

## Column: Challenging a Negative CPARS-- What Remedies Are Available?

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As any experienced government contractor knows, poor performance under a federal contract can have significant consequences.

Not only can it lead to contract termination and damages, but it can also affect a contractor's ability to obtain future work, as agencies are generally required to consider past performance information posted on the Contractor Performance Assessment Reporting System ("CPARS") when making source selection decisions.

Because a CPARS rating is generally valid for three years (6 years for construction/architect-engineer contracts), a contractor may be inclined to challenge a negative CPARS if it believes it has been unfairly evaluated.

As outlined below, there are a number of ways this can be done. However, the specific remedies available when challenging a negative CPARS will depend largely on the venue/juncture at which relief is obtained.

### Providing additional information

To begin, it is important to note that contractors have 14 calendar days from the date they are notified of a CPARS rating to submit comments, rebutting statements, or additional information.

By submitting comments and engaging the agency during this time period, a contractor may be able to negotiate a revised CPARS or at least correct any inaccuracies noted in the evaluation.

Assuming, however, the contractor is unable to obtain this type of informal relief, the negative CPARS will be automatically published after the 14-day comment period has expired.

### Submitting a claim and next steps

Thereafter, in order to formally challenge the CPARS, a contractor must submit a claim challenging the past performance evaluation, and seeking a final decision under the relevant disputes clause.

If the claim is denied, the next step would be to appeal the denial to the relevant Board of Contract Appeals or to

the Court of Federal Claims.

And, while it is possible that a contractor could negotiate a favorable settlement during the pendency of a CPARS Appeal, contractors should also be aware of the remedies available to them should the appeal proceed to a trial or a hearing.

### Declaratory judgments

As an initial matter, because the Court of Federal Claims and the appeals boards view a CPARS challenge as a matter under the Contract Disputes Act, a contractor pursuing a CPARS appeal cannot obtain specific performance or injunctive relief. This means that neither tribunal can direct the Government to revise, remove, or to not rely on a specific CPARS rating.

However, both the court and the appeals boards can determine, by way of a declaratory judgment, whether the Government acted arbitrarily and capriciously, breached its duty of good faith and fair dealing, or abused its discretion in assigning an inaccurate and unfair performance evaluation. Even so, this type of relief would not require an agency to remove the negative evaluation from CPARS.

That being said, the tribunal's declaration that an agency abused its discretion in assigning a CPARS could be used by a contractor to explain the presence of a negative CPARS when bidding future work.

In addition, in the event the subject CPARS is relied upon by another agency to the contractor's prejudice, the tribunal's declaration could be used to set the stage for injunctive relief in a bid protest.

### Case remanded to agency

Moreover, with respect to CPARS appeals, the Court of Federal Claims has long-recognized that it has the authority to remand a matter to the agency with specific instructions that the contracting officer follow applicable regulations and provide the ap-

pellant a fair and accurate performance evaluation.

Notably, the appeals boards historically have been more hesitant to acknowledge this authority. However, in a recent CPARS appeal, the Armed Services Board of Contract Appeals squarely confirmed that it has such authority. See *Cameron Bell Corp., d/b/a Gov Solutions Group (GovSG)*, ASBCA No. 61856 (May 1, 2019) ("Although we do not have jurisdiction to grant specific performance or injunctive relief, and therefore cannot order the government to revise a CPARS rating, we may remand to require the contracting officer to follow applicable regulations and provide appellant a fair and accurate performance evaluation.").

### Monetary damages

Lastly, although CPARS appeals are traditionally pursued as a result of a non-monetary claim, there is at least one recent appeals board case that suggests that a contractor may be able to recover monetary damage for certain administrative expenses such as the costs associated with addressing the negative CPARS on future proposals, and in negotiations and future protests. See *Gov't Servs. Corp.*, ASBCA No. 60367 (June 20, 2016).

That said, neither the Court of Federal Claims nor the appeals boards actually have granted monetary relief in a CPARS appeal.

### Summary

In short, if you believe your company has received an unfair CPARS rating, there are a number of ways for you to challenge the evaluation. There are, however, important deadlines and procedures that will need to be followed, not all of which are outlined above.

*If you would like to discuss these procedures or a possible CPARS appeal in further detail, please contact Samuel Finnerty at [sfinnerty@pilieromazza.com](mailto:sfinnerty@pilieromazza.com) or one of the attorneys in PilieroMazza's Government Contracts Group. Reprinted with permission from PilieroMazza PLLC.*