

PAST PERFORMANCE INFORMATION “TOO CLOSE AT HAND” TO IGNORE

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Contracting Officers are instructed in the Federal Acquisition Regulation (“FAR”) that “past performance evaluations shall be prepared at least annually and at the time the work under a contract or order is completed.” FAR 42.1502. This information must be entered into the Contractor Performance Assessment Reporting System (“CPARS” located at www.cpars.gov), the information in which is automatically transmitted to the Past Performance Information Retrieval System (“PPIRS” located at www.ppirs.gov). Past performance evaluations are required for:

- All contracts and orders that exceeds the simplified acquisition threshold (\$150,000)
- Construction contracts of \$650,000 or more, and any such contract terminated for default
- Architect-engineer services contract of \$30,000 or more, and any such contract terminated for default.

Id. The FAR further requires that “past performance shall be evaluated in all source selections for negotiated competitive acquisitions expected to exceed the simplified acquisition threshold” except where the contracting officer documents the reason past performance is not an appropriate evaluation factor. FAR 15.304(c)(3)(i) & (iii).

Normally contracting officers include past performance as an important evaluation factor. This was the case in *DKW Communications, Inc.*, B-411182, June 9, 2015, a procurement for information technology services where DKW protested that the Defense Advanced Research Projects Agency (“DARPA”) failed to consider positive past performance information that was “close at hand.”

DKW alleged that DARPA failed to consider positive information found in a CPARS report related to one of its subcontractors. The CPARS report was completed around the time the past performance evaluations for this procurement were conducted, and was completed by the same individual who served as technical chair for the evaluations in this source selection. DKW could not have included the CPARS report as part of its proposal, since it was not available at the time of proposal submission.

The Government Accountability Office (“GAO”) has recognized that in certain limited circumstances, an agency has an obligation (not merely the discretion) to consider outside information bearing on an offeror’s past performance when it is too close at hand to require offerors to shoulder the inequities that spring from an agency’s failure to obtain and consider the information. *DARPA acknowledged that the CPARS report was completed and known to the evaluators.* Also, DARPA considered a past performance questionnaire relevant to the contract in question as part of its source selection evaluation. The CPARS report was considerably more positive than the questionnaire which DARPA had considered as part of its evaluation and the CPARS report concerned the work on the bridge contract for work immediately preceding this

procurement. In fact, the past performance information that was considered by the evaluators was *not consistent* with the evaluation in the CPARS report.

GAO held that the Agency had been unreasonable when it stated that it had “considered all relevant information when it considered the past performance questionnaire.” It sustained DKW’s protest on this and one other ground not relevant here.

TIP: The “too close at hand” principle cuts both ways for contractors. Contractors must present their best past performance information in, or reference that information in their proposals. On the positive side, on some occasions, a later past performance evaluation (such as a CPARS report) may be helpful to a contractor, but is not available at the time proposals are submitted. On the negative side, other information (for example, a known cure notice or a known default of a contractor or a competitor) may be known to the evaluators, but ignored. Only in such circumstances is the GAO likely to conclude that an agency has unreasonably ignored past performance information that is “too close at hand.”