Federal Past Performance Evaluations Is the New Deal a Square Deal?

In 1904 Theodore Roosevelt campaigned for President on a platform promising a “Square Deal” for Americans. Twenty-eight years later, his cousin, Franklin, promised a “New Deal” during his Presidential campaign. On May 30, 2014, the FAR Councils issued a revised regulation which substantially alters the process for the preparation, review and completion of a final Past Performance Evaluation (PPE) of a federal government contractor’s performance beginning on July 1, 2014. (See 79 Fed. Reg. 31197.) Essentially mirroring legislative mandates set by Congress in an effort to speed up the PPE process, this new regulation significantly revises the current process for consideration of a contractor’s comments, criticisms, or rebuttal of an evaluation. While the new approach promises a quicker completion of the PPE process, it is doubtful that this New Deal is a Square Deal for the construction industry.

In federal construction contracting, a contractor’s past performance has long been a factor in determining if that firm is deemed to be responsible. A contracting officer is required to make an affirmative determination that the contractor is responsible as part of the award process. In the context of a traditional firm fixed-price sealed bid competition, a responsibility determination was essentially a “pass-fail” type evaluation as there is no process for federal agencies to compare firms’ relative records of past performance. However, in the best-value negotiated selection process, comparative consideration of the offerors’ past performance is a mandatory evaluation factor in most competitions. Once the federal agencies were authorized to consider and compare the offerors’ relative past performance records, there was a need to implement a process to obtain and retain information on a firm’s past performance record in a relatively consistent format, which could be reviewed by any federal agency.

In 1994, Congress passed the Federal Acquisitions Streamlining Act (FASA). In so doing, Congress adopted a policy that a contractor’s historical (past) performance should be evaluated to determine whether that contractor should receive future work. Section 1091 of FASA provides that “past contract performance of an offeror is one of the relevant factors that a contracting official of an executive agency should consider in awarding a contract.” Under FASA, all federal departments and agencies were required to record contractor performance contemporaneous with that performance on all contracts over $100,000 and to use the contractor’s past performance during future acquisition processes. The federal government believes that the use of past performance evaluations will sufficiently motivate contractors to perform at the highest standards or, to the extent they are not, to improve their performance before they are rated again by an agency or department.

Importance of Past Performance Evaluations

As part of the evaluation process for a new award, the procuring agency is expected to confirm the accuracy of the offeror’s past contract information and assign a performance risk rating. In a prospective contractor’s performance risk assessment, the number and severity of problems in its overall work record are considered, as well as the effectiveness of the contractor’s corrective action.

The Office of Federal Procurement Policy (OFPP) has outlined several factors as guidance to procuring agencies in drafting and using past performance evaluation criteria. These include:

- **Quality of Product or Service.** The offeror will be evaluated on compliance with previous contract requirements, accuracy of reports, and technical excellence, to include quality awards/certificates.
- **Timeliness of Performance.** The offeror will be evaluated on meeting milestones, reliability, responsiveness to technical direction, deliverables completed on time, and adherence to contract schedules, including contract administration.
- **Cost Control.** The offeror will be evaluated on its ability to perform within or below budget; use of cost efficiencies; relationship of negotiated costs to actuals; submission of reasonably priced change proposals; and timely providing current, accurate, and complete billing.
- **Business Relations.** The offeror will be evaluated on its ability to provide effective management, meet subcontractor and SDB [Small Disadvantaged Business] goals,
cooperative and proactive behavior with the technical representative(s) and contracting officer, flexibility, responsiveness to inquiries, problem resolution, and customer satisfaction.

OFPP also stated that an evaluation of an offeror should reflect the agency’s satisfaction with the overall performance and final product and services. Evaluation of past performance is to be based on consideration of all relevant factors and circumstances and would include a determination of the offeror’s commitment to customer satisfaction. The evaluation is expected to reflect conclusions of informed judgment that are substantially documented. If an offeror’s proposal reflects use of particular subcontractors, team members or JV partners, OFPP indicated that each firm in the business arrangement will be evaluated on its performance under existing and prior contracts for similar products or services.

The PPE based risk assessment developed by the procuring agency is then used along with other evaluation factors, such as price, in a comparative assessment to determine the most highly rated offeror. If the procuring activity identifies negative findings that translate to high performance risk ratings, OFPP’s guidance stated that the agency should determine the extent to which the government may have played a part in or contributed to the negative finding and the extent of that contribution.

The agency is given broad discretion in evaluating past performance as a risk when making a new award. If an agency determines that a contractor’s performance on a past project introduces “an unsatisfactory level of risk,” it is very unlikely that GAO will overrule that discretionary decision. For example, a contractor’s prior default as a joint venture partner was sufficient to offset other positive projects, where the protesting contractor had positive performance histories. For any contractor seeking an award of a new contract, the substantive content, accuracy, and fairness of the PPEs of its prior performance are critical.

Challenges to an Incorrect Past Performance Evaluation

FAR § 42.1503 provides that contractors can respond to performance evaluations after the contracting officer has signed the completed assessment. The initial or draft assessment of the contractor’s performance is made by the program and contracting officer and typically is signed by the program office person most familiar with the contractor’s performance. The contracting officer initials the initial assessment and signs the completed assessment. Once the contracting officer signs the assessment, it should be sent to the contractor for the contractor’s comments.

Before the revised regulation, once a contractor received its evaluation, FAR § 42.1503(b) provided that the contractor was to be given a “minimum of 30 days to submit comments, rebuttals, statements, or additional information.” The submission of these contractor comments sometimes resulted in a lengthy period of exchanges with the contracting officer in an effort to resolve differences of opinion. If no agreement could be reached, the contractor was entitled to seek review at least one level above the contracting officer. As a consequence, the availability of an evaluation could be delayed for an extended period.

Reflecting its belief that the agencies were not expeditiously completing and posting past performance evaluations, Congress mandated changes to this procedure in the FY 2012 and 2013 National Defense Authorization Acts. Congress has mandated revisions to the FAR on past performance evaluations so that contractors are provided up to 14 calendar days . . . from the date of delivery of past performance evaluations to submit comments, rebuttals, or additional information pertaining to past performance for inclusion in the federal government’s past performance database. In addition, these acts require that agency evaluations of contractor performance, including any information submitted by contractors, be included in the relevant past performance database not later than the date that is 14 days after the date of delivery of the past performance evaluation to the contractor.

The changes mandated by Congress did not appear to require that an agency wait for receipt of the contractor’s submission before posting its evaluation and did not expressly provide for a process to revise or correct an evaluation based upon consideration of the contractor’s submission or rebuttal. Several industry representatives noted those concerns. To a limited extent, the FAR regulation,
which becomes effective on July 1, 2014 attempts to address those concerns by stating:

(d) * * * Contractors shall be afforded up to 14 calendar days from the date of notification of availability of the past performance evaluation to submit comments, rebutting statements, or additional information. * * *

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(f) Agencies shall prepare and submit all past performance evaluations electronically in the CPARS at http://www.cpars.gov. These evaluations, including any contractor-submitted information (with indication whether agency review is pending), are automatically transmitted to PPIRS at http://www.ppirs.gov not later than 14 days after the date on which the contractor is notified of the evaluation’s availability for comment. The Government shall update PPIRS with any contractor comments provided after 14 days, as well as any subsequent agency review of comments received.

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The commentary which accompanies the new regulations provides further insight on the following topics.

- **Posting of Evaluation Prior to Expiration of the 14 Day Comment Period:** The FAR Councils reported that the software used to manage the past performance databases would not allow the posting of an evaluation prior to the expiration of the 14 day period unless the government has received the contractor’s comments.

- **Receipt of Comments after the 14 Day Period Expires.** While the FAR Councils indicated that the agencies are expected to post in the past performance database contractor comments received after the 14 day comment period, it elected not to impose any regulatory requirement on the agencies to do that. Rather, the Councils stated that the contractor would need to address such issues with the agency responsible for the evaluation. The new FAR provision has no express direction to the agency regarding any revisions to a posted evaluation or a time frame for making a revision.

- **Meeting with Contracting Officer and Evaluators.** Traditionally, contractors have sought to meet with the evaluating (assessing) official in an effort to reconcile differing viewpoints on an evaluation. Often this meeting or meetings occurred before the evaluation was posted to the past performance database. Unless the meeting takes place in the initial 14 comment period, that process has no effect on the evaluation as it is posted by the agency. Moreover, the FAR Councils elected to remind the agencies that **there is no requirement** for the assessing official to meet with the contractor with the following comment.

- **There is no requirement in the law for the Government assessing official to meet with the contractor.** However, if the contractor requests such a meeting, the assessing official may accept the request. In this case, the **statute** is clear and does not allow for alterations to the 14 calendar day time frame and requires that the past performance evaluation must be made available for the use of source selection officials 14 days after its initial submission, and it will be made available at that time with any contractor comments that have been received. Delaying the availability of the contractor’s comments until after a meeting with the assessing official would only result in the past performance evaluation being seen by source selection officials without them having the benefit of any contractor comments.

(Emphasis added)

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In that context, the FAR Council noted that the provision in FAR § 42.1503(d) that allows a contractor to “appeal” a past performance evaluation and have a review one level above contracting officer was retained. However, contractors need to appreciate that a request for this review (“appeal”) does not stop the running of the 14 calendar day period mandated by Congress. Erroneous or unjustified reviews will be posted. If a contractor is surprised by the content and criticisms of its performance in any PPE (interim or final), the 14 calendar day response period means that there is very little realistic opportunity to marshal information and prepare a well-documented rebuttal.
In effect, the completion and posting of past performance evaluations is now on a “fast track.” Contractors need to recognize that reality and plan accordingly. Congress mandated the process and the FAR Councils have and will use that mandate to change the process. The time crunch falls exclusively on industry as there is no mandated deadline for the agency to prepare a PPE evaluation. Whether this new approach is a “Square Deal” for contractors is far from clear. This may ultimately prompt more litigation regarding unjustified evaluations. In federal government contracting, a contractor may challenge a past performance evaluation in the United States Court of Federal Claims and at the boards of contracts appeals to the extent that the contractor can relate that dispute to a contract requirement or term. However, the nature of the available relief is often difficult to predict as the courts and boards often focus on the process rather than the basis for the substantive comments in the evaluation.

Planning for the New Deal in Past Performance Evaluations

Even if a judicial or administrative challenge process is available to a federal government contractor, a challenge to an unjust performance evaluation in a court or administrative hearing to obtain some measure of relief should be viewed as the last option. Rather, contractors should make the achievement of an outstanding performance evaluation one of its main priorities from the day it receives the contract award. Contractors can improve their chances of receiving a favorable performance evaluation by following these steps:

- At any initial project kick-off or partnering meeting, advise all of the government’s representatives that it has a goal to achieve an Outstanding rating. If there is no initial partnering session, place achievement of an Outstanding past performance rating on the preconstruction meeting agenda.
- Engage the agency’s representatives in a discussion of the various categories of performance in order to understand the agency’s practical application of the concepts to be considered in the PPE. Make certain that the project staff understand the agency’s standards of evaluating performance and its expectations regarding performance.
- Periodically address the performance evaluation categories at project meetings with the agency’s representatives. Ask “How are we doing?” and “What can we do better?”
- If there are deficiencies or criticisms of its performance, the contractor should take action to address these and improve on them. Follow up and specifically ask if there has been a performance improvement. Remember, the key is to avoid being unpleasantly surprised at the end of the project.
- Establish a system to collect and retain all e-mails, meeting minutes, etc., which reflect an evaluation of the firm’s performance. The government representatives who complimented a contractor’s performance may be transferred as a project nears completion and the process of preparing the evaluation will be assigned to a new person who lacks an in depth knowledge of the project.
- Retain that documentation in a file (electronic or hard copy) that is easily retrieved and reviewed. A 14 business day period to develop comments or a rebuttal to a PPE does not allow time to research and retrieve files and e-mails.

By following some or all of these steps during the performance of a contract, contractors not only improve their chances of receiving a favorable performance evaluation but make it easier to challenge an unfavorable performance evaluation in the event one is received. It is much easier to show that a performance evaluation is unjust or erroneous when a contractor can document that it obtained positive feedback from the owner’s representatives throughout its performance only to receive an unfavorable evaluation at the conclusion of the contract.

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[1] See FAR § 9.104-1(c).


[1] FAR § 42.1502(e) requires the preparation of a PPE on each construction contract of $650,000 or more. Interim evaluations are required if the contract performance period exceeds one year. In general, the contractor comment and rebuttal process set forth in FAR Subpart 42.15 applies to both interim and final PPEs.


