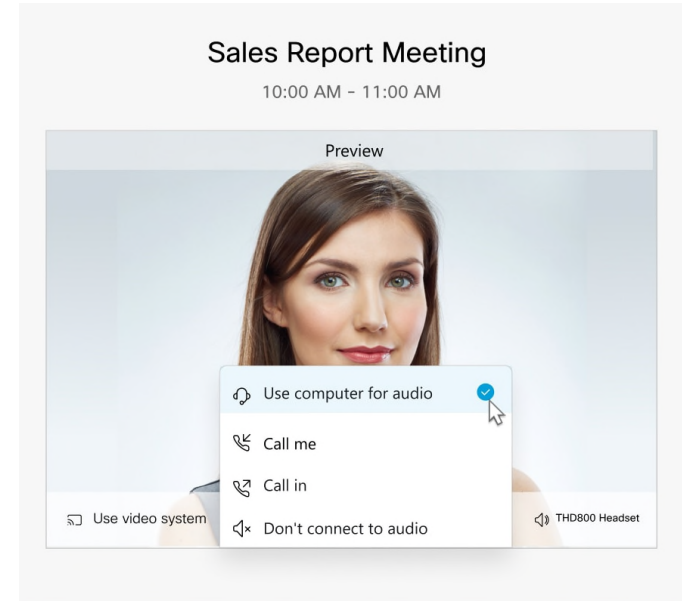
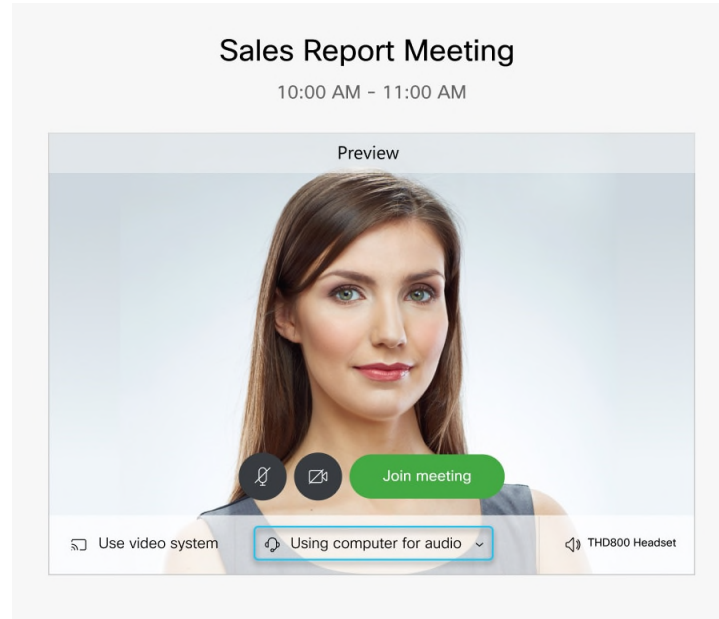


Welcome and thank you for joining us for today's presentation. Our topic is **“Protecting the Reputation of Government Contractors: How to Contest Erroneous CPARS Evaluations.”**

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Protecting the Reputation of Government Contractors: How to Contest Erroneous CPARS Evaluations

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Today's Goals

- Understanding performance evaluation claims and the importance in the federal marketplace
- The evaluation process: Timeline and roles/responsibilities
- Takeaway: Practical strategies for dispute resolution and better evaluations



What Is the Contractor Performance Assessment Reporting System (CPARS)?

- Required under the Federal Acquisition Regulations Part 42 (FAR 42.15)
- Tool used by all federal agencies (Source Selection Decisions)
- Evaluates all aspects of a contractor's performance (“Past Performance”)



Overview of Past Performance Evaluations on Federal Projects

- The role of past performance as an evaluation factor
- Role of CPARS in source selection decisions
 - Best value determinations
 - Responsibility determinations
- **Agency Counsel Perspective:** Importance of past performance in the eyes of source selection evaluation boards



The Process: CPARS Evaluation Ratings & Narratives

- FAR 42.1503 provides that every CPARS evaluation must include an assessment of the following **five factors**:
 - **Technical** (i.e., the objective quality of the product or service)
 - **Cost control**
 - **Schedule/timeliness**
 - **Management**
 - **Small business subcontracting** (when applicable)
- Agency is free to add additional evaluation criteria – including subfactors – on a contract-by-contract basis



The Process: CPARS Evaluation Ratings & Narratives (Cont'd)

- Agencies evaluate each factor (and subfactor) on a five-rating scale:
 - **Unsatisfactory (lowest)**
 - **Marginal**
 - **Satisfactory**
 - **Very Good**
 - **Exceptional (highest)**
- The agency must include a **written narrative**
 - FAR 42.1503, Table 42-1



Evaluation Ratings Definitions (FAR 42.1503, Table 42-1)

Rating	Definition	Note
Satisfactory	<p><u>Performance meets contractual requirements.</u> The contractual performance of the element or sub-element contains <u>some minor problems for which corrective actions taken by the contractor appear or were satisfactory.</u></p>	<p>To justify a Satisfactory rating, there should have been only <u>minor problems, or major problems the contractor recovered from without impact to the contract/order.</u> There should have been <u>NO significant weaknesses identified.</u> A fundamental principle of assigning ratings is that contractors will not be evaluated with a rating lower than Satisfactory solely for not performing beyond the requirements of the contract/order.</p>



Evaluation Ratings Definitions (FAR 42.1503, Table 42-1) (Cont'd)

Rating	Definition	Note
Marginal	<p><u>Performance does not meet some contractual requirements.</u> The contractual performance of the element or sub-element being evaluated reflects a <u>serious problem for which the contractor has not yet identified corrective actions.</u> <u>The contractor's proposed actions appear only marginally effective or were not fully implemented.</u></p>	<p>To justify Marginal performance, identify a significant event in each category that the contractor had trouble overcoming and state how it impacted the Government. <u>A Marginal rating should be supported by referencing the management tool that notified the contractor of the contractual deficiency</u> (e.g., management, quality, safety, or environmental deficiency report or letter).</p>



Evaluation Ratings Definitions (FAR 42.1503, Table 42-1) (Cont'd)

Rating	Definition	Note
Unsatisfactory	Performance does not meet most contractual requirements and recovery is not likely in a timely manner. The contractual performance of the element or sub-element contains a serious problem(s) for which the contractor's corrective actions appear or were ineffective.	To justify an Unsatisfactory rating, identify <u>multiple significant events</u> in each category that the contractor had trouble overcoming and <u>state how it impacted the Government</u> . A singular problem, however, could be of such serious magnitude that it alone constitutes an unsatisfactory rating. An Unsatisfactory rating should be supported by referencing the management tools used to notify the contractor of the contractual deficiencies (e.g., management, quality, safety, or environmental deficiency reports, or letters).



The Process: CPARS Evaluation Ratings & Narratives

- Evaluations include an overall recommendation concerning future performance
- Measures the agency's willingness to work with the contractor again in the future:

“Given what I know today about the contractor’s ability to perform in accordance with this contract or order’s most significant requirements, I (‘would’ or ‘would not’) recommend them for similar requirements in the future.”



The Process: Roles & Responsibilities

- Agency bears responsibility for initiating and completing performance evaluations and entering them in the CPAR system
- Agency responsibility and oversight for the evaluation process:
 - Assessing Official (“AO”)
 - Responsible for completing quality evaluations in a timely manner
 - Must be the equivalent of an individual responsible for program, project or task/job/delivery order execution



The Process: Roles & Responsibilities (Cont'd)

- Reviewing Official (“RO”)
 - Provides the “checks and balances” for the evaluation in the event of a disagreement between the agency and the contractor.
- Contractor Representative (“CR”)
 - Responsible for receiving evaluations on behalf of the contractor



CPARS Evaluation Ratings & Narratives – Agency Counsel Perspective

- Contracting Officer vs. Contracting Specialist vs. Contracting Officer Representative
- Performance under review may have been assigned to numerous contracting officials
- Assessing Officials responsible for the ratings are often:
 - Overworked
 - Nearing the deadline for the evaluation
- The role of current circumstances



CPARS Procedure & Timeline

- Three-part process:
 - (1) Agency initial evaluation
 - (2) Contractor comments
 - (3) Final evaluation
- The entire evaluation process should not take more than **120 days** following the end of the period of performance.



CPARS Procedure & Timeline – Agency's Initial Evaluation

- End of contract performance period
- AO enters ratings and narratives reflecting the contractor's performance
- AO signs the evaluation and sends it to the contractor (CR)



CPARS Procedure & Timeline – Contractor's Comments

- Contractor options:
 - Concur/agree, or
 - Provide comments in the CPAR system
- Unless the evaluation is outstanding, there is almost always a reason that the contractor can (and should) provide comments.
 - Use it or lose it



CPARS Procedure & Timeline – Contractor's Comments

- Contractor comments should be:
 - Detailed and specific
 - Names, dates and practical examples
 - Point out factual inaccuracies
 - Note where rating lack a rational basis
 - Helpful to tie to FAR 42.15, Table 42-1



CPARS Procedure & Timeline – Contractor's Comments

- Contractor has **60 days** following the evaluation to submit comments
- Contractors **should** finalize comments in the CPAR system within 14 days in order to provide context
- If the contractor desires a meeting to discuss the evaluation, it must request one (in writing) no later than seven calendar days from the receipt of the evaluation.
 - Can be as useful tool if ...



CPARS Procedure & Timeline – Final Evaluation

- After 60 days, contractor is “locked out” of the CPAR system
- If contractor contests the evaluation, elevated for RO review
- The RO can add comments and finalize, or send the evaluation back to the AO to make changes
- Following the RO process (including any changes) – released as final in the CPARS system
 - Available for SSEB evaluation



Strategies for Resolution of Negative Performance Evaluations

- Participate in the CPAR system comment period
 - Engage with the agency (Formal and/or Informal)
 - Provide concise, clear and factual/objective comments
 - Cite to the record
 - Address logic flaws
- Address inconsistent ratings (interim to final)
- Hire an attorney or consultant to assist in drafting comments?



CPARS Strategy for Resolution– Agency Counsel Perspective

- Address low-hanging fruit
- Often fail to meet 120 day “deadline”
- Overworked: May be more or less willing to accept contractor comments
- AO and RO personalities matter
- Desire to avoid in-person meeting
- Comments may or may not be brought to agency in-house lawyer’s attention



Next Steps: Contracts Disputes Act (41 U.S.C. §§ 7101-7109)

- Relief for claims based on arbitrary and capricious past performance evaluations
- Contractor must file a conforming CDA claim
 - Sent to the CO
 - All traditional requirements apply (sum certain, etc.)
- Receive a denial or “deemed denial”
- Appeal to Court of Federal Claims (COFC) or appropriate board of contract appeals (ASBCA, CBCA, etc.)



CPARS Claim: Early Intervention

- **Goal:** Compel the agency to change or modify evaluation ratings so that they more accurately reflect the contractor's **actual performance** of the contract
- Point to **detailed errors** in the agency's evaluation procedure and/or **specific factual mistakes** in the evaluation itself
- Prove the findings are **arbitrary, capricious or an abuse of discretion**



Filing a CPARS Claim With the Agency – Agency Counsel Perspective

- Most Likely triggers review by agency counsel
- Increases odds of lawyer-to-lawyer communication
- Low-hanging fruit
 - Combination with other claims increases likelihood of success
- Desire to avoid litigation
- Personalities of CO/RO
- Showing you are serious



Next Steps: Appeal of a Denied Claim

- Agency denial or deemed denial: What happens next?
- Appeal to the Appropriate Board of Contract Appeals (within 90 days)
 - Less formal and likely faster
 - Greater opportunity for ADR
- Appeal to the COFC (within 12 months)
 - More like traditional litigation
 - Option when bundled with other claims



Relief After Filing a Claim

- **Equitable relief**

- Ruling that agency's evaluation was arbitrary and capricious
- COFC/board will not direct the agency to make specific changes
- Remand for fair and accurate evaluation

- **Monetary damages**

- Emerging area of the law



Gov't Servs. Corp., ASBCA No. 60367 (June 20, 2016)

- Contractors can pursue a very specific type of monetary relief as part of a CPARS performance evaluation claim.
- The board allowed the contractor to proceed with a claim for “administrative and legal” costs associated with addressing an allegedly arbitrary and capricious performance evaluation that remained in the CPARS System while the contractor continued to bid on new work.
- Cost of dealing with the CPARS fallout
 - Not lost business/income/profit





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Questions?



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