to the initial CPAR evaluation claimed entitlement to the relief

of a correct CPAR and that [a]fter the final CPAR evaluation was published in the PPIRS database it demanded in writing that the CPAR be corrected."<sup>6</sup>

The court then had to decide whether the contractor was entitled to a CPAR. It resolved this in the positive as the FAR required that each contract that exceeded the acquisition threshold have a CPAR and that this had been entered into the regulations at 48 C.F.R. 42.1502(a). The court also found that as the contractor was entitled to a CPAR, it was also entitled to a fair and accurate CPAR as "anything less than fair and accurate information in a CPAR would be a disservice to the contractor and other government agencies considering doing business with the contractor."<sup>7</sup>





The court also decided that the contractor had submitted a claim to the contracting officer in that he had objected to the CPAR as written and requested changes. When the contracting officer denied the request, the court held this to be a contracting officer's denial, even though the letter did not contain the required language concerning a final contracting officer's decision. The court also stated that as this claim was for a non-monetary relief and as a reasonable period of time had occurred, the court would consider a "deemed denial" and allow the parties to proceed with the litigation.<sup>8</sup> However, this part of the decision would be reversed by a later ruling.

The next case on this issue to arrive at the Claims Court was *Todd Construction*.<sup>9</sup> This involved a U.S. Army Corps of Engineers' contractor evaluation under its Construction Contractor Appraisal Support System (CCASS). Again, the contractor disagreed with the government's performance evaluation and submitted comments to the contracting officer on why it should be changed. His suggestions were denied and the original evaluation was placed in the Corps' archival system. The contractor filed with the Claims Court. The court first went into a detailed explanation of why they had jurisdiction over the case as this was a request for non-monetary relief and the original Tucker Act,<sup>10</sup> on which the jurisdiction of the Claims Court was based, only granted jurisdiction over monetary claims against the United States. Under the Federal Courts Improvement Act of 1982, the Claims Court was split into a trial court

and an appellate court (U.S. Court of Appeals for the Federal Circuit) and expanded its jurisdiction. Congress also redefined the jurisdiction of the Boards of Contract Appeals, giving them the authority to grant any relief available to a litigant in the Claims Court. However, it took the Federal Circuit Court of Appeals to define the jurisdiction of the Boards of Contract Appeals to cover non-monetary claims.

In *Malone*,<sup>11</sup> the court concluded that the Boards possessed jurisdiction to provide "declaratory" (or non-monetary) relief in default termination cases. This same conclusion was not reached in *Overall Roofing & Construction, Inc.*,<sup>12</sup> where the Federal Circuit ruled that the Tucker Act did not give the Claims Court declaratory relief jurisdiction. Partly in response to *Overall*, Congress then amended the Tucker Act to include a general grant of jurisdiction over Contract Dispute Act nonmonetary disputes.<sup>13</sup> Therefore, the Claims Court does have jurisdiction over non-monetary or declaratory relief. However, the court requested the parties to conduct additional briefings on whether or not the court could provide the relief the plaintiff was requesting—i.e., injunctive relief and a rewriting of the performance evaluation.


We now jump ahead through two more *Todd* rulings,<sup>14</sup> one more *BLR* case,<sup>15</sup> and an additional case, *Kemron Environmental Services, Inc.*<sup>16</sup> Rather than analyze each of these cases, I will try to pull from them the present state of the law and how an inaccurate performance report should be handled.

### Jurisdiction

The Claims Court has now apparently settled the fact that they do have jurisdiction over a properly filed complaint challenging a past performance review. It has authority to review a nonmonetary dispute pursuant to the Contract Disputes Act.<sup>17</sup> The regulations requiring past performance reviews are incorporated into the contracts<sup>18</sup> and the benefits apply equally to both the contractor and the government.<sup>19</sup>

### CDA Claim

All of the cases have ruled that to be properly before the Claims Court, the contractor must have filed a proper claim pursuant to the Contracts Disputes Act (CDA). This means that the contractor must have filed a document with the contracting officer stating that it is claiming as a matter of right something to which it is entitled to under the contract and requesting a contracting officer's final decision letter. In *BLR* (2010), the court ruled that it had the jurisdiction to rule on the complaint; however, the series of letters and correspondence between the contractor and the contracting officer did not rise to the level of a request for a final decision and a resulting contracting officer's final decision. Therefore, it did not qualify as a CDA claim.<sup>20</sup> In *Todd* (2010), the court determined that a proper CDA claim had been filed. However, a review of the complaint revealed that the contractor did not provide facts which would substantiate the court's providing the requested relief.<sup>21</sup>

A crowd of people holding American flags in front of the US Capitol building. The scene is captured from a low angle, looking up at the crowd and the building. The flags are in the foreground, and the Capitol building is in the background, slightly out of focus. The lighting is warm, suggesting a sunset or sunrise.

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### Relief

In *Todd* (2008), the court first took on the issue of whether or not it could provide any relief, even if the contractor submitted a proper CDA claim. The court could not decide if it possessed the proper authority to order injunctive or corrective relief and directed the parties to brief this issue further.<sup>22</sup> In *Todd* (2009), the court stated that it had the jurisdiction to declare the rights of the parties; however, this would not resolve the dispute because it would neither change the performance rating nor remove the evaluation from the archived system.<sup>23</sup>

The court went on to decide that while the contractor was entitled to a fair and accurate evaluation and the court had the jurisdiction to review the evaluation process to determine if it was fair and accurate, it did not possess the jurisdiction to order the agency to give the contractor a specific rating. It could, however, review the process to determine if the exercise of the contracting officer's discretion in what was a subjective process was arbitrarily or capriciously exercised.<sup>24</sup> As the court stated:

Given the remedial powers relied upon by the plaintiff, the court may issue a

declaration of rights and may remand to the contracting officer with "proper and just" instructions, but those instructions cannot include a direction that the agency reach a particular conclusion on the merits of the performance evaluation. Thus, the court does not possess the ability, under the remand clause of §1491(a)(2) [Tucker Act], to order that the corps set aside its final evaluation or remove it from CCASS. Under its remand authority, this court can review the procedural propriety of the manner in which the performance evaluation was determined and, if it finds inadequacies, remand to the agency with a description of the procedural deficiencies found by the court and directions as to how to remedy them. The court can also review whether the agency abused its discretion in determining that the assigned performance rating was "accurate" and "fair" and, if it finds an abuse of discretion, can remand to the agency for further consideration. The court contemplates that such a remand would involve a "proper and just" direction that the agency reexamine its rating and either build a proper record for the rating it assigned or assign a rating that is supported by the record. The court does not possess the power to mandate that upon remand

the agency assign a particular rating, withdraw a rating, or remove a rating from the prescribed database.<sup>25</sup>

### IMPORTANT LESSONS LEARNED

The key takeaways to glean from this discussion include the following:

- Always check any CPAR evaluation to ensure that it is a "proper and just" rating and that it reflects the contractor's actual performance.
- If the rating is inaccurate, object in writing to the contracting officer and specify where you think it is inaccurate and what the rating should be.
- If you are not satisfied with the action taken by the contracting officer, always appeal to the proper authorities above his or her authority. Remember that one inaccurate bad rating can jeopardize your entire contracting future.
- If, after you have exhausted all administrative avenues, you are still not satisfied and want to take it to the next level (i.e., a judicial appeal), do not depend on the stream of correspondence between you and the government to provide the basis of a proper CDA claim. Submit a formal claim letter to the contracting officer detailing where the performance evaluation is incorrect and what it should be. Identify the letter as a claim and specifically request a "contracting officer's final decision."
- As this is not a monetary claim, it does not have to be certified. The contracting officer has a "reasonable time" in which to issue a final decision. The general rule is that if a final decision has not been issued in 60 days, consider it a "deemed denial" and prepare to file with the U.S. Claims Court.
- If you file with the U.S. Claims Court, make sure that your complaint is very detailed and provides the basis for the Court to determine that the performance evaluation is not accurate or

that the contracting agency's actions were arbitrary and capricious.

- Finally, realize that this is a very new area of the law and is thus very fluid. Even if you are successful at the U.S. Claims Court, the agency may not revise the performance report totally as you request as the court does not have the jurisdiction to order this. However, if you subsequently get into a proposal evaluation controversy and are protesting because you were downgraded due to this performance report, you should have documentation to show GAO that a court disapproved of the evaluation. **CM**

**ABOUT THE AUTHOR**

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**ENDNOTES**

1. *BLR Group of America, Inc. v. United States*, 84 Fed. Cl. 634, 636 (2008).
2. *See Westech Int'l v. United States*, 79 Fed. Cl. 272, 293-294 (2007).
3. *Precision Images, LLC v. United States*, 79 Fed. Cl. 598, 624-625 (2007).
4. *Public Warehousing Company K.S.C. v. United States*, 2007 U.S. Claims LEXIS 431 (2007).
5. *BLR Group of America, Inc.*, see note 1.
6. *Ibid.*, at 640.
7. *Ibid.*, at 641.
8. *Ibid.*, at 648.
9. *Todd Construction, L.P. v. United States*, 85 Fed. Cl. 34 (2008).
10. 28 U.S.C. 1494(a)(2).
11. *Malone v. Unites States*, 849 F.2d 1441, Fed. Cr. (1988).
12. *Overall Roofing & Construction, Inc. v. United States*, 929 F.2d 687, Fed. Cr. (1991).
13. As an aside, the author of this article was the plaintiff's counsel for both *Malone* and *Overall*.
14. *Todd Construction, L.P. v. Unites States*, 88 Fed. Cl. 235 (2009); and *Todd Construction, L.P. v. Unites States*, 2010 U.S. Claims LEXIS 544 (2010).
15. *BLR Group of America, Inc. v. United States*, 2010 U.S. Claims LEXIS 593 (2010).
16. *Kemron Environmental Services, Inc. v. United States*, 93 Fed. Cl. 74 (2010).
17. *Todd* (2008), see note 9.
18. *Todd* (2010), see note 14, at 551.
19. *Ibid.*, at 552.
20. See note 15, at 612; see also *Kemron*, note 16, at 93.
21. *Todd* (2010), see note 14, at 556.
22. *Todd* (2008), see note 9, at 48.
23. *Todd* (2009), see note 14, at 244.
24. *Ibid.*, at 247-248.
25. *Ibid.*, at 248-249.

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