TOP SHEET*

Challenging Negative Performance Evaluations: Confronting Hurdles at ASBCA and COFC

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For decades the Federal Acquisition Regulation (FAR) has required federal agencies to record contractor performance on current contracts and use past performance information when making source selection decisions.[1] Accurate and fair evaluations are intended to "enable [agencies] to better predict the quality of, and customer satisfaction with, a contractor's future work."[2] Inaccurate evaluations, on the other hand, are harmful to the government and can be "devastating to a contractor, who may have no opportunity—or very little opportunity—to mitigate the impact that review will have on future awards."[3]

Today, federal agencies are required to submit past performance evaluations electronically in the web-based Contractor Performance Assessment Reporting System (CPARS). Although contractors are provided an opportunity to comment on the evaluations, the evaluations, including any contractor comments, are automatically transmitted to another web-based program, the Past Performance Information Retrieval System (PPIRS), within 14 days of the agency notifying the contractor of the evaluation's availability for comment. While contractors may seek adjustment of an evaluation from the issuing agency, pending the issuing agency's reconsideration of the contractors' performance, the evaluations remain available for review by other agencies as part of the source selection process.

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Until recently, contractor performance evaluation claims often did not survive jurisdictional challenges. The primary issue revolved around whether the contractor performance evaluation claim constituted a cognizable claim under the Contract Disputes Act (CDA).[4] Now, the Court of Federal Claims (COFC or court) and the Armed Services Board of Contract Appeals (ASBCA or board) have acknowledged the importance of fair and accurate performance evaluations, and recognized their jurisdiction to hear appeals involving contractor performance evaluation claims to the extent that such claims (a) relate to contract performance; (b) seek interpretation of contract terms; and (c) request relief arising under or relating to contract.[5]

A previous *Procurement Lawyer* article, the "Rise of the Performance Evaluation: New Developments in Contractor Challenges to Adverse Evaluations under the Contract Disputes Act", outlined the case law involving contractor performance evaluation challenges, culminating in the board's decision in *Sundt Construction*, ASBCA No. 56293, 09-1 BCA ¶ 34,084.[6] As described in the instant article, the case law has continued to evolve, providing additional insights into the jurisdictional requirements contractors must meet to appeal a claim involving an adverse evaluation.

Early Case Law: Jurisdictional Challenges

Before 2009, the seminal case involving performance evaluations at the board was *Konoike Construction Company*. There, the contractor sought "reversal" of its "unsatisfactory" performance rating to "satisfactory."[7] The contractor, however, had never submitted a claim to the contracting officer. The board held that the performance evaluation itself was not a claim under the CDA because it did not seek, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. Moreover, the board held that even if it were to consider the request for reversal of the past performance evaluation a CDA "claim," it could not grant the relief requested—reversal of the rating—because injunctive relief and specific performance are not available from the board.[8]

The board reached similar conclusions in *Aim Construction & Contracting Corp.*, *TLT Construction Corp.*, *CardioMetrix*, and *G. Bliudzius Contractors, Inc.*[9] Although

the contractors involved in these appeals submitted claims for contracting officer final decisions, the board repeatedly refused to find jurisdiction based largely on the relief the contractor sought, i.e., changes to the evaluations. For example, in *TLT Construction*, the board found that "a contractor's request that a contracting officer change an evaluation is not a contractor claim," and concluded that the evaluations are administrative matters over which the board has no jurisdiction.[10]

The Rise of the Performance Evaluation Challenges: Recap

In *Coast Canvas Products II Co.* and *Sundt Construction*, however, the board concluded that it had jurisdiction to determine and declare whether the government's utilization of a particular rating violates the terms of an agreement.[11] In both appeals the contractor's claim centered on the terms of a settlement agreement.

In *Coast Canvas*, the contractor argued that the government's adverse evaluation violated the parties' settlement agreement because the settlement was intended to put to rest all the parties' disputes regarding performance delay under the contract. The board agreed and "determine[d] and declare[d] that the utilization by the government of an unsatisfactory rating premised upon such performance delay would be violative of [the] Contract Modification."[12]In *Sundt Construction*, the contractor alleged the settlement agreement required the government to issue an overall satisfactory performance rating. Consistent with its holding in *Coast Canvas*, the board held that it had "jurisdiction to determine the rights and obligations of the parties" under disputed terms of a contract, i.e., the settlement agreement.[13]

Around the time the board issued its decision in *Sundt Construction*, the court also issued a series of decisions in which it recognized the court's authority to hear contractor challenges to performance evaluations. First, in *Record Steel and Construction, Inc. v. United States*, the court expressly rejected the government's argument that, because the board had previously declined to exercise jurisdiction over cases involving review of contractor performance evaluations, so should the court.[14] The court further held that the contractor's request for reconsideration of its performance evaluation constituted a CDA claim; that the contracting officer's denial of the request rendered the evaluation a final action and constituted a final decision under the CDA; and that the court has jurisdiction to grant declaratory relief.[15]

Second, in *BLR Group of America Inc. v. United States*, the court specifically found that the holdings in *Konoike Construction's* progeny (e.g., *G. Bliudzius* and *TLT Construction*)—that a contractor's request to a contracting officer to change a performance evaluation is not a valid CDA claim—were "unwarranted extension[s]" of the *Konoike Construction* decision.[16] In *BLR*, the contractor sought a declaratory judgment that the government's performance evaluation was "false and highly prejudicial."[17] The court acknowledged its jurisdiction over the claim and stated that a contractor need not argue breach of a specific contract clause to secure jurisdiction. [18] The court further held that a contractor is entitled to a "fair and accurate performance evaluation" and the contractor's request for declaratory relief was related to the contract and therefore a valid claim under the CDA.[19]

Finally, in a line of decisions issued between 2008 and 2011 involving Todd Construction, the court resolved questions relating to jurisdiction, the relief the court may grant, and pleading requirements for contractor performance evaluation claims.[20] In *Todd Construction, L.P. v. United States* (*Todd I*), the court held that it had jurisdiction over an appeal involving a contractor's claim that the government's evaluation was "erroneous" and violated contractual procedures. The court noted the inequity in denying contractors a forum for disputes relating to performance evaluations.[21] In *Todd Construction, L.P. v. United States* (*Todd II*), the court held that it had jurisdiction to issue declaratory judgments involving contractor performance evaluation challenges.[22] In determining that this was an available form of relief, the court reviewed its remand authority and found that the court can review the "procedural propriety of the manner in which the performance evaluation was determined and, if it finds inadequacies," can remand to the agency with a description of the procedural deficiencies.[23] Although the contractor ultimately won the jurisdictional issue in *Todd Construction, L.P. v. United States* (*Todd III*), the court dismissed the appeal on the basis of lack of standing and failure to state a claim due to insufficient pleading.[24] In *Todd Construction, L.P. v. United States* (*Todd IV*), the Federal Circuit affirmed that the court has jurisdiction over a contractor performance evaluation claim but also affirmed the court's dismissal of the appeal (*see* discussion below). [25]

Subsequent Case Law

Recent ASBCA decisions continue to endorse the reasoning laid out in *Coast Canvas* and *Sundt Construction*, but have also adopted the reasoning of the court, more clearly outlining the jurisdictional boundaries for challenges to performance evaluations. Specifically, in several decisions since 2009, the board has recognized that it has jurisdiction to (i) review challenges to performance evaluations to the extent the claim demands that it interpret contract clauses; (ii) assess whether the government acted reasonably in rendering a performance rating or was arbitrary and capricious and abused its discretion; and (iii) determine whether the government breached its implied contractual duty of good faith and fair dealing.[26]

For example, in *Versar, Inc.* (*Versar I*), the board held that it had jurisdiction over a contractor's performance evaluation challenge where the contract at issue contained an "Awarding Orders" clause.[27] The clause required that the contractor be afforded a "fair opportunity

to be considered" for orders.[28] It also set forth evaluation criteria the contracting officer was to use in connection with that "fair opportunity, including the contractor's performance on prior [task orders]."[29] Thus, the board held that the performance rating claim fell under the board's CDA jurisdiction because the claim "relates to" the contract at issue satisfying sections 605(a) and 607(d) of the CDA, seeks an interpretation of contract terms and relief arising under the contract, and, therefore, meets the definition of a CDA claim under FAR 2.101 and the contract's Disputes clause.[30]

Less than two months later, the board issued its decision in *Colonna's Shipyard Inc.*[31] In that case, the board again found that it had jurisdiction over a contractor's performance evaluation claim. There, the contractor's claim alleged that (a) the government breached the contract's "Performance Assessment" clause and the incorporated regulations by issuing "arbitrary and capricious" CPARS scores; and (b) the government violated the duty of good faith and fair dealing implicit in every contract.

Similar to the Awarding Orders clause at issue in *Versar I*, the board found that the Performance Assessment clause at issue in *Colonna's Shipyard* set forth the rating categories and described their criteria in general terms, including the need to assess whether the contractor met contractual requirements with respect to each category.[32] In addition, the clause incorporated FAR subpart 42.15 and FAR 36.201, regulations that require the government to provide "accurate and fair" contractor performance evaluations. Citing *Sundt Construction*, *Coast Canvas*, and *Versar I*, the board concluded it had jurisdiction to consider the appeal. The board further held that "whether a given category applied to a contractor's performance [was] subject to interpretation of both the [Performance Assessment] clause and the contract as a whole" and, moreover, "a contract interpretation claim need not be limited to the language of a clause in dispute but may involve a decision as to the correctness of actions taken under the contract in light of the clause and associated regulations."[33]

Then, in *Metag Insaat Ticaret A.S.*, the board affirmed that a "performance evaluation dispute may constitute a CDA claim where it seeks the interpretation of contract terms and relief arising under or relating to the contract."[34] The board also found that the contract in dispute contained a "Contractor Performance Evaluations" clause, which incorporated FAR Subpart 42.15 and FAR 36.201. The board held that these FAR provisions include procedures for "systematically assessing contractor performance . . . including accurate and timely performance reviews to ensure that performance of construction contracts is evaluated fairly and objectively."[35] Accordingly, the board concluded that it had jurisdiction to consider the appeal because the contractor's claim questioned the correctness of the contracting officer's actions based on the express and incorporated terms of the contract and sought relief based on the contract.[36]

The Claim Requirement

Although the jurisdiction of the court and board to hear contractor performance evaluation claims is now well-established, submission of an underlying claim to the contracting officer remains a jurisdictional prerequisite at either venue.

For example, in *Konoike Construction*, the board held that the government performance evaluation, standing alone, did not constitute a government claim and the board did not have jurisdiction over the appeal because there was no predicate claim supporting the board's jurisdiction. In *Versar I*, the board affirmed its earlier decision in *Konoike Construction* but also found that the claim at issue in *Versar I* involved a different situation (*see also* discussion above).

In *Versar I*, the claim the contractor appealed to the board did not "explicitly ask" the contracting officer to change the government's performance rating. The government thus asserted, *inter alia*, that the performance evaluation issue was not the subject of a CDA claim and was, therefore, not properly before the board. The board disagreed, holding that "[w]hether a claim before the Board is new or essentially the same as that presented to the [contracting officer] depends upon whether the claims derive from common or related operative facts."[37] The board also held that it was not limited to the claim document to determine the parameters of the claim, but could examine the totality of the circumstances. In addition, the board held that "[n]o particular wording" is required, but the contracting officer must have "'adequate notice' of the basis and amount of the claim."[38]

The board also found that based on a "reasonable reading" of the contractor's claim, the contractor disputed the adverse performance rating.[39] Further, the claim "mentioned or included [the contractor's] prior correspondence and submissions," in which the contractor denied that its performance was deficient and asked the government to withdraw its performance rating. The board also found that the government "was clearly on notice" that the contractor disagreed with the performance rating.[40] Therefore, the board concluded that "the performance rating matter derives from facts that are common or related to those presented or implicit in [the contractor's] claim; the [contracting officer] had adequate notice of it; and it does not constitute a new claim." The board then turned to the government's assertion that the board *per se* lacked jurisdiction over a performance evaluation claim. As discussed above, the board held that it does have jurisdiction to consider the contractor performance evaluation challenges.

Metag, also discussed above, involved a contractor claim asking that the contracting officer reconsider an overall "marginal" performance evaluation and issue a final decision.[41] Only 51 days after submitting its claim to the contracting officer, the contractor appealed on the basis of a deemed denial. The government moved to dismiss the appeal, asserting that it had not been provided a

reasonable time to issue a final decision. The board denied the motion, finding that: (a) the government was aware of the contractor's objections to the adverse performance rating before the claim was filed; (b) approximately 176 days had elapsed between the date of claim submission and the government's motion; and (c) as of the date of the government's motion, the contracting officer still had not issued a decision on the claim. The board concluded that "this extended passage of time" without a contracting officer decision was "unreasonable given the nature of the claim."[42]

Conversely, in *Extreme Coatings, Inc. v. United States*, an unpublished COFC decision, the contractor challenged the accuracy of the agency's performance evaluation, and requested that the government withdraw previously issued negative performance evaluations and replace those evaluations with satisfactory assessments.[43] Although the contractor submitted a performance evaluation claim to the contracting officer, it only submitted the claim to the contracting officer after filing suit at the COFC.[44] The court thus held that it lacked subject matter jurisdiction over the performance evaluation claim.[45] Nevertheless, in the interest of judicial economy, the court stayed the proceedings for 30 days to allow the contracting officer to make a final determination on the performance evaluation claim.[46]

In GSC *Construction, Inc. v. United States* (*GSI I*), another unpublished COFC decision, the contractor requested rescission of a performance evaluation alleged to be erroneous, arbitrary, and capricious as a result of a purported agency failure to follow mandatory procedures in preparing the evaluation.[47] The government sought dismissal, challenging the claim's ripeness.[48] The court granted the government's motion because it found that the evaluation at issue was not "final" and the contractor had merely provided "contractor feedback" in response to a "proposed final evaluation."[49] Moreover, the contractor never submitted a claim in response to the final evaluation. Therefore, the court concluded that the contractor had failed to exhaust its administrative remedies as required by the CDA and dismissed the appeal.[50] Following the court's decision, the contractor filed a claim challenging the government's final evaluation, which the contractor later appealed to the board (*see* below).

COFC and ASBCA: No Jurisdiction over Requests for Injunctive Relief

The court and board have uniformly held that neither has jurisdiction to grant injunctive relief or specific performance.[51] For this reason, although the board retained jurisdiction over the performance evaluation claims at issue in *Versar I* and *Colonna's Shipyard*, the board struck those portions of the appeals in which the contractors asked the board to "rescind" or revise the performance evaluations.

In addition, in *Todd II*, the COFC held that the court generally does not have authority to grant injunctive relief to require the government to change an evaluation because the evaluation process "is necessarily subjective and is within the sole purview of the Government."[52] Accordingly, the "contractor is entitled only to a determination whether the agency's choice of a 'fair and accurate' rating constituted an abuse of discretion."[53]

In *Davis Group, Inc. v. United States*, an unpublished decision, COFC also held that it does not have authority to grant a preliminary injunction to bar an "unsatisfactory" performance rating until the related CDA litigation is resolved.[54] Although the Tucker Act[55] gives the court the power to remand "appropriate matters" to an agency "with such direction as it may deem proper and just," such action would be "ineffective" during the pendency of an appeal. In short, according to the court, the initiation of litigation divests the contracting officer of authority to act on the matters at issue in the performance evaluation claim while the litigation is pending.[56]

Other Pleading Requirements

Essential to any claim challenging a performance evaluation are allegations sufficient to withstand a motion for summary judgment for failure to state a claim. For example, in *Todd III*, the court held that although the contractor won on jurisdictional issues, it lost on the sufficiency of its pleadings.[57]

Specifically, in *Todd III*, the contractor sought declaratory relief for the alleged failure of the government to follow proper procedures, as well as its issuance of an arbitrary and capricious performance evaluation of "unsatisfactory."[58] Because the contractor failed to plead any discernible injury, the COFC dismissed the case for lack of standing and failure to state a claim.[59] The court determined that while standing existed to challenge an unfair and inaccurate performance evaluation, the contractor provided nothing in the amended complaint to support the claim.[60]

The Federal Circuit affirmed the COFC's *Todd III* decision.[61] With respect to the alleged procedural failures, the Federal Circuit determined that because the supposed violations were not fundamental procedural rights, the contractor was required to show prejudice.[62] As a result, the contractor lacked standing to bring a claim for procedural violations as nothing alleged suggested that a different outcome would have resulted if the procedural violations were cured.[63]

The Federal Circuit next looked to the contractor's allegation that the agency acted arbitrarily and capriciously when it issued an inaccurate and unfair performance evaluation.[64] The government argued that the contractor failed to plead the facts necessary to support the claim.[65] The Federal Circuit agreed, finding that the contractor's complaint did not "specifically identify which unsatisfactory ratings were arbitrary and capricious."[66] The Federal Circuit stated that "[a]ll of the facts alleged by Todd could be true and yet it does not follow that any of the unsatisfactory ratings were an abuse of discretion or

should be changed."[67]

The board reached a similar conclusion in *Versar Inc.* (*Versar II*), and denied the contractor's performance evaluation claim. There, the contractor alleged, *inter alia*, that the government breached the contract and its duty of good faith and fair dealing by assigning the contractor an adverse performance rating as punishment for disputed performance delays.[68] The board, however, found that the contractor had not supported its allegations with sufficient detail or specificity, and further held that the performance rating dispute arose from actions for which the board found the contractor responsible.[69] The board concluded that "[b]are or insufficient allegations cannot sustain a claim that the government issued an unjustified performance rating."[70]

The most recent case at the board is another involving GSC. After COFC dismissed its appeal, the contractor filed a new claim with the contracting officer and appealed the deemed denial to the board. In *GSC Construction, Inc.* (*GSC II*), the contractor alleged that the final performance evaluation was not performed in accordance with the FAR.[71] The contractor also maintained that the "factual analysis and conclusions in the final performance evaluation were clearly erroneous and arbitrary and capricious because the [government] failed to consider the adverse impact of changes, disputed work, defective specifications, and the government's administration of the contract on the contract work and schedule."[72] Based on these allegations, the contractor moved for summary judgment.

In denying the contractor's motion, the board in *GSC II* held:

> [Contractor] first alleges that the [government] committed procedural violations in the preparation and dissemination of the final performance evaluation. The [government] disputes the alleged violations and contends that, regardless of whether procedural violations occurred, [contractor] has failed to offer any proof that it was prejudiced as a result thereof. We agree. *To prevail, [contractor] must show that the performance evaluation would have been more favorable but for the purported procedural violations*. . . . Assuming solely for purposes of argument that one or more procedural violations occurred, [contractor's] motion *wholly fails to proffer uncontested facts establishing that the [government's] violations had any substantive adverse impact on the ratings set forth in the performance evaluation*.

> [Contractor] also alleges that the [government's] final performance evaluation is arbitrary and capricious because it is based on erroneous factual conclusions regarding its performance under the contract . . . which *necessarily requires an examination of the details of [contractor's] performance that underlie the [the government's] adverse ratings*. . . . In short, *the adequacy and propriety of the evaluation is inextricably intertwined with the plethora of genuine factual issues presented in the related companion appeals*. The motion cannot be granted.[73]

Conclusion

The court and board have jurisdiction over disputes involving performance evaluations to the extent the dispute relates to a contract. Nevertheless, before challenging an unfavorable performance evaluation at either the COFC or ASBCA, contractors must be cognizant of the pleading requirements demanded by each forum. In particular, a performance evaluation is not, in and of itself, a "claim" sufficient to maintain jurisdiction; nor are contractor comments to an evaluation. Thus, to survive the most basic jurisdictional challenge, contractors must first file a CDA claim, challenging the adverse performance evaluation, and exhaust the available administrative remedies. In addition, contractors must plead the claim with the appropriate detail, including the requested relief. Finally, performance evaluation claims are often intertwined with factual issues and may not be readily susceptible to motions for summary judgment. PL

Endnotes

1. *See* FAR 15.305, 42.1500–42.1503.
2. Office of Mgmt. & Budget, Best Practices for Collecting and Using Current and Past Performance Information (2000), *available at* http://www.whitehouse.gov/omb/best_practice_re_past_perf.
3. Todd Constr., L.P. v. United States, 85 Fed. Cl. 34, 42 (2008).
4. 41 U.S.C. §§ 7101–7109 (2012).
5. *Todd Constr.*, 85 Fed. Cl. at 34; BLR Grp. of Am., Inc. v. United States, 84 Fed. Cl. 634 (2008); Record Steel & Constr., Inc. v. United States, 62 Fed. Cl. 508 (2004); Sundt Constr., Inc., ASBCA No. 56293, 09-1 BCA ¶ 34,084; *see also* 41 U.S.C. §§ 7101–7109 (2012).
6. Dorothy E. Terrell and Kathryn T. Muldoon, *The Rise of the Performance Evaluation: New Developments in Contractor Challenges to Adverse Evaluations Under the Contract Disputes Act*, 45 Procurement Law. 2 (2010).
7. Konoike Constr. Co., ASBCA No. 40910, 91-3 BCA ¶ 24,170 at 120,907.
8. *Id.* at 120,908.
9. Aim Constr., ASBCA No. 52540, 07-1 BCA ¶ 33,466 at 165,915; TLT Constr. Corp., ASBCA No. 53769, 02-2 BCA ¶ 31,969 at 157,912; CardioMetrix, ASBCA No. 50897, 97-2 BCA ¶ 29,319 at 145,787; G. Bliudzius Contractors, Inc., ASBCA No. 42365, 92-1 BCA ¶ 24,605 at 122,751.
10. *TLT Constr.*, 02-2 BCA at 157,912.
11. Coast Canvas Prods. II Co., ASBCA No. 31699, 87-1 BCA ¶ 19,678 at 99,609; Sundt Constr., Inc., ASBCA No. 56293, 09-1 BCA ¶ 34,084 at 168,518.
12. *Coast Canvas*, 87-1 BCA at 99,609.
13. *Sundt Constr., Inc.*, 09-1 BCA at 168,518.
14. Record Steel & Constr., Inc. v. United States, 62 Fed. Cl. 508, 520 (2004).
15. *Id.* at 519–20.
16. BLR Grp. of Am. Inc. v. United States, 84 Fed. Cl. 634, 646 (2008).
17. *Id.* at 637.
18. *Id.* at 640.
19. *Id.* at 642.
20. Todd Constr. L.P. v. United States, 85 Fed. Cl. 34, 45 (2008) (*Todd I*); Todd Constr., L.P. v. United States, 88 Fed. Cl. 235 (2009) (*Todd II*); Todd Constr., L.P. v. United States, 94 Fed. Cl.

100 (2010) (*Todd III*); Todd Constr., L.P. v. United States, 656 F.3d 1306 (Fed. Cir. 2011) (*Todd IV*).
21. *Todd I*, 85 Fed. Cl. at 45.
22. *Todd II*, 88 Fed. Cl. at 246.
23. *Id.* at 248.
24. *Todd III*, 94 Fed. Cl. at 116.
25. *Todd IV*, 656 F.3d at 1317.
26. Sundt Constr. Inc., ASBCA No. 56293, 09-1 BCA ¶ 34,084 at 168,518; Versar, Inc., ASBCA No. 56857, 10-1 BCA ¶ 34,437 at 169,959; Colonna's Shipyard Inc., ASBCA No. 56940, 10-2 BCA ¶ 34,494 at 170,140.
27. *Versar I*, 10-1 BCA at 169,959.
28. *Id.* at 169,959.
29. *Id.*
30. *Id.*
31. *Colonna's Shipyard*, 10-2 BCA at 170,141.
32. *Id.* at 170,139–40.
33. *Id.* at 170,140 (citations omitted).
34. Metag Insaat Ticaret A.S., ASBCA No. 58616, 13-1 BCA ¶ 35,454 at 173,862.
35. *Id.* at 173,861 (internal quotations omitted).
36. *Id.* at 173,862.
37. *Versar, Inc.*, 10-1 BCA at 169,957-58 (citing Dawkins Gen. Contractors & Supply, Inc., ASBCA No. 48535, 03-2 BCA ¶ 32,305 at 159,844 (collecting cases)).
38. *Id.* at 169,957–58.
39. *Id.* at 169,957–58.
40. *Id.* at 169,958.
41. *Metag*, 13-1 BCA ¶ 35,454 at 173,861.
42. *Id.* at 173,862.
43. Extreme Coatings, Inc. v. United States, No. 11-895C, 2012 WL 4747248, at *2 (Fed. Cl. Oct. 3, 2012).
44. *Id.* at *2.
45. *Id.* at *2–3.
46. *Id.* at *4–5.
47. GSC Constr., Inc. v. United States, No. 11-407C, 2012 WL 3031284, at *2 (Fed. Cl. July 24, 2012).
48. *Id.* at *1.
49. *Id.* at *3.
50. *Id.* at *3.
51. *Colonna's Shipyard*, 10-2 BCA at 170,140; *Versar*, 10-1 BCA ¶ at 169,959; *Coast Canvas*, 87-1 BCA at 99,609.
52. *Todd II*, 88 Fed. Cl. at 247.
53. *Id.* at 248.
54. Davis Grp., Inc. v. United States, No. 12-275C, 2012 WL 2686053, at *2–3 (Fed. Cl. July 6, 2012).
55. *See* 28 U.S.C. § 1491(a).
56. *Id.* at *2.
57. *Todd III*, 94 Fed. Cl. at 116.
58. *Id.* at 103.
59. *Id.* at 116.
60. *Id.*
61. *Todd IV*, 656 F.3d at 1317.
62. *Id.* at 1315–16.
63. *Id.* at 1316.
64. *Id.*
65. *Id.*
66. *Id.* at 1310.
67. *Id.* at 1316.
68. Versar, Inc., ASBCA No. 56857, 12-1 BCA ¶ 35,025 at 172,119.
69. *Id.* at 172,129.
70. *Id.* at 172,128–29 (citing *Todd IV*, 656 F.3d at 1316–1317). *See also* Jacqueline R. Sims LLC v. United States, No. 13–174C, 2014 WL 811411, at *10 (Fed. Cl. Feb. 25, 2014) (finding that the government did not breach the implied duty of good faith and fair dealing by allegedly producing inaccurate past performance evaluations because even though the contracts were unenforceable as written, the evidence did not demonstrate any bad faith in the government's evaluation of the contractor's past performance); *cf.* Kiewit-Turner v. Dep't of Veterans Affairs, CBCA No. 3450, 15-1 BCA ¶ 35,820 ("To show a violation of the duty of good faith and fair dealing, a party need not prove that the other party to a contract acted in bad faith.") (citing Metcalf Constr. Co. v. United States, 742 F.3d 984, 990 (Fed. Cir. 2014)).
71. GSC Constr. Inc., ASBCA No. 58747, 14-1 BCA ¶ 35,714.
72. *Id.* at 174,867–68.
73. *Id.* at 174,868 (emphasis added).