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REPORT

Past Performance

Revisiting the Past: *Todd Construction, Inc v. U.S.* and Judicial Review of Past Performance Evaluations, Part I[1]

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Past performance evaluations have become the lifeblood of government contractors. The importance of these evaluations to contractors has increased dramatically since the mid 1990s, when past performance became a mandatory evaluation factor for all U.S. government-negotiated procurements above the simplified acquisition threshold. *See* 41 U.S.C. § 405(j)(1) (requiring that the Office of Federal Procurement Policy issue guidance for agencies on the consideration of past performance); 60 Fed. Reg. 16718 (March 31, 1995) (notice regarding implementation of a final Federal Acquisition Regulation rule requiring past performance evaluation); FAR § 15.304(c)(3) (requiring that past performance be evaluated for negotiated competitive acquisitions expected to exceed the simplified acquisition threshold unless the contracting officer documents the reason a past performance is not an appropriate evaluation factor for the acquisition).

In fact, in some procurements, past performance is the *only* non-price evaluation factor. Because of the significance of past performance evaluations to obtaining future business, the accuracy of such evaluations is critical to contractors.

In the past, a contractor receiving what it believed to be an unfairly negative past performance evaluation had little recourse beyond the agency. The Government Accountability Office and the Court of Federal Claims have considered challenges to past performance evaluations in the context of the protest of a subsequent procurement. However, given the setting and the exigencies associated with protest litigation, that protest review has been quite limited.

Naturally, agencies would prefer to have absolute discretion with respect to past performance evaluations. *See, e.g., G. Bliudzius Contractors, Inc.*, ASBCA No. 42365, 92-1 BCA ¶ 24605 (agency argued successfully that the Armed Services Board of Contract Appeals lacked authority to order the contracting officer to amend a final performance evaluation). However, a rising tide has grown in opposition to such a one-sided approach. For example, despite strong government opposition, the Court of Federal Claims has, in a series of cases, gradually come to the conclusion that it *does* have jurisdiction under the Contract Disputes Act to review a contractor's challenge to a contracting officer's past performance evaluation. *See Record Steel Construction, Inc. v. United States*, 62 Fed. Cl. 508 (2004) (contractor brought claim seeking equitable adjustment and derivative claim regarding its performance evaluation, and the court held that it had jurisdiction under the CDA to address the claim for nonmonetary relief; *i.e.*, declaratory judgment that a performance evaluation be corrected to reflect accurately the plaintiff's per-

[1] This article will be presented in two parts. This first part provides background and addresses jurisdiction generally and the applicable standard of review. A later article, part II, will address the appropriate relief with respect to claims alleging improprieties in past performance evaluations under the CDA.

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formance under the contract); *BLR Group of America, Inc. v. United States*, 84 Fed. Cl. 634 (2008) (holding that the court has jurisdiction over a contractor's claim alleging that government personnel prepared and disseminated an unfair and inaccurate evaluation of its performance under a contract with the United States Air Force, and seeking declaratory and injunctive relief).

Most recently, the Court of Federal Claims reaffirmed its jurisdiction over such claims in *Todd Construction, L.P. v. United States*, 85 Fed. Cl. 34 (2008).

The *Todd Construction* Decision

In that case, contractor Todd Construction had been hired by the Army Corps of Engineers to perform roof repairs on buildings at an Air Force base in North Carolina. After completion of the work, the Corps issued a final evaluation, rating Todd Construction's work as ''Unsatisfactory,'' an evaluation Todd Construction believed to be in violation of applicable performance review procedures and unsupported by the facts.

Todd Construction first submitted comments to the contracting officer explaining why it viewed the past performance evaluation ratings to be without merit, and when the contracting officer nonetheless issued final unfavorable evaluations, Todd Construction appealed to the Army pursuant to a certified claim. The Army issued a final decision rejecting the appeal and adopting the unsatisfactory evaluation. The evaluation was filed in the central past performance database system, the Construction Contractor Appraisal Support System (''CCASS''), where it would be stored for six years. Todd Construction then filed suit in the Court of Federal Claims.

The government moved to dismiss for lack of subject matter jurisdiction or for failure to state a claim upon which relief can be granted. The crux of the issue was whether Todd Construction's challenge to the accuracy and procedural propriety of the performance evaluation was a ''claim'' properly brought pursuant to the Contract Disputes Act.

The Tucker Act provides at 28 U.S.C. § 1491(a)(2) that the Court of Federal Claims has jurisdiction over ''any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the CDA, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and *other nonmonetary disputes on which a decision of the contracting officer has been issued* under section 6 of that Act.'' (emphasis added)

In reviewing the merits of the government's arguments, the court set forth an exhaustive analysis of the history of the CDA which, as originally enacted, did not grant the court jurisdiction over declaratory judgment actions unless the request was tied to a demand for monetary award. However, the court recounted that Congress had in fact amended the CDA and added the phrase ''including declaratory judgment'' to the powers granted to the boards of contract appeals and Court of Federal Claims.

Having concluded that the CDA granted jurisdiction to the court over nonmonetary disputes, the court then determined that Todd Construction had asserted a ''claim,'' as defined by the FAR, because it met all the elements; that is, there was: (1) a decision of a contracting officer; (2) on a written demand; (3) made as a matter of right; (4) and requesting relief arising under or related to the contract.

Notably, in its decision rejecting the government's arguments and denying the motion to dismiss, the court emphasized the growing importance of past performance evaluations, as government contract awards are made less based on the lowest bid and more frequently based on an evaluation that puts significant weight on a prospective contractor's past performance history. The court noted that the ''creation of mandatory performance reviews, databases archiving those reviews, and the requirement to consider those archived materials in future contracts awards means that a negative review is potentially devastating to a contractor, who may not have the opportunity—or very little opportunity—to mitigate the impact that review will have on future awards.''

Public Policy Concerns Mandate Independent Forum

The court was correct to recognize the significant negative consequences that an unjust past performance rating would have on a contractor's future competitive prospects. In an extreme case, an inaccurate negative past performance evaluation could in fact be the kiss of death for a small contractor that depends on its U.S. government business, particularly in these uncertain economic times.

Furthermore, it makes sense to provide a forum where a contractor can bring such a claim under the contract that is the subject of the performance review, as opposed to waiting until the negative past performance evaluation has an adverse impact on future competition.

Although past performance reviews appropriately come into play in the bid protest context, the review in that situation is of a different nature.

First, in a bid protest, the actions of the contracting officer who performed the past performance review are not the subject of scrutiny. Rather, the GAO or court reviews the actions of a presumably *different* contracting officer for the new procurement who is evaluating that past performance review in light of the terms of the new solicitation.

In contrast, a claim challenging the original past performance determination is brought contemporaneously with the contractual performance that is the subject of the performance evaluation, and the court is in a better position to do a more searching review of the actual facts underlying a contractor's performance.

Second, a bid protest action involves a review of the contemporaneous procurement record, and an agency's review of pre-existing past performance evaluations are given ''the greatest deference possible.'' *See Westech Int'l, Inc. v. United States*, 79 Fed. Cl. 272, 293-94 (2007); *see also ITT Industries Space Systems, LLC*, B-309964, Nov. 9, 2007, 2007 WL 4303799 (''Determining the relative merits of an offeror's past performance information is primarily a matter within the contracting agency's discretion, and we will not substitute our judgment for reasonably based past performance ratings. We will examine an agency's evaluation only to ensure that it was reasonable and consistent with the solicitation's evaluation criteria and procurement statutes and regulations.''). The limited scope of the review makes sense for bid protests, which are conducted under the exigencies of a compressed time schedule to allow the

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government to move forward with the new contract as quickly as possible.

These contextual differences were highlighted in *BLR Group of America*:

> In the instant case, plaintiff 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 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. To begin, it is important to note that Congress has endeavored over the years to make government contracting more efficient. 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. These two factors could be particularly fatal to a contractor's challenge given the heavy burden faced by unsuccessful bidders challenging contract awards.

BLR Group of America, Inc. v. United States, 84 Fed. Cl. 634, 647 (2008) (and also noting that, as compared to bid protests, ''CDA claims are typically nondisruptive''). Not only does it make practical and procedural sense to allow for challenge of a past performance evaluation as a claim under the CDA, but the different context makes it unnecessary to adopt the deferential standard of review used by the GAO and courts in deciding bid protests.

Unanswered Questions

Despite its conclusion as to jurisdiction,[2] the *Todd Construction* court recognized that certain thorny issues remain as to the specifics of this judicial review. At the end of the opinion, the court set forth a series of questions for further briefing, including, *inter alia*:

- Whether it is within the jurisdiction of the court to declare that the Corps' final decision is unlawful and should be set aside;
- Whether the exercise of such authority is appropriate in this case;
- Whether the court possesses the authority, were it to declare that the final decision is unlawful, to remand the matter to the agency for further action;
- Whether the court possesses the injunctive power to order the agency to remove the final performance evaluation from the CCASS database;
- Whether the court possesses the authority to order correction of plaintiff's performance evaluations;
- What is the appropriate standard of review to apply?

While part I of this article addresses only the final question listed above regarding standard of review; part II will address the issues relating to relief.

Standard of Review

The question that is arguably the least complicated to address is that regarding the appropriate standard of review, as the answer is found in the jurisdiction-granting CDA itself. The government in Todd Construction argued that the ''court's review of the performance evaluations should be limited to a review of an administrative record prepared by the agency,'' because Todd Construction has challenged agency action, and therefore using the Administrative Procedures Act standard is appropriate.

The government supported its argument by pointing to the deferential record review performed in the bid protest context (citing 28 U.S.C. § 1491(b)(4)).

It makes no sense for the court to look to the APA standard of review, used in the context of bid protests, in lieu of the standard of review set forth in the CDA. As a threshold matter, the APA's deferential, record-review standard is applied in bid protests because the Tucker Act specifically requires that standard of review for those actions. (See 28 U.S.C. § 1491(b)(4), stating that the courts shall review the agency's decision in a bid protest action pursuant to the standards set forth in the APA). This same statutory mandate for use of the APA standard of review does *not* apply to claims brought under the CDA. In fact, the CDA provides:

> (1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary.
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> (2) In the case of an action against the Tennessee Valley Authority, the contractor may only bring an action directly on the claim in a United States district court pursuant to section 1337 of title 28, notwithstanding any contract provision, regulation, or rule of law to the contrary.
>
> (3) Any action under paragraph (1) or (2) shall be filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim, and ***shall proceed de novo*** in accordance with the rules of an appropriate court.

41 U.S.C. § 609(a) (emphasis added).

This standard is routinely applied by the court in CDA cases, where ''[i]n [such] . . . proceedings . . . ' the facts, as well as the law, are decided *de novo* by the . . . court.' '' *Renda Marine, Inc. v. United States*, 66 Fed. Cl. 639, 646 (2005); *see also Keeter Trading Company, Inc. v. United States*, 79 Fed. Cl. 243, 251 (2007) (contracting officer's decision to terminate the contract for default and the contracting officer's decision to deny each of plaintiff's certified claims are reviewed de novo by the court under the CDA). As with review of a contracting officer's decision to terminate a contract for default, a *de novo* review is appropriately applied in situ-

[2] For now, at least, it appears that the doors of the boards of contract appeals remain closed to this type of claim. *See, e.g., Konoike Construction Co.*, ASBCA No. 40910, 91-3 BCA ¶ 24170 (1991); TLT Construction Corp., ASBCA No. 53769, 02-2 BCA¶ 31969 (2002); *Aim Construction*, ASBCA No. 52540, 07-1 BCA ¶ 33466 (2006).

ations where the contracting officer has relatively broad discretion; whether that discretion was exercised properly must be reviewed based on a searching look at all of the underlying facts. There is no rational basis to deviate from the normal CDA standard of review in the context of past performance evaluations. On the contrary, given that it is the contractor's actual performance that should be the subject of any such review and not an agency's ''record'' of such performance, limiting the court's review to some artificially created record would be inappropriate.

Conclusion

The Todd Construction decision presents many interesting issues, and only time will tell how the court will resolve them. However, it is heartening at the outset that the court has not shut its doors on reviews of potential arbitrary and irrational past performance evaluations. Hopefully, as it grapples with the details, the court will ensure that it provides meaningful relief so that contractors can be assured of a fair playing field as they continue to compete for the opportunity to provide goods and services to the U.S. government.

Part II of this article, in a later issue, will more specifically address the potential legal and practical issues related to granting meaningful relief.

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