



From Our President

Dear Members,

I hope this message finds each and every member healthy and well. The month of November marks a time in which the spirit of gratitude is particularly evident. This is no less the case for the chapter. We thank our veterans and their families for your esteemed service to and sacrifice for our country, and we hope that Veterans Day was a day of rest and reflection. The honor of the day is well deserved, and my personal appreciation is extended as well.

Further, I would like to take this opportunity to express my gratitude to the diligent, hard-working members of the chapter's Executive Council. Despite the challenges of this year and personal and business obligations, the engagement and dedication of each member has remained high and the chapter continues to flourish.

With that said, I am immensely proud of our chapter's selection as the recipient of the Chapter Excellence Award in our size category and Program Chair Mike Scuteri's honor as a Volunteer of the Year. It will be my honor to accept the chapter's award at Virtual GCMS in early December.

As we approach the Thanksgiving holiday, I wish for everyone an enjoyable and relaxing break!

**Wanda Wallace; CPCM,
CFCM**
Chapter President

Calendar

12/03/2020

FL 8(a) Alliance Webinar
[Six Steps to Marketing to Lockheed Martin](#)

12/03/2020 -12/04/2020

NCMA HQ Event:
[Government Contract Management Symposium \(GCMS\)](#)

12/10/2020

HQ Webinar:
[FAR/DFARS Update](#)

12/15/2020

NCMA JAX Webinar:
[Year in Review - Law, Rule, and Policy Changes](#)

New Members

Welcome to our newest transfers and chapter members:

- Halis Batista
- Corey Moore



NCMA Names Jacksonville "Best Medium Size Chapter" for 2019-2020

NCMA HQ has announced the Jacksonville Chapter as the recipient of the 'Chapter Excellence Award' in the 76-200 member category, honoring the chapter's accomplishments during the past program year. Nominations were reviewed by a panel of NCMA Fellows. The Jacksonville Chapter will be honored as part of the [Government Contract Management Symposium \(GCMS\)](#) award ceremony, to be held virtually this December.

FREE Webinar (NCMA JAX) - Year in Review: Law, Rule, and Policy Changes

12/15/2020, 11:30AM - 1:00PM; Virtual Webinar via Zoom

Speaker: Charles Sills

Join us for a virtual event discussing a review of the law, rule and policy changes from 2020. Topics will include:

- Legislative and regulatory updates.
- NDAA and other funding authorization and appropriation bills.
- Major FAR, DFARS, and other acquisition regulations and policy updates.
- Major additions to the body of case law governing contracting.
- Important Court and Board of Contract Appeals decisions.
- Recommendations for law/policy changes.
- Congressional testimony on Acquisition/contracting issues.



Member Milestones

Congratulations to our NCMA JAX members celebrating membership anniversaries:

Sean Doughty (13) Leslie Gibson (3) Linda Hosey (16) Corey Moore (4)

Lisa Spears (5) Dezra Steep (10)

Past Performance Evaluations Concerns for Contractors

A Review of Use and Potential for Misuse

James E. Krause, P.A. - Federal Contracts Law – Jacksonville, Florida

Contractor Performance Evaluations, created and filed by the agency, are one of the most critical concerns affecting Federal contractors today. These evaluations assess a contractor's performance on Federal contracts. The Agencies are required to use past performance evaluations in determining award on most Federal contracts. Evaluations, inserted during and after the Project, provide the Federal government a database to use in selecting the best contractors for future Contract awards. The FAR [1] requires that past performance information [2] shall be entered into the Contractor Performance Assessment Reports System (CPARS), the Governmentwide evaluation reporting tool for all past performance reports on contracts and orders [3].

Adherence to this regulation requires careful, reasonable, objective evaluations, and strict management to the requirements. Each evaluation must be based on objective facts and supported by contract management data, including supporting contract performance elements that evaluate quality, timely performance, effectiveness of management, and compliance with contract terms, labor standards, and safety requirements. Contractor's concerns, which have been increasing during the last years, are what to do when an inaccurate or unfair evaluation is placed in the CPARS. Simply put, Marginal and Unsatisfactory Evaluations can destroy a contractor's ability to receive a federal contract for years.

The FAR obligates the Government to issue performance evaluations in an "accurate and fair" manner at "the time of final acceptance of the work" on contracts exceeding certain monetary limits. See 48 CFR § 36.201(a)(2) and (b). The evaluations are supposed to rate a contractor's performance in terms of cost, schedule, quality, and compliance with

contractual, regulatory, and other standards. The need for accuracy and fairness of the information stored in CCASS [4] cannot be overstated – it will be very unlikely for contractors with unsatisfactory or marginal performance evaluations to receive Government contracts when bidding against contractors who have better performance evaluations, even when the evaluations have an explanation or are simply incorrect. *Todd Constr., L.P. v. United States*, 656 F.3d 1306, at 12-13 (Fed. Cir. 2011).

The Contractor “is legally entitled to a fair and accurate performance evaluation.” *BLR Group of America, Inc. v. U.S.*, P. 641, 84 Fed.Cl. 624 (2008).

The Agency may not improperly and unfairly state, and rely on, inaccurate data in making their past performance evaluation. The Agency must apply the required evaluation rating classifications as identified at Table 42-1 [5] and the CPARS Guidance in applying accurate and fair performance evaluation ratings. The Agency must also abide by the Agency's Regulations, policies and procedures in creating and filing performance evaluations. The FAR provides: “Past performance evaluations shall be prepared at least annually and at the time the work under a contract or order is completed.” 48 CFR §45.1502(a).

Where an Agency deviates from the FAR and CPARS guidelines to inject personal opinions, animosity, or bias into the evaluations, the Contractor is not receiving a fair or objective rating. The personal opinions of Agency employees do not meet the established rating criteria set by the FAR and CPARS guidance, are not pertinent to the performance evaluation process, and cannot serve as the basis for improper ratings and remarks forming an evaluation. Agency Statements such as: “In our opinion,” “the contractor should have,” “It appears,” “We believe,” “We did not like,” or “We Think,” signal a serious concern for contractors to carefully review the evaluation.

By regulation, the contractor has the right to appeal unsatisfactory performance evaluations both under the CDA and as a bid protest claim. Courts have recognized in prior decisions the importance of performance evaluations and the need for them to be rendered in a fair, accurate, and unbiased manner by the Government. See, e.g., *Todd Constr., L.P. v. United States*, 88 Fed.Cl. 235, 244-245 (2009); *Todd Constr., L.P. v. United States*, 85 Fed.Cl. 34, 42-43 (2008); *BLR Group of America, Inc. v. United States*, 84 Fed.Cl. 634, 640 (2008); *Record Steel and Const., Inc. v. United States*, 62 Fed. Cl. 508, 519 (2004); and, *Seattle Sec. Services. Inc., v. United States*, 45 Fed. Cl. 560, 567 (2000).

The Contractor must be graded according to the published ratings pursuant to the Solicitation or Contract, or the applicable Government regulations at FAR 42-1. As an example, in one case the contractor received a marginal rating even though they had

originally identified the problem, corrected the problem, and it had been reviewed and accepted by the government. This is a misuse of the regulations. Per Table 2-12 Definitions, A “marginal” rating in the FAR is defined as follows,

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

In this particular example, the Contractor had timely identified and implemented the corrective action. When that corrective action is accepted by the Agency, it is obvious a marginal rating cannot be applied. Thus, this performance evaluation was unfair and inaccurate. Any unfair and inaccurate marginal evaluation ratings must then be changed to meet the CPARS guidelines.

PPE’s have gone to both the GAO and the Court of Federal Claims as Contract Dispute Act Claims. In a Past Performance Evaluation complaint, the Contractor is seeking relief “arising under or relating to this contract,” as the connection between contract and evaluation is “more than tangential, as FAR requirements [a]re equivalent to mandatory contract term, and performance evaluation related to contractor’s performance in same way that any evaluation related to thing evaluated [6].

The GAO says, “the critical question in our review of an agency’s past performance evaluation ‘is whether the evaluation was conducted fairly, reasonably, and in accordance with the solicitation’s evaluation scheme, and whether it was based on relevant information sufficient to make a reasonable determination of the offeror’s past performance.’” The Emergence Group B-404844.7, 2012 [7].

The Court of Federal Claims has identified that the Contractor should allege arbitrary and capricious actions by the Government personnel in assigning an inaccurate and unfair performance evaluation, as well as breach of the covenant of good faith and fair dealing in filing an unfair and inaccurate performance evaluation. The “Contractor can show prejudice through the identification of specific instances where the Government improperly alleges unsatisfactory performance, with the facts attached to each performance evaluation category that solely and substantially demonstrates how the Government’s decisions are either incorrect or that the Government had approved specific performance by Contractor and now attempts to allege unsatisfactory performance.” Additional arbitrary and capricious Government action arise from specific violations of improper reading and application of the rules defining how performance evaluation scores must be developed. See *Todd Const., LP v. U.S.*, P. 1316, 656 F.3d 1306 (2011).

Contractors concerns are well placed - Marginal and Unsatisfactory Evaluations can destroy a contractor's ability to receive a federal contract for years. Unfortunately, over the last few years we have seen evidence that Contracting Officers (CO) have misread or misapplied the FAR, and misused this tool that was originally meant to be a valuable resource for federal contracting. Contractors must understand their rights in the process, respond immediately to incorrect information, and be prepared to defend their rights to the Agency, and if necessary, at the Government Accountability Office, Boards of Contract Appeals, or the Federal Courts.

Footnotes:

[1] Federal Acquisition Regulations (FAR)

[2] FAR 42.1502 – past performance information includes performance evaluations

[3] Instructions for preparing and submitting evaluations into CPARS are available at <http://www.cpars.gov/>

[4] The Construction Contractor Appraisal Support System (CCASS) is still in existence, but CPARS is the current database.

[5] FAR 42.1503, Table 42-1 Evaluation Rating Definitions.

[6] Contract Disputes Act of 1978, § 6(a), 41 U.S.C.A. § 605(a); 48 C.F.R. §§ 42.1502(a), 52.233-1." See 48 C.F.R. §2.101 for definition of claim; 28 U.S.C. 1491(a)(2) for nonmonetary disputes.

[7] See *Cameron Bell*, ASBCA No. 61856, 2019 WL 2067642 (May 1, 2019)

If you have any questions or comments, please contact Jim Krause at jimkrause@krause.law or call 904.353.5533.

NCMA JAX Membership - Not Just for Locals



This month's honoree is Sabrina Bastine, who has been an NCMA member since 1991. She currently works as a Contracting Officer with US Army Corps of Engineers (USACE), Savannah District. Prior to 2007, she was a Contract Specialist at US Army Contracting

Command Fort Belvoir (VA) Center. She had several years of non-appropriated fund (Morale Welfare and Recreation) contracting experience for the Marine Corps at Camp Pendleton (CA) as well as Camps Courtney and Foster in Okinawa, Japan.

Sabrina originally joined NCMA as a member of the Tysons Chapter. She says NCMA helps her stay current on the latest acquisition development; she even participated in a working group to update the Contract Management Body of Knowledge (5th Edition). Her advice to newer employees: "You have to believe in yourself and have good customer service. With that comes developing great listening skills." She is a firm believer in meditation and enjoys crafting including knitting and crochet; she also reads sci-fi , fantasy books, graphic novels, and manga.
