

Performance Review Rule Preserves Contractor Appeals

By **Dietrich Knauth**

Law360, New York (August 01, 2013, 9:48 PM ET) -- A new governmentwide rule on agencies' reporting of contractor past performance has preserved contractors' ability to appeal poor performance reviews at higher levels within an agency, walking back a proposed change that some contractors feared would lead to more costly litigation.

The U.S. Department of Defense, the U.S. General Services Administration and NASA finalized a change to the Federal Acquisition Regulation on Thursday that standardizes the evaluation criteria for contractors' performance reviews and pressures agencies to complete the reviews in a timely manner. The rule was proposed a little more than two years ago and amended in September 2012.

That amendment would have eliminated contractors' right to appeal poor reviews within the agencies that released them, as opposed to in court or before the Armed Services or Civilian boards of contract appeals. It aimed to increase the efficiency and speed of the government's reviews.

But contractors that commented on the proposed rule said closing off internal agency appeals would encourage costly and inefficient litigation at the Court of Federal Claims or before the appeals boards.

"They were considering cutting off nonlitigation options at the same time that the boards were opening up litigation options," said Stuart Turner of Arnold & Porter LLP.

The rule was spurred in part by a 2010 decision to collect all contractor reviews into a single, governmentwide database: the Contractor Performance Assessment Reporting System.

The government also decided that year to implement recommendations from a 2009 U.S. Government Accountability Office report finding that varying evaluation factors limited the usefulness of past performance information and that an accountability vacuum made it difficult for managers to ensure timely performance reports. And efforts to address the shortcomings were hindered by a lack of central oversight of the database, the GAO said.

The final rule pushes toward greater oversight of the agencies' reviews, but it remains important for contractors to make sure reports are accurate, because poor reviews can damage a contractor's reputation and ability to win new contracts, according to Peter Eyre of Crowell & Moring LLP.

"There has been criticism about some agencies not completing these reports in a timely manner, and some are not completed at all," Eyre said. "Because there's going to be much more emphasis on this from the government's side, I think contractors will need to focus on this issue more actively."

Improving contracting data has been a priority for President Barack Obama's Office of Federal Procurement Policy, which said in a January 2011 memo that most reports lacked sufficient explanation of contractor ratings and sometimes omitted ratings for performance areas like cost control or product quality. The OFPP found that past performance assessments had been completed for only a small percentage of contract awards, especially in the civilian agencies.

The quest for uniform performance reviews is part of a governmentwide effort to smooth out what the U.S. Postal Service's inspector general has called "a Byzantine warren of procurement fiefdoms" with different rules and accounting systems.

The issue has been a continued focus for some in Congress, as well. During a July 16 Senate hearing on contracting, the Department of Defense, Department of State and U.S. Agency for International Development reported progress in submitting reports on contractors' past performance. The agencies are shooting for a 2015 goal of 100 percent reporting.

The DOD currently reports the performance of about 80 percent of its contracts into centralized databases. USAID, which reported past performance for only 7 percent of its contracts in 2010, expects to reach 65 percent by the end of the year, and the State Department expects to reach 45 to 50 percent by the end of the year, witnesses said.

The rule standardizes the way agencies evaluate contractors based on technical factors, cost control, timeliness, management or business relations, and small business subcontracting, laying out how to rate contractors on each factor. The new version of the rule also establishes standards for the timely and complete submission of the reviews by agencies, harmonizes past performance reviews with award fee reviews, and assigns responsibility within agencies for managing performance information.

"Conceptually, it makes a great deal of sense," Eyre said. "I think what contractors are focused on, in terms of the implementation and dialog going forward, is what opportunities they will have to review the information and to respond to errors in the review. There are, very often, two sides to the same story."

The rule adds a new evaluation category, "Other," that could contain information such as late payments to subcontractors, trafficking violations, tax delinquency, defective cost or pricing data, contract terminations, and suspensions and debarments.

Commenting contractors suggested that the Federal Acquisition Regulatory Council include some positive examples in the list, but the council declined.

"The risk to contractors there is that the 'Other' category will be seen as a catchall only for negative findings, and the list of examples in the new rule tends to support that," Turner said. "The inclusion of that as a mandatory requirement may encourage some contracting officers to dig deep to find something to fill that category."

The final rule also included a new requirement that CPARS reports include a "clear, nontechnical description of the principal purpose of the contract" — an area contractors should give their attention, Eyre says.

"In order for the ratings to mean much, you have to understand the context, so there's a real focus on describing the work in a nontechnical way, so that it's more accessible to other customers and other agencies," Eyre said.

In general, contractors need a system in place to respond quickly to performance reports, especially bad ones, attorneys say. Agencies will seek information from contractors while putting together their reports, and contractors will have to respond right away.

Contractors should also pay attention to the alerts they receive when agencies enter information in CPARS, because during future contract competitions, agencies will only have to disclose past performance information that hadn't already been passed along to the contractor, Turner said.

"If contractors let those pitches go by, they may be planting seeds that damage them later on, and they may never know," Turner said.

The rule specifically allows agencies to give "Exceptional" reviews to contractors that effectively correct problems that arise during a contract — a standard used in some, but not all, contract solicitations. That could encourage more agencies to consider corrective action when evaluating contract bids, and not just when evaluating contractor past performance, Turner says.

"It will be interesting to see if that language migrates over into competitive [requests for proposals] to allow the consideration of effective corrective action," Turner said. "It's been an issue in some protests."

--Editing by Kat Laskowski and Jeremy Barker.

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