FEDERAL CONSTRUCTION PROJECT MANAGER'S BULLETIN

Devoted exclusively to problems encountered while performing Government construction contracts

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THE CONTRACTOR PERFORMANCE EVALUATION SYSTEM (REVISITED)

In Bulletin No. 10, Volume I, dated June 1, 2005, the subject of the Construction Contractor Performance Evaluation System (CCASS) was addressed in rather great detail. At that point in time, the author had worked within the system as an Authorized Representative of the Contracting Officer and/or Administrative Contracting Officer; Project Manager for a General Contractor; and private consultant. The author's frustration with the potential for and actual occurrences of unfairness, biases, and abuses within the system, as it existed at that time, should have been obvious to all project managers receiving and reading Bulletin No. 10.

Prior to the late 1980's, it was normal for Federal Government construction contractors to not receive a formal performance evaluation. Those that did receive a formal written performance evaluation were not overly concerned about the ratings assigned to individual elements or even the overall rating assigned by the Government because they thought that the future Government contract awards would continue to be made to the lowest responsive and responsible bidder. However, contractor performance evaluations started to take on dramatically increased importance back in the late 1980's and early 1990's as the Federal Government procurement agencies implemented what has become a long but very steady transition from making the majority of the contract awards based solely on price to the making of the majority of the contract awards based on factors other than or in addition to price, such as past performance. This was the transition from requests for a bid (RFB) to requests for a proposal (RFP). RFB's have become exceptions and not the rule, a total reversal of what existed previously.

As someone who has worked for the Government, private industry and as a private consultant, it is difficult to disagree with the proposition that the Federal Government should not be forced to entrust its critical and/or mission essential construction program to contractors with a proven or verifiable performance record that is less than fully satisfactory. However, it is unfortunate but true that the determination of what constitutes less than fully satisfactory performance can and often does become very subjective. For example, if a construction contractor draws a line in the sand and makes the decision to pursue a claim under the Disputes clause of the contract then this can be and too often has been viewed by the Government as a lack of cooperation. Clearly, the filing of what the Contractor sincerely believes to be a valid claim should have no adverse affects whatsoever on their overall performance evaluation. However, it can and it too often does. If a competent and prudent project manager stands up for what he/she honestly feels is the correct interpretation of the contract documents then this should have no adverse affects whatsoever on the company's overall performance evaluation. However, it can and it too often does.

Even though three and one-half years have elapsed and the CCASS system, which was managed by the Portland District of the U. S. Army Corps of Engineers (USACE), had been replaced with a system managed by the U.S. Navy, prior to November 25, 2008 there had been no good news to report in these bulletins. In the view of the author, the new system was plagued with many of the same problems as the one it replaced and possibly more, if that be possible. The appeal rights within the new system were actually less affective than

within the old and they were already extremely ineffective. It was far too common for two Government employees who worked within the same department/division, on the same floor, and in the same building too be the judge and jury on any disputes involving less than fully satisfactory performance evaluations with no established way for the Contractor to elevate the issue to another governmental agency or even a to a higher level within the same governmental agency. This was the nearest thing to a kangaroo court system imaginable within the Federal Government.

There has been no professional subject more near and dear to the author's heart than the subject of the Contractor performance evaluation system. This was partially because of the far reaching affects and extreme importance of the system. However, it was further true because the author has personally witnessed the Government's abuse of the system on more than one occasion. If, within the author's extremely limited visibility, he has personally witnessed multiple instances of the abuse of the system then it would be fair to assume there has been very widespread abuse.

In the past, each Government procurement agency has had its own internal rules. The U. S. Army Corps of Engineers (USACE) is the largest construction procurement agency in the free world. Up until November 25, 2008, there was no established mechanism within the USACE for appealing an overall marginal rating and no effective mechanism for appealing an overall unsatisfactory rating. For many years, there were appeal rights to one level above that of the Contracting Officer which was typically the Chief of the Contracting Division. However, based on the author's first hand experiences, this was not a fair, impartial, unbiased or effective appeal process. The USACE, like many other Government procurement agencies, was extremely proficient at circling the wagons when one member of the team, such as the Contracting Officer, comes under attack by a construction contractor. This was especially true if there were no established appeal rights above the one level above the Contracting Officer.

CCSI is extremely pleased to report that this potential for abuse on the part of certain Government employees has quite suddenly and dramatically came to an end. It will take time for Contractors to get the word and even more time to see how the new appeal system works. As a result, it will be quite some time before we know how much of a positive affect the change had on the current unacceptable system. However, the simple fact that there has been a dramatic change and the fact the procurement agency is no longer the sole judge and jury with no effective appeal rights will within itself almost certainly bring positive change.

In 1991, the Armed Services Board of Contract Appeals (ASBCA) was confronted with the appeal of a less than fully satisfactory performance evaluation issued by the Government, Konoike Construction Co., ASBCA No. 40910. The ASBCA ruled that it did not have jurisdiction of such an appeal. For the past seventeen years, the ASBCA has build upon its decision in the Konoike case and established a long string of decisions wherein it took the position that it lacked jurisdiction because the final performance evaluation was an "administrative" issue that was not subject to appeal under the Contract Disputes act (CDA).

Construction Contractors performing work for the Federal Government have the option of appealing unfavorable Final Decisions by the Contracting Officer to either the appropriate Agency Board of Contract

Prepared by Construction Contract Specialists, Inc., #12 Pembrooke Court, Niceville, Florida 32578, Telephone 850-388-4553, Mobile 850-259-1021, Facsimile 850-897-1263, e-mail Paul.Perkins@ConstructionContractSpecialists.com. Published monthly. The current edition is provided free. Previous editions can be purchased for $10.00 each.

Appeals or the United States Court of Federal Claims. CCSI has repeatedly stated that the fact the Boards have a ninety day statute of limitations for filing an appeal compared to the twelve month statute of limitations for the filing of an appeal before the U. S. Court of Federal Claims should not be what controls the decision with regard to which is the best avenue for pursuing an appeal. The following example drives this point home.

In a very recent decision filed November 25, 2008 in the case of BLR Group of America, Inc. v. United States, No. 07-579C the United States Court of Federal Claims made it clear that decisions rendered by the ASBCA or Civilian Board of Contract Appeals (CBCA) were not binding on that Court and that the United States Court of Federal Claims "declines to adopt the Board's reasoning in this line of cases" flowing from the Konoike decision. Contractors should be extremely thankful that the days of the kangaroo court appear to finally be coming to an abrupt end if they chose the proper venue for their appeals.

BLR Group of America was given less than a fully satisfactory final performance evaluation by the United States Air Force. BLR alleged that the less than fully satisfactory evaluation was unjustified and was not objectively arrived at by the U.S. Air Force. BLR attempted to get the Contracting Officer to correct what it considered to be an injustice. The Contracting Officer changed one rating factor but left all other less than satisfactory factors unchanged. Upon appeal, the U.S. Air Force attempted to utilize all the typical defenses which the Government has been successful in utilizing before the various Boards since 1991. One-by-one, the U.S. Court of Federal Claims rejected these arguments. In so doing, the Court stated:

> "A logical corollary to the court's conclusion that plaintiff is legally entitled to a performance evaluation is that plaintiff is legally entitled to a fair and accurate performance evaluation. It would be nonsensical to find an entitlement to a performance evaluation but to hold that the evaluation need not be fair or accurate. Indeed, the Air Force has recognized the need for fair and accurate performance evaluations."

The Court continued by noting that the U.S. Air Force crafted regulations that specifically required the use of the CPARS system, which replaced the CCASS sustem, to record the evaluations of its contractor's performance. The Court noted:

> "According to the CPARS Policy Guide, "[t]he primary purpose of the CPARS is to ensure that accurate data on contractor performance is current and available for use in source selections." Attach. 1 at 1. Given the identified "primary purpose," to allow anything less than fair and accurate information in a CPAR would be a disservice to the contractor and other government agencies considering doing business with the contractor."

The Court further noted:

> "Finally, allowing a contractor to challenge a performance evaluation in the Court of Federal Claims is in complete harmony with the overall jurisdictional scheme fashioned by Congress in enacting and amending the Tucker Act."

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The Court noted that BLR was faced with two options.

> "It could either attempt to challenge an allegedly unfair and inaccurate performance evaluation as a contract-performance claim pursuant to the CDA at the time the Air Force issued the performance evaluation or it could wait and lodge a protest when the performance evaluation played a major role in an unsuccessful bid on a future contract. While both options are legally viable, only one makes sense when examining the government procurement process as a whole. *** The efficiency of the procurement process would be compromised by forcing a contractor to protest an issue that could have been resolved at an earlier time under the CDA. Indeed, to force a wrongly evaluated contractor to defer a challenge to the evaluation until it unsuccessfully bids on a future contract is not only inefficient, but is potentially unfair. The contractor would be tethered to the inaccurate performance evaluation for an unspecified-possibly lengthy-period of time. It is conceivable that by the time the contractor was able to challenge the evaluation, personnel changes and fading memories could hinder the contractor's chances for success. *** Thus, it is imperative to quickly address and correct an erroneous performance evaluation."

The U. S. Court of Federal Claims noted:

> "Accordingly, challenges to performance evaluations are best made within the confines of the CDA, thus allowing the contractor and government to avoid unnecessary and disruptive bid protests. In sum, a contractor's claim requesting a change to a performance evaluation is not a meaningless act. To the contrary, such a claim is a proper mechanism, and provides the proper jurisdictional predicate, to challenge an adverse performance evaluation in the Court of Federal Claims."

Contractors have argued for years that the final performance evaluation should not be prepared and entered into the system until all formal contract disputes have been resolved. However, it may be literally years before all disputes are resolved. Therefore, to counter this argument made by various contractors, the Government has rather consistently argued that final performance evaluations need to be timely entered if they are going to serve the intended purpose and that they are not set in concrete. The Government's position is that if the resolution of one or more claims materially changes something in the performance evaluation then the evaluation can and will be revisited and revised, as appropriate.

The point being made is this. If a less than fully satisfactory performance evaluation is the total issue in dispute or only a part of the issues in dispute then the proper forum for the appeal must be, without exception, the U. S. Court of Federal Claims. It is possible to request a Final Decision by the Contracting Officer solely based on a disputed final performance evaluation. However, it is more likely that the Final Decision request should include certain disputed contractual issues in addition to the demand that the final performance evaluation be corrected or revised. In either case, the proper forum must be, without exception, the U. S. Court of Federal Claims.

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INDEX – VOLUME I

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INDEX – VOLUME II

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INDEX – VOLUME III

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