THE NASH & CIBINIC REPORT

government contract analysis and advice monthly from professors ralph c. nash and john cibinic

Author: Ralph C. Nash, Professor Emeritus of Law, The George Washington University
Contributing Authors: Vernon J. Edwards and Steven L. Schooner

OCTOBER 2019 | VOLUME 33 | ISSUE 10

GUEST APPEARANCE

¶ 60 DEATH BY CPAR: Is There A Remedy?

A special column by Jerome Gabig, Wilmer & Lee, Huntsville, Alabama

As explained by the Congressional Research Service:

> Poor performance under a federal contract can have immediate consequences for contractors, who could be denied award or incentive fees, required to pay damages, or terminated for default. In addition, it could affect their ability to obtain future contracts because federal law generally requires agencies to evaluate contractors' past performance and consider past performance information when making source selection decisions in negotiated procurements and determining whether prospective contractors are "responsible."

Evaluating the "Past Performance" of Federal Contractors: Legal Requirements and Issues, CRS R41562 (Feb. 5, 2015). Hence, a negative Contractor Performance Assessment Review (CPAR) can be fatal to a Government contractor.

Seeking Review Of Negative CPAR At A Level Above The CO

Usually there are two sides to a story. Federal Acquisition Regulation Subpart 42.15 allows a contractor the opportunity to review the draft CPAR. If the contractor does not agree, the contractor has 14 days to seek a review at a level above the Contracting Officer. "The ultimate conclusion on the performance evaluation is a decision of the contracting agency," FAR 42.1503(d). The entire process must be completed within 120 days culminating with the CPAR being entered into the General Services Administration's centralized data repository called the Past Performance Information Retrieval System—Report Card (PPIRS-RC).

Occasionally, the fault for a contract not being successfully completed rests (in whole or in part) with the Government. On those occasions, it is not uncommon for the contractor to be the scapegoat for the failure resulting in a negative CPAR. Furthermore, even at a level above the CO, there are occasions where the agency is unwilling to be objective about assessing blame. For such an unfortunate predicament, is there a remedy?

The answer is a feeble "maybe." At the outset, if the contractor has not built a strong administrative record during the review "at a level above the contracting officer," the administrative record will probably be too weak to support a remedy. However, if the contractor astutely documented during the review why the CPAR unfairly assessed blame on the contractor, the contractor should consider proceeding under the "Disputes" clause by requesting the CO to issue a final decision. Expect the CO to take at least 60 days to issue a final decision. See FAR 33.211(c).

Appealing CO's Final Decision To A Board Or Court

Once a final decision is issued, the contractor has the option to appeal to a board of contract appeals or the U.S. Court of Federal Claims. Neither forum offers a fresh review of the CPAR. Instead, a board or court judge will only resolve the contractor's challenge in the context of whether the agency's action was arbitrary, capricious, or an abuse of discretion.

Contractors should expect that great deference will be given to the agency's judgment. See *Todd Construction L.P. v. U.S.*, 85 Fed. Cl. 34, 42 (2008), 51 GC ¶ 50.

Going to a board of contract appeals usually is a bad decision. Injunctive relief is not available, *Compucraft, Inc. v. General Services Administration*, CBCA 5516, 17-1 BCA ¶ 36,662, 2017 WL 838076, The litigation will be pursued by agency attorneys who are evaluated on how zealously they defend the agency's position. Board judges are likely to be former agency attorneys whom some criticize as being prone to default to their background of enforcing rules rather than adapting a judicial temperament of seeking a just resolution to the dispute. Additionally, the best result the contractor can expect is for the board to return the CPAR to the CO to rewrite it. However, if the CO had a bias the first time, there is a real risk that the bias will find its way into a rewritten CPAR.

An advantage that can be gained by the court route is that litigation will be handled by attorneys from the Civil Division of the Department of Justice who tend to be less "personally invested" in the agency decision. Also, these attorneys generally have a heavy case load and do not like to waste time on inconsequential matters. Hopefully, if the facts reveal that the CPAR is flawed, the assigned DOJ attorney may agreeable to settle the matter based on fundamental fairness.

Although proceeding to court has the possibility of injunctive relief, as a practical matter, such relief is unlikely. Hence, the contractor should expect the unfavorable CPAR will be used to the company's detriment while the litigation drags on. Because court litigation involves more formalities than board litigation, it can be more time consuming. Prolonged litigation is not in the contractor's interest because the risk of harm increases with time.

Requesting ADR

Since time is of the essence to get the CPAR corrected, a prudent litigation strategy is to ask for alternative Dispute Resolution (ADR) under Appendix H of the Court of Federal Claims rules. Although the DOJ must agree to ADR, typically it consents. The case is then assigned to a separate judge to handle the ADR. Appendix H recognizes the following types of ADR: (1) early neutral evaluation; (2) mini-trial; (3) outcome prediction; and (4) non-binding arbitration. Any of these four techniques is likely to produce a just result in a shorter amount of time than full litigation. Conversely, if ADR is unsuccessful, further litigation probably holds little likelihood for relief and the contractor should consider dismissing the lawsuit. *Jerome Gabig*

