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WORLD
CONGRESS

CHICAGO

July 23-26



NCMA
NATIONAL CONTRACT MANAGEMENT ASSOCIATION



A Contractor's Guide to Mitigating Negative Past Performance Reviews

Breakout Session #: F04

Presented by:

Adam K. Lasky, J.D.

Partner
Oles Morrison Rinker & Baker LLP

Date: Tuesday July 25, 2017

Time: 4:00pm – 5:15pm



Overview

- Intro to Past Performance in source selection
- Intro to CPARS
- Pre- award best practices to mitigate negative performance reviews
 - Framing and addressing in proposal
 - Discussion questions
 - *Activity Break #1 - Addressing a Negative CPAR in Discussions*
- Post- awards best practices to mitigate negative performance reviews
 - CPAR Contractors Comments and Higher- Level Reviews
 - *Activity Break #2 - Submitting Comments to Dispute a Negative CPAR*
 - CDA Claim and Appeal to Board/COFC



Intro to Past Performance in Source Selections

- In most procurements it's the most important non-price factor
 - Mandatory evaluation factor in FAR part 15 procurements above the simplified acquisition threshold
 - It's the hardest factor to fudge
 - New trend in source selection → Best Value Trade- Off (Price/Past Performance) of Technically Acceptable Proposals
- Collection methods
 - CPARS/PPIRS
 - PPQ
 - Other
- One Negative CPAR Can Cost You Millions (or Billions) of Dollars
 - Ex. CSAR- XProcurement



Intro to CPAR(S)



Key Terms

- **CPARS = Contractor Performance Assessment Reporting System**
 - Primary Purpose → to ensure that “current, complete and accurate information on contractor performance information” is utilized by agency source selection officials in awarding best value contracts and orders to contractors
- **CPAR(s) = Contractor Performance Assessment Report(s)**
- **PPIRS = Past Performance Information Retrieval System**



CPARS/CPAR(s)/PPIRS Basics

- Agencies “shall prepare evaluations of contractor performance for each contract that exceeds the simplified acquisition threshold.” FAR 42.1502(b)
- The FAR instructs that performance evaluations shall be entered into the CPARS and then automatically transmitted to the Past Performance Information Retrieval System (PPIRS), from which they can be retrieved by federal government agencies seeking information on contractor past performance. FAR 42.1503(f)
- Contractors may, after notification that their evaluation is ready, submit comments, rebut statements, or provide additional information in response to the contracting officer’s evaluation. FAR 42.1503(d)
- Any disagreements between the parties shall be reviewed at a level above the contracting officer, but “the ultimate conclusion on the performance evaluation is a decision of the contracting agency.” FAR 42.1503(d)



CPAR Evaluation – The Players

- Assessing Official (AO)
- Reviewing Official (RO)
- Designated Contractor Representative (CR)



CPAR Evaluation – The Evaluation Factors

- Technical (quality of product or service)
- Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements)
- Schedule/timeliness
- Management or business relations
- Small business subcontracting
- Regulatory Compliance
- Other factors



CPAR Evaluation – The Ratings

- Adjectival

- AO is to provide an adjectival rating for each applicable factor
- Exceptional, Very Good, Satisfactory, Marginal, and Unsatisfactory
- Definitions and Guidance at FAR 42.1503, Table 42- 1

- https://www.ecfr.gov/cgi-bin/text-idx?SID=295c9a6e91f315552fcd872661a11992&mc=true&node=se48.1.42_11503&rgn=div8

- Qualitative/Narratives

- AO is to provide a narrative to support each rating given

- Recommendation

- “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.”



CPAR Evaluation – The Ratings (Adjectival - abbrev.)

Rating	Contract Requirements	Problems	Corrective Actions
Exceptional	Exceeds Many - Gov't Benefit	Few Minor	Highly Effective
Very Good	Exceeds Some - Gov't Benefit	Some Minor	Effective
Satisfactory	Meets All	Some Minor	Satisfactory
Marginal	Does Not Meet Some - Gov't Impact	Serious; Recovery Still Possible	Marginally Effective; Not Fully Implemented
Unsatisfactory	Does Not Meet Most - Gov't Impact	Serious; Recovery Not Likely	Ineffective



CPAR Evaluation – The Ratings (Adjectival - full)

Evaluation Ratings Definitions¹⁷

Rating	Definition	Note
Exceptional	Performance meets contractual requirements and exceeds many to the Government's benefit. The contractual performance of the element or sub-element being evaluated was accomplished with few minor problems for which corrective actions taken by the contractor were highly effective.	To justify an Exceptional rating, identify multiple significant events and state how they were of benefit to the Government. A singular benefit, however, could be of such magnitude that it alone constitutes an Exceptional rating. Also, there should have been NO significant weaknesses identified.
Very Good	Performance meets contractual requirements and exceeds some to the Government's benefit. The contractual performance of the element or sub-element being evaluated was accomplished with some minor problems for which corrective actions taken by the contractor was effective.	To justify a Very Good rating, identify a significant event and state how it was a benefit to the Government. There should have been no significant weaknesses identified.
Satisfactory	Performance meets contractual requirements. The contractual performance of the element or sub-element contains some minor problems for which corrective actions taken by the contractor appear or were satisfactory.	To justify a Satisfactory rating, there should have been only minor problems, or major problems the contractor recovered from without impact to the contract/order. There should have been NO significant weaknesses identified. 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.



CPAR Evaluation – The Ratings (Adjectival - full)

Marginal

Performance does not meet some contractual requirements. The contractual performance of the element or sub-element being evaluated reflects a serious problem for which the contractor has not yet identified corrective actions. The contractor's proposed actions appear only marginally effective or were not fully implemented.

To justify Marginal performance, identify a significant event in each category that the contractor had trouble overcoming and state how it impacted the Government. A Marginal rating should be supported by referencing the management tool that notified the contractor of the contractual deficiency (e.g., management, quality, safety, or environmental deficiency report or letter).

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 multiple significant events in each category that the contractor had trouble overcoming and state how it impacted the Government. 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).

NOTE 1: N/A (not applicable) should be used if the ratings are not going to be applied to a particular area for evaluation.



CPAR Evaluation – Lifespan & Frequency

- Lifespan
 - CPARs effectively stay on your record for 3 years (6 years for construction or a/e contracts (FAR 42.1503(g)))
- Frequency
 - Interim
 - At least once every 12 months
 - Final
 - Once, upon contract completion
 - Agency compliance varies



CPAR Evaluation – Agency Compliance w/ Rept. Req.

Rate of Compliance with Past Performance Reporting Requirement as of April 2013 and April 2014 for Top 10 Agencies Based on Number of Evaluations Due

Agency	Compliance Rate as of	
	April 2013	April 2014
Defense	76%	83%
Treasury	47	71
Interior	15	51
Homeland Security	34	45
Justice	21	29
Agriculture	13	27
Veterans Affairs	4	25
Health and Human Services	10	24
State	3	15
General Services Administration	3	13
Other agencies	32	47
Total federal government	32%	49%

Source: Past Performance Information Retrieval System | GAO-14-707



CPAR Evaluation – Sample CPARs

- <http://www.thebluebook.com/inc/img/qp/2096306/onopa-services-llc-testimonial-letter.pdf>
- http://www.jsconstruction.com/files/ft_campbell_two.pdf
- <http://www.ortizgroup.com/pdf/ConPerfAsesRptt.pdf>
- http://recoveredenergy.com/wp-content/uploads/2016/07/CPARS_FAPIIS.pdf
- *Caution – don't put your CPARs on your company website!!!*



Timeline – Contractor Comment Period

Day 0

AO Enters Ratings/Narrative into CPAR
→ Sends CPAR To CR

Days 1 – 14

CR has opportunity to review and submit comments to CPAR

Day 15

CPAR becomes available in PPIRS, with or w/o CR comments (marked "Pending")

Day 15 – 60

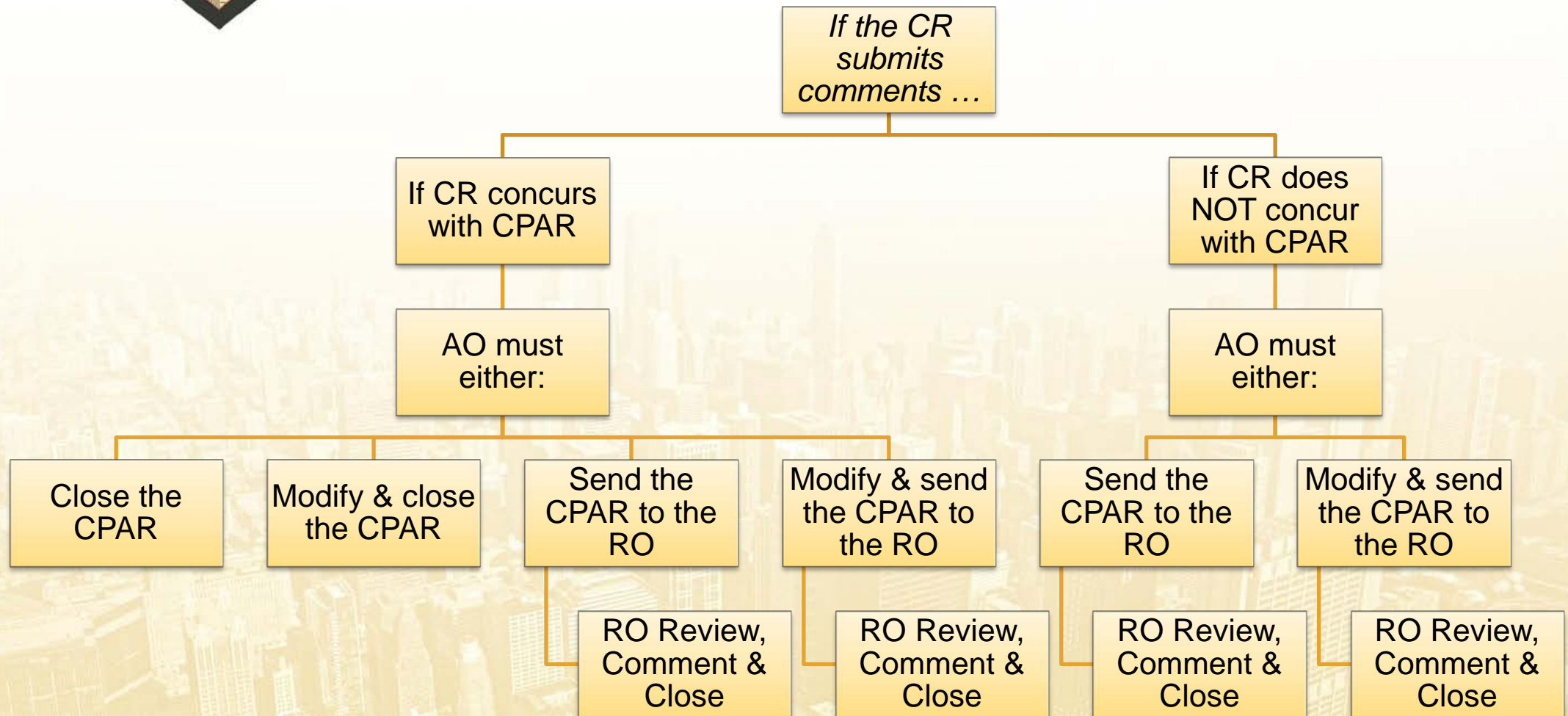
CR has opportunity to review and submit comments to CPAR, if not already submitted
Once comments are submitted PPIRS is updated to include comments (remains "Pending")

Day 61

CR comments period ends
(CR locked out of CPAR)



Timeline – AO Review Period



Once CPAR is closed, the "Pending" marking is removed in PPIRS

CPAR must be closed within 120 days following the end of the period of performance



Pre-award BEST PRACTICES to mitigate negative past performance reviews

1. Developing a company- wide collection, database, and comment/response system for CPARS
2. Drafting proposals to mitigate or avoid negative CPARs
3. Addressing negative CPARS in pre- award (post- proposal) discussions



Best Practice: Company- Wide Database/ Policy

- Company- wide policy for commenting on and responding to CPARs
- Company- wide past performance database and collection policy
- Catalog and organize projects
 - *Quality of ratings / type of project / type of contract / size of contract / duration and dates*
 - *People who were key personnel on the projects*
 - *Affiliate's projects*
 - *Key personnel experience while working on projects for other companies*
 - *Projects as a sub*
 - *Private projects, state and local projects*



Best Practice: Proposal Drafting to Mitigate CPARs

- Understand the government's approach for evaluating past performance factor
 - Sections L & M
 - Recent/Relevant criteria
 - Scope of information government may consider
 - Rating system being used
- Understand the distinction between Experience and Past Performance



Best Practice: Proposal Drafting to Mitigate CPARs

- *To address or not address a negative and relevant past performance reference in your proposal?*
- *Avoiding negative affiliate past performance*



Activity Break #1

Addressing a Negative CPAR in Discussions



Best Practice: Using Discussions to Address Negative CPARs

- If the Gov't asks you to explain a negative past performance review in discussions ...
 - Trying to avoid directly addressing won't do you any good
 - It's a sign the government thinks this is a problem
 - The government has likely already considered your CPAR comments



Best Practice: Using Discussions to Address Negative CPARs

- *If the negative review is accurate...*

- Take responsibility for real problems, identify mitigating circumstances and corrective steps taken (or taking) to correct problems identified



Best Practice: Using Discussions to Address Negative CPARs

- *If the Negative review is inaccurate ...*

DO ...	DON'T ...
Point out facts not considered that would impact rating	Allege bias
Identify specific inaccuracies, misinterpretations or otherwise underlying the ratings – be very specific	Make it personal
Submit contemporaneous documentation that supports your position (if permitted by RFP)	Rest on what's already in your CPAR Comments
Identify positions taken by agency during/after project that are inconsistent with the CPAR evaluation – submit supporting documentation (if permitted by RFP)	Rely on a bid protest to solve you problem
Mention if matter is the subject of a claim/litigation – mention results of claim/litigation if it support your position	
<i>Show you addressed concern of problems seriously, identify mitigating circumstances and corrective steps taken (or taking) to correct perception of problems identified</i>	



Post-award BEST PRACTICES to mitigate negative past performance reviews

1. Comment and Review of Negative CPARs
2. Challenging Negative CPARs – Claims and Litigation



Activity Break #2
Submitting Comments to
Dispute a Negative CPAR



Best Practice: Comment and Review of Negative CPARs

• Submitting Comments

- Respond to correct/complete *or* rebut the assessment
- Keep in mind your comments become part of the CPAR for use in future procurement past performance evaluations
- Focus on underlying factual errors and omissions in narratives
- Provide additional information
- Rebutting the assessment



Best Practice: Comment and Review of Negative CPARs

- Questions contractor should have in mind when reviewing CPARs
 - Do you agree with ratings? (too high and too low)
 - Did the agency assess all major areas of performance?
 - Did the agency interpret the contract requirements correctly?
 - Are the factual narratives factually accurate?



Best Practice: Comment and Review of Negative CPARs

DO ...	DON'T ...
Point out facts not considered that would impact rating	Don't insult or make it personal
Identify specific inaccuracies, misinterpretations or otherwise underlying the ratings	Don't complain about ratings without attacking underlying findings (unless findings narrative doesn't match rating definition)
Identify if narrative/rating inconsistent with definition/rating	Don't challenge Satisfactory ratings unless you have a very strong case
Discuss strengths of performance	Don't ignore bad narratives even if tied to good ratings
Take responsibility for real problems, identify mitigating circumstances and corrective steps taken (or taking) to correct problems identified	
Keep in mind how your statement might impact the viability of a related claim	



Challenging CPARs – Claims/Litigation

- Contract claims challenging negative CPARS
- Obtaining improved CPARS rating through settlements
- Challenging unfair CPARS at the ASBCA/CBCA and the Court of Federal Claims



Challenging CPARs – Claims/Litigation

- Jurisdiction

- COFC and ASBCA/CBCA – YES

- BUT properly asserted CDA Claim is a pre-requisite

- GAO – NO



Challenging CPARs – Claims/Litigation

- **What kind of errors can be reviewed**
 - **Procedural errors** – failure to follow procedure preparing CPAR
 - *de novo* review
 - **Substantive errors** – disputing the accuracy of the CPAR
 - Alleged misvaluation rests on a dispute concerning the interpretation of a contract clause
 - accuracy and fairness of the CPAR – reviewed only for abuse of discretion
 - breach of implied duty of good faith and fair dealing
 - **Must allege prejudice from errors**
 - there must be some quantifiable prejudice to the contractor from the performance evaluation, meaning damage or detriment to one's legal rights or claims
 - procedural errors – tough to show prejudice – but for the procedural error, performance evaluation would have been any different
 - substantive errors – easy to show prejudice – disputed performance evaluation will have an effect upon future consideration for awards



Challenging CPARs – Claims/Litigation – Relief

- Specific Performance – NO

- COFC

- *Todd Const., L.P. v. United States*, 88 Fed. Cl. 235 (2009):

- Court lacks authority under general Tucker Act (CDA) jurisdiction to provide injunctive relief
 - *But possible COFC could issue injunctive relief if claim is also tied to a protest of a specific procurement* → court observed that a contractor could seek injunctive relief over a past performance evaluation in connection with a pending procurement if the challenge were fashioned as a bid protest under 28 USC 1491(b)(2) instead of a CDA claim under 28 USC 1491(a)

- Boards

- *Versar, Inc.*, ASBCA No. 56857, 10-1 BCA ¶ 34437 (May 6, 2010) (“we do not have jurisdiction to grant specific performance”)
 - *CompuCraft, Inc.*, CBCA 5516 (Mar. 1, 2017) (Board dismissed request to direct GSA to revise its performance evaluation by changing the rating for each evaluative factor to exceptional or remove the evaluation from the CPARS database)



Challenging CPARs – Claims/Litigation – Relief

- Injunctive Relief – NO (except if tied to a bid protest)
 - COFC
 - *Todd Const., L.P. v. United States*, 88 Fed. Cl. 235 (2009):
 - Court lacks authority under general Tucker Act (CDA) jurisdiction to provide injunctive relief
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 - Boards
 - *Versar, Inc.*, ASBCA No. 56857, 10-1 BCA ¶ 34437 (May 6, 2010) (“we do not have jurisdiction to grant ...injunctive relief.”)
 - *CompuCraft, Inc.*, CBCA 5516 (Mar. 1, 2017) (“the Board cannot direct the Government to revise a performance evaluation in a particular way through some form of injunctive relief”)



Challenging CPARs – Claims/Litigation – Relief

- Declaratory Relief – YES
 - COFC and Boards can declare that rating is inaccurate
 - Contractual interpretation
 - Abuse of discretion
 - Breach of good faith and fair dealing



Challenging CPARs – Claims/Litigation – Relief

- Remand with instructions
 - COFC: YES (but limits on instructions unclear)
 - *Todd Const., L.P. v. United States*, 88 Fed. Cl. 235 (2009) – authorized to remand case to the agency with “proper and just” direction
 - Boards: UNCLEAR
 - *Versar, Inc.*, ASBCA No. 56857, 10- 1 BCA ¶ 34437 (May 6, 2010):
 - “we can interpret the contract's ...clauses and assess whether the CO acted reasonably in rendering the disputed ‘red’ performance rating or was arbitrary and capricious and abused her discretion. ...However, we do not have jurisdiction to grant specific performance or injunctive relief. ...The precise nature of any relief that we can grant to appellant regarding its ‘red’ rating, if warranted, remains to be determined.”
 - *Microtechnologies, LLC*, ASBCA No. 59911, 16- 1 BCA 36354 (Apr. 21, 2016):
 - A request for remand of the CPAR back to the CO with a requirement that the CO provide a fair and accurate evaluation is a prohibited request for specific performance or injunctive relief



Challenging CPARs – Claims/Litigation – Relief

- Monetary Relief – MAYBE
 - *Gov't Servs. Corp.*, ASBCA No. 60367, 16-1 BCA ¶ 36411 (June 20, 2016)
 - ASBCA refused to dismiss \$100k appeal of claim for damages associated with wrongful negative CPAR



Best Practices: Challenging CPARs – Claims/Litigation

- **File a detailed CDA Claim**
 - Jurisdictional pre- requisite
 - Seek corrective and monetary relief in CPAR claim
 - Monetary relief provides real leverage
 - Include CPAR challenge in a related claim
- **If CPAR claim is denied, file timely appeal at the Board or the COFC**
 - Know time limits to appeal
 - Keep in mind the Board moves slowly
- **Filing your Complaint at the Board or COFC**
 - Should be heavy on the facts
 - Make broad and multiple requests for relief
- **Resolve the CPAR claim in connection with negotiating a resolution of other monetary REA/Claim on the project**



Resources

- FAR Subpart 42.15
 - https://www.ecfr.gov/cgi-bin/text-idx?SID=295c9a6e91f315552fcd872661a11992&mc=true&node=sp48.1.42.42_115&rgn=div6
- FAR Subpart 15.3
 - https://www.ecfr.gov/cgi-bin/text-idx?SID=8db42a8131a2c9b48005d9bf1032ec06&mc=true&node=pt48.1.15&rgn=div5#sp48.1.15.15_13
- GUIDANCE FOR THE CONTRACTOR PERFORMANCE ASSESSMENT REPORTING SYSTEM (CPARS)
 - <https://www.cpars.gov/pdfs/CPARS-Guidance.pdf>



Best Practice: Comment and Review of Negative CPARs

- Questions contractor should have in mind when reviewing CPARs
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Contact Information

Adam K. Lasky | Partner

Oles Morrison Rinker & Baker, LLP

701 Pike Street, Suite 1700 | Seattle, WA 98101

O: 206.623.3427 | lasky@oles.com

www.oles.com | www.procurementplaybook.com

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