

## ARTICLES

# PAST PERFORMANCE AS AN EVALUATION FACTOR IN PUBLIC CONTRACT SOURCE SELECTION

WILLIAM W. GOODRICH, JR.\*

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\* Member, Arent Fox Kintner Plotkin & Kahn, PLLC, Washington, D.C.

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## INTRODUCTION

One of the major changes in recent memory affecting U.S. Government contractors has been the mandate for Federal agencies to accumulate "past performance information" on contractor performance, and to use that information as a mandatory comparative evaluation factor for award in nearly all competitively negotiated acquisitions.<sup>1</sup> As of January, 1999, end of contract performance reviews and the evaluation of that information in making source selection decisions are required for all contracts exceeding \$100,000.<sup>2</sup>

Contracting agencies have long been required to consider past performance information concerning an offeror in determining whether the offeror is qualified to perform the contract as a "responsible prospective contractor."<sup>3</sup> A responsible prospective contractor must have, at a minimum, adequate financial resources, the ability to comply with the delivery schedule, a satisfactory performance record, a satisfactory record of business integrity and ethics, the necessary organizational and administrative resources, sufficient production facilities, and must be otherwise qualified to receive an award.<sup>4</sup> However, responsibility determinations normally occur only after identifying the otherwise apparently successful offeror.<sup>5</sup> Responsibility determinations deal only with whether the offeror's past efforts have been "satisfactory."<sup>6</sup> They do not involve comparisons of the relative capabilities of the competing offerors based on past work efforts completed for government or commercial customers.<sup>7</sup> The Office of Federal Procurement Policy's ("OFPP") initiatives concerning contractor past performance have not

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1. Federal Acquisition Regulation ("FAR") 48 C.F.R. § 15.304(c)(3) (1997), as amended by 62 Fed. Reg. 51,236 (1997) (requiring past performance as an evaluation factor); 48 C.F.R. § 42.1502(a) (1997) (mandating an accumulation of contractor performance information).

2. See 48 C.F.R. § 15.304(c)(2) (1997). According to the time-table set forth in the Federal Acquisition Regulation ("FAR"), as of January 1, 1998, collection of past performance information became mandatory for contracts exceeding \$100,000.

3. See 48 C.F.R. § 9.101 (1997) (defining "responsible prospective contractor" as a contractor that comports with the standards set forth in section 9.104).

4. See *id.* § 9.104-1.

5. See *id.* § 9.105-1(b)(1) (stating that there is an exception for negotiated contracts, especially those involving research and development).

6. See *id.* § 9.104-1(c).

7. See *id.* § 15.305(a)(2).

supplanted responsibility determinations. Rather, they have incorporated past performance considerations in the comparative process of proposal evaluation in the source selection process as an original matter.<sup>8</sup>

With the best of intentions, OFPP is leading executive agencies toward government-wide implementation of its policy pronouncements concerning past performance. OFPP's purpose has been simply stated: "[T]o further the exercise of good business judgment and improve contractor performance."<sup>9</sup> Yet, in the author's view, implementation of these policies creates risks that should be identified. Chief among the author's concerns are: (1) the potential for *de facto* debarment of contractors, particularly small businesses, as a result of unfavorable past information accumulated in decentralized databases; (2) the potential for undermining the statutory requirement for full and open competition<sup>10</sup> as a result of the intensely subjective nature of contractor performance evaluations; and (3) a certain potential for unjust retaliation against contractors who choose to pursue legitimate requests for equitable adjustment or claims.

The potential for *de facto* debarment arises from a number of converging factors. Among these are the highly informal nature of routine contractor performance evaluations,<sup>11</sup> OFPP's stated policy objective that past performance should be a heavily weighted award factor for all new contracts of any size,<sup>12</sup> a sharply limited standard of review in the General Accounting Office ("GAO") and in the courts,<sup>13</sup> and GAO's unwillingness in the cases decided thus far to question the validity of the underlying past performance information that agency procurement officials must utilize in making their many source selection decisions.<sup>14</sup>

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8. See *id.* § 15.305(a)(2).

9. Past Performance Information, OFPP Letter No. 92-5, 58 Fed. Reg. 3573, 3575, ¶ 1 (1993).

10. See 10 U.S.C. § 2304(a)(1)(A) (1994) (providing that except in limited cases, an agency head who conducts a procurement for property or services must use competitive procedures to promote "full and open competition"); 41 U.S.C. § 253(a)(1)(A) (1994) (same); FAR, 48 C.F.R. § 6.101 (1997) (prescribing the policy and procedures that should be employed to foster "full and open competition").

11. See *infra* Part I.C (explaining the procedures required by the FAR for communications with offerors regarding past performance).

12. See *infra* Part I.D (noting that the OFPP Guidebook's provisions were designed to ensure the meaningful consideration of past performance evaluation as a selection criterion for an award).

13. See *infra* Part III.A.4 (quoting the controlling legal standards of review set forth by GAO in *Wind Gap Knitwear*, Comp. Gen. B-261045, 95-2 CPD ¶ 124 (1995)).

14. See *infra* Part III.A.16.b (discussing the limited success those challenging adverse past performance ratings have experienced).

The potential for undermining full and open competition arises from the obvious opportunity these fundamentally new practices create for government personnel to affect future source selection decisions. Through reference check replies,<sup>15</sup> past performance questionnaire responses,<sup>16</sup> and highly subjective contractor performance assessments placed in past performance databases,<sup>17</sup> government personnel can now have a profound impact upon the outcomes of contract awards, both in their own agencies and in others. The potential for misuse becomes more apparent when one observes GAO's liberal acceptance of past performance/cost tradeoffs,<sup>18</sup> its extreme deference to agency point scoring of past performance evaluation criteria,<sup>19</sup> its unwillingness to require procuring agencies to check all references provided by offerors in their proposals,<sup>20</sup> and its refusal to look behind the written record to test the validity of the past performance information itself.<sup>21</sup> Also somewhat troublesome in terms of undermining competition is the very concept of an evaluation scheme which envisions a "tradeoff" between past performance and cost.<sup>22</sup>

The concern regarding retaliation for a contractor submitting equitable adjustment requests and claims derives initially from OFPP's guidance that past performance reports should consider contract change proposals.<sup>23</sup> Further, no provision is made for excluding such information from past performance files or databases while disputes are resolved through the contract appeals process.<sup>24</sup>

Government officials are presumed to have acted properly and in

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15. See *infra* Part III.A.8 (addressing the issue of whether GAO requires evaluators to check references supplied by the offeror in a proposal).

16. See *infra* Part III.A.9 (stating that "GAO does not object to the use of past performance questionnaires by agencies in conducting source selections").

17. See *infra* Parts II.A-E, III.A.14 (discussing agencies' efforts to compile usable past performance information and limitations which apply to agencies' uses of contractor performance information databases).

18. See *infra* Part III.A.5 (stating that past performance and cost trade-off must be reasonable and consistent with stated evaluation criteria).

19. See *infra* Part III.A.7 (describing a disturbing case in which GAO upheld a seemingly arbitrary point scoring method and citing another reported case where GAO felt the point scoring system was used unreasonably).

20. See *infra* Part III.A.8 ("GAO has made it clear that the agency has no obligation to check all references provided by an offeror.").

21. See *infra* Part III.A.16.b (arguing that no challenger to its own past performance rating has a real prospect of successful rebuttal because GAO seems uninterested in looking behind an evaluation write-up to examine the legitimacy of the evaluator's information).

22. See *infra* Part III.A.5 (stating that GAO again has resorted to conventional principles in judging whether a superior past performance rating will overcome a competitor's price advantage).

23. See *infra* Part I.D (stating that guidelines suggest that agencies consider contract change proposals among other factors).

24. See *infra* Part I.D (describing OFPP guidelines).

accord with the applicable laws and regulations.<sup>25</sup> That presumption only may compound the problem. How can an offeror be assured that the government's files or databases contain only correct and objectively presented past performance information? If an offeror becomes aware of erroneous information, what can be done about it?

The first objective of this Article is to summarize the law as it currently exists in the area of past performance. The second and more important objective is to offer observations—and a word of caution—concerning the direction in which the past performance initiative could take the competitive procurement system. This Article begins by surveying the applicable OFPP guidance, statutory requirements, and applicable provisions of the FAR.<sup>26</sup> It then discusses agencies' efforts to compile past performance data.<sup>27</sup> Next, this Article considers the emerging principles of past performance law as enunciated in the relevant decisions.<sup>28</sup> The Article then considers, in detail, those relatively few decisions thus far where GAO and one U.S. Court of Appeals have ruled in favor of an offeror challenging a government source selection decision based upon problems in the agency's evaluation of past performance information.<sup>29</sup> Finally, this Article proposes a modest revision to the FAR to provide contractors with a more meaningful opportunity to correct inaccurate or unfair reports of past performance through Alternative Dispute Resolution.<sup>30</sup>

## I. OFPP POLICY LETTER 92-5 AND OTHER STATUTORY AND FAR REQUIREMENTS

### A. *OFPP's Past Performance Initiatives*

On January 11, 1993, OFPP issued Policy Letter No. 92-5, entitled "Past Performance Information."<sup>31</sup> OFPP Policy Letter 92-5 first announced the phased implementation of two related requirements: (1) that executive agencies prepare contractor performance

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25. See *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."); *Petrelle v. Weirton Steel Corp.*, 953 F.2d 148, 153 (4th Cir. 1991) ("It has long been recognized that public officials are accredited with a presumption of regularity.").

26. See *infra* Part I.

27. See *infra* Part II.

28. See *infra* Part III.

29. See *infra* Part III.B. Currently, there are twenty-four such decisions, twenty-three of which were considered by GAO and one by the U.S. Court of Appeals for the Eleventh Circuit.

30. See *infra* Part IV.

31. 58 Fed. Reg. 3573 (1993).

evaluations on all contracts exceeding \$100,000, and (2) that past performance be utilized as an evaluation factor for award in solicitations for all competitively-awarded negotiated contracts expected to exceed \$100,000.<sup>32</sup>

OFPP believes that “[a] contractor’s past performance record is a key indicator for predicting future performance.”<sup>33</sup> OFPP has set up specific guidelines for each of the Federal Government Agencies to follow in conducting their evaluations of offerors and determining which offeror should receive the award of the contract.<sup>34</sup>

Agencies are to notify contractors of their past performance evaluations at the time they are completed and to provide contractors with a minimum of thirty days notice to respond to any evaluation.<sup>35</sup> The contractor’s response, if any, must be included with the evaluation itself.<sup>36</sup> Past performance information may be obtained from the contracting agency, from other government agencies, and from private firms.<sup>37</sup>

Concerning the *use* of past performance information, OFPP states as follows:

(8) Using Past Performance Information. Past performance information *should be used to assess risk*. Each performance

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32. See *id.* OFPP defines “Past Performance Information” as:

[R]elevant information regarding a contractor’s actions under previously awarded contracts. It includes the contractor’s record of conforming to specifications and to standards of good workmanship; the contractor’s record of containing and forecasting costs on any previously performed cost reimbursable contracts; the contractor’s adherence to contract schedules, including the administrative aspects of performance; the contractor’s history for reasonable and cooperative behavior and commitment to customer satisfaction; and generally, the contractor’s business-like concern for the interest of the customer.

*Id.* at 3575.

33. *Id.*

34. See *id.* According to OFPP, Executive Agencies shall:

- a. Prepare evaluations of contractors’ performance on all new contracts over \$100,000. Evaluations shall be made during contract performance . . . at the time the work under the contract is completed.
- b. Use past performance information in making responsibility determinations in both sealed bid and competitively negotiated procurements . . . .
- c. Specify past performance as an evaluation factor in solicitations for offers for all competitively negotiated contracts expected to exceed \$100,000 except where the contracting office determines that such action is not appropriate. Such determinations shall be in writing and included in the contract file. As an evaluation factor, past performance should be used to assess the relative capabilities of competing offerors and to help assure greatest value source selections.
- d. Allow newly established firms to compete for contracts even though they lack a history of past performance.

*Id.*

35. See *id.*

36. See *id.*

37. See *id.* at 3576.

evaluation and risk assessment should consider the number and severity of a contractor's problems, the effectiveness of corrective actions taken, and the contractor's overall work record. The assessment of performance risk should consider the relative merits of the contractor's prior experience and performance as compared to that of other competing offerors.<sup>38</sup>

OFPP's answers to public comments submitted in response to its proposed Policy Letter<sup>39</sup> addressed the concerns of some agencies that the use of past performance information in source selections could lead to *de facto* debarment in individual cases. OFPP, however, chose to avoid the issue.<sup>40</sup>

### B. *Federal Acquisition Streamlining Act of 1994*

Subsequent to Policy Letter 92-5, Congress addressed the issue of contractor past performance information in Section 1091 of the Federal Acquisition Streamlining Act of 1994 ("FASA").<sup>41</sup> FASA amended Section 2 of the Office of Federal Procurement Policy Act to require OFPP to establish policies and procedures concerning past performance.<sup>42</sup> Congress found that "[p]ast contract performance of an offeror is one of the relevant factors" that should be considered in contract award decisions, and that "[i]t is appropriate for a contracting official to consider past contract performance of an offeror as an indicator of the likelihood that the offeror will successfully perform a contract to be awarded by that official."<sup>43</sup> Congress explicitly required that offerors "be afforded an opportunity to submit relevant information on past contract performance," that this information be considered, and as for offerors with no past performance information, that such contractors "not be evaluated favorably or unfavorably on the factor of past contract performance."<sup>44</sup>

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38. *Id.* (emphasis added).

39. 56 Fed. Reg. 63,988 (1991).

40. See Past Performance Information, OFPP Letter No. 92-5, 58 Fed. Reg. 3573, 3574 (1993). OFPP stated only that:

[T]he Policy Letter is not intended to supplant contracting officials' judgments in initiating or conducting debarment and suspension proceedings under FAR 9.4. Even though P[ast] P[erformance] I[nformation] may be used in debarment or suspension proceedings, the Policy Letter does not waive or change any of the due process requirements presently provided with suspension and debarment proceedings . . . .

*Id.*

41. Pub. L. No. 103-355, 108 Stat. 3243, 3272 (codified at 41 U.S.C. § 405 (1994)).

42. 41 U.S.C. § 401(14) (1994).

43. Pub. L. No. 103-355, § 1091(b)(1), 108 Stat. 3272, 3272 (1994).

44. § 1091(b)(2)(C-D), 108 Stat. at 3272-73 (adding 41 U.S.C. § 405(j)).



### C. FAR Coverage of Past Performance Information

The FAR contains four basic requirements concerning accumulation of past performance information and its use in negotiated acquisitions.<sup>45</sup> First, FAR § 15.304(c)(2) mandates that in nearly all cases, past performance shall be an evaluation factor in each competitively negotiated acquisition expected to exceed \$1 million, and, on or after January 1, 1999, in all such acquisitions expected to exceed \$100,000.<sup>46</sup>

Second, FAR § 15.305(a)(2)(ii) requires that solicitations provide offerors the opportunity to identify all types of contracts, including Federal, state, and local government contracts and private contracts, which have a bearing on the contractor's past performance.<sup>47</sup> At the contracting officer's discretion, offerors may be invited to comment on problems encountered in these contracts and the offeror's corrective actions.<sup>48</sup> FAR § 15.305(a)(2)(iv) dictates that if a firm has no record of relevant past performance or if there is no past performance information available for the offeror, "the offeror may not be evaluated favorably or unfavorably on past performance."<sup>49</sup>

Third, FAR § 15.306 addresses communications with offerors concerning past performance at various stages of the negotiation process. Upon receipt of initial proposals, "clarifications" may be obtained pertaining to the "relevance" of the offeror's past performance, and even with respect to adverse past performance information on which the offeror has had no prior opportunity to

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45. All references in this section to FAR Part 15 ("Contracting by Negotiation") are to the rules as set forth in the "FAR Part 15 Rewrite," published in final form at 62 Fed. Reg. 51,224 (1997). The FAR Part 15 Rewrite applies to all solicitations issued on or after October 10, 1997. See *id.* The reader should note that many of the GAO and court decisions surveyed in this Article were issued under the previous version of FAR Part 15. In discussing the case law throughout the Article, the author endeavors to note those few instances where the new version of FAR Part 15 may lead to results contrary to past decisions.

46. See FAR, 48 C.F.R. § 15.304(c)(2) (1997). Prior to the FAR Part 15 Rewrite, milestones were established requiring past performance to be an evaluation factor on solicitations with an estimated value of \$1 million issued on or after July 1, 1995; \$500,000 issued on or after July 1, 1997; and \$100,000 issued on or after January 1, 1999. See 48 C.F.R. § 15.605(b)(1) (1996). In a December 1996 Memorandum, however, OFPP Administrator Kelman temporarily eliminated the \$500,000 milestone. See Steve Kelman, *Memorandum for Agency Senior Procurement Executives and the Deputy Under Secretary of Defense (Acquisition Reform)* (Dec. 18, 1996) <[http://www.arnet.gov/References/Policy\\_Letters/ppersus.html](http://www.arnet.gov/References/Policy_Letters/ppersus.html)>. In addition, DOD's Director of Defense Procurement has issued a "class deviation" from the FAR, providing that for systems and operations support contracts, collection of past performance information and its use in the competitive negotiation process is required only for contracts exceeding or expected to exceed \$5 million. See *Spector Issues Class Deviation on Collecting, Using Contractors' Past Performance Data*, 69 Fed. Cont. Rep. (BNA) 26 (Jan. 12, 1998).

47. See FAR, 48 C.F.R. § 15.305(a)(2)(ii) (1997).

48. See *id.*

49. *Id.* § 15.305(a)(2)(iv).

comment.<sup>50</sup> Such clarifications do not affect the government's right to award the contract based on the initial proposals without formal negotiations.<sup>51</sup> Likewise, prior to establishing a "competitive range" of those offerors with the most highly rated proposals,<sup>52</sup> the government must communicate with offerors concerning their past performance information when the offeror has had no prior opportunity to comment on the adverse information and when that information "is the determining factor preventing them from being placed in the competitive range."<sup>53</sup> After establishing the competitive range, the government must "indicate to, or discuss with, each offeror . . . significant weaknesses, deficiencies, and other aspects of its proposal [including past performance] that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award."<sup>54</sup> Regardless of the stage of the acquisition process, the names of individuals providing past performance information should not be disclosed to the affected offeror.<sup>55</sup>

Finally, FAR Subpart 42.15 sets out the rules for compiling and maintaining contractor performance information based upon end-of-contract routine reviews. FAR § 42.1502(a) specifies a time-table for preparing evaluations of contractor performance.<sup>56</sup> Contract agencies must complete such performance evaluations for each contract exceeding \$1 million by July 1, 1995, \$500,000 beginning July 1, 1996, and \$100,000 beginning January 1, 1998, regardless of the date of contract award.<sup>57</sup> The agency must complete these

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50. See *id.* § 15.306.

51. See *id.* § 15.306(a)(2). The term "Negotiations" denotes "exchanges . . . between the Government and offerors . . . undertaken with the intent of allowing the offeror to revise its proposal." *Id.* § 15.306(d).

52. See *id.* § 15.306(c)(1).

53. *Id.* § 15.306(b)(1)(i).

54. *Id.* § 15.306(d)(3). While this language suggests that the contracting officer could, in his or her discretion, decline to discuss adverse past performance information where such information could not be "altered or explained" in a way that would materially affect the offeror's evaluation, the prefatory comments to the final version of the FAR Part 15 Rewrite suggest the contrary. These comments state, without equivocation, that the rules "[require] that all adverse past performance information be brought to the offeror's attention during discussions, if the offeror is placed in the competitive range." 62 Fed. Reg. at 51,225 (1997). Yet in another place, the comments state that offerors admitted to the competitive range are entitled to notice of adverse past performance information only where the offeror has not previously had an opportunity to comment, for example, in the offeror's proposal (for known past performance problems), or in responses to routine past performance reports maintained by agencies pursuant to FAR, 48 C.F.R. § 42.15. See 62 Fed. Reg. 51,228 (1997).

55. See FAR, 48 C.F.R. § 15.306(e)(4) (1997) (reporting that Government personnel involved in the acquisition may not reveal the names of references providing information about an offeror's performance).

56. See *id.* § 42.1502(a).

57. See *id.*

evaluations when the contract work is completed.<sup>58</sup>

The procedure is intended to be fairly simple. Under FAR § 42.1503(a), the contracting agency seeks input from the technical office, the contracting office, and when appropriate, from end users.<sup>59</sup> The contracting agency must provide past performance evaluations to the contractor "as soon as practicable after completion of the evaluation," and contractors are entitled to a minimum of thirty days within which to offer comments, rebuttal, or additional information.<sup>60</sup> An agency review at a level above the contracting officer is required.<sup>61</sup> The resultant evaluations and contractor comments "may be used to support future award decisions,"<sup>62</sup> and for that reason should be marked "Source Selection Information."<sup>63</sup> Agencies are expected to share past performance information with each other through interviews and/or by sending copies of evaluations and contractor comments to the requesting agency.<sup>64</sup> Contracting agencies are not to retain past performance information for longer than three years after completion of contract performance.<sup>65</sup>

References to past performance information and its use in award decisions appear in other parts of the FAR as well. FAR § 12.206, entitled "Use of Past Performance," states that past performance "should be an important element of every evaluation and contract award for commercial items."<sup>66</sup> FAR § 13.106-2(b) provides that contracting officers may at their discretion evaluate past performance on purchases exceeding the "micro-purchase" threshold.<sup>67</sup> In this

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58. See *id.* These rules do not apply to acquisitions from Federal Prison Industries, Inc. or from agencies involving the blind or severely disabled. Furthermore, past performance evaluations for construction and architect/engineer contracts are handled under other sections of the FAR. See FAR, 48 C.F.R. § 42.1502(b) (1997) (referring to 48 C.F.R. Part 8, subparts 6.6 and 8.7 regarding acquisitions from Federal Prison Industries, Inc. and non-profit agencies employing people who are blind or severely disabled, respectively).

59. See *id.* § 42.1503(a). End users are the Government agency personnel whose requirements are satisfied by the acquisition in question. See, e.g., AAC Assoc., Inc., Comp. Gen. B-274928, 97-1 CPD ¶ 55 (1997) (reporting that end users were those personnel actually supported by local area network and communications systems being procured); Saft America, Inc., Comp. Gen. B-270111, 96-1 CPD ¶ 134 (1996) (noting that Army soldiers were "end users" of lithium batteries procured for military applications).

60. See *id.* § 42.1503(b).

61. See *id.*

62. *Id.*

63. See *id.*

64. See *id.* § 42.1503(c).

65. See *id.* § 42.1503(e). OFPP's December 18, 1996, *Memorandum for Agency Senior Procurement Executives and the Deputy Under Secretary of Defense (Acquisition Reform)* also temporarily suspended the requirement to perform post-performance/past performance evaluations on contracts of less than \$1 million. See Kelman, *supra* note 46.

66. FAR, 48 C.F.R. § 12.206 (1997).

67. See *id.* § 13.106-2(b)(1).

optional context, the past performance evaluation does not require the maintenance of a formal database and may be based on "such information as the contracting officer's knowledge of and previous experience with the item or service being purchased, customer surveys, or other reasonable basis."<sup>68</sup> Under FAR § 16.505(b), applicable to orders under multiple award contracts, contracting officers "should consider factors such as past performance on earlier tasks under the multiple award contract, [and] quality of deliverables"<sup>69</sup> in determining who will receive the order.<sup>70</sup>

#### D. OFPP Guide to Best Practices for Past Performance

OFPP has undertaken considerable efforts to assist agencies in effectively implementing the statutory and FAR requirements relating to past performance information. In May 1995, OFPP issued an "interim edition" of "A Guide to Best Practices for Past Performance" (the "OFPP Guidebook").<sup>71</sup>

The OFPP Guidebook emphasizes that the techniques and practices it discusses are "not to be viewed as mandatory regulatory guidance and should not form the basis for Inspector General or other audit reviews; instead they should be viewed as techniques that OFPP has found are useful in recording and using contractor past performance in the contractor selection process."<sup>72</sup> However, the OFPP Guidebook also states that "[t]he use of past performance as an evaluation factor in the contract award process makes the awards 'best value' selections [and] . . . enables agencies to better predict the quality of, and customer satisfaction with, future work. It also provides the contractors with a powerful incentive to strive for excellence."<sup>73</sup>

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68. *Id.*

69. *Id.*

70. § 16.505(b). The Department of Defense FAR Supplement goes a step further. It requires contracting officers to consider past performance in complying with the clause at FAR § 52.219-8, "Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns," when awarding a contract that will include such a clause. See Defense Federal Acquisition Regulation Supplement, 48 C.F.R. § 215.608(a)(2) (1997).

71. OFFICE OF FEDERAL PROCUREMENT POLICY, A GUIDE TO BEST PRACTICES FOR PAST PERFORMANCE (Interim ed. May 1995) [hereinafter OFPP GUIDEBOOK]. This document is available from the Office of Federal Procurement Policy, and also may be downloaded from the Internet at <<http://www-far.npr.gov/BestP/BestPract.html>>.

72. Steven Kelman, OFPP Administrator, *Forward to OFPP GUIDEBOOK*, *supra* note 71.

73. *Id.* at 3. OFPP Administrator Kelman's Forward further explains that:

Industry and the government must move from an adversarial, litigious relationship to a relationship based on partnership. Government suppliers must deliver the same high quality of service to government customers as they deliver to their best commercial customers. The government will, in turn, reward those contractors that deliver quality service by giving them credit for their good performance when making

The OFPP Guidebook states that “[t]he key to the long term success [of the past performance initiative] . . . is the establishment, in each agency, of a past performance information system to systematically record on every contract exceeding \$100,000 contractor performance”<sup>74</sup> in very specific areas.<sup>75</sup> Furthermore, the OFPP Guidebook explains that:

[t]he objective of Policy Letter 92-5 and FAR Subpart 42.15 is to have a clear and concise evaluation of a contractor’s past performance on every contract that is readily available in the file, or in a database, and can be shared with a requesting source selection team with a minimum of delay.<sup>76</sup>

The OFPP Guidebook expresses the hope that as agencies implement these requirements and observance of past performance initiatives becomes common throughout government, “solicitations will need only to ask offerors to provide a list, in the proposal, of past contracts they have performed that were similar to the potential contract.”<sup>77</sup>

Chapters Two through Six of the OFPP Guidebook enumerate perceived “best practices” in several areas: “Basic Considerations” (Chapter Two); “Solicitation Language for Using Past Performance” (Chapter Three); “Obtaining Information on a Contractor’s Past Performance” (Chapter Four); “Rating Past Performance” (Chapter Five); and “Contractor Performance Reports” (Chapter Six). Appendix One provides agency contacts and Appendix Two provides “sample questionnaires” for agency use in obtaining past performance information as a part of the award process.<sup>78</sup>

Specifically, Chapter Two of the OFPP Guidebook emphasizes the inherent difference between utilizing past performance as an

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selections for future contracts.

*Id.*

74. *Id.* at 7.

75. *See id.* at 7-8. These areas include:

[1] [c]onformance to specifications and to standards of good workmanship; [2] [c]ontainment and forecasting of costs; [3] [a]dherence to contract schedules, including the administrative aspects of performance; [4] [h]istory of reasonable and cooperative behavior and overall business-like concern for the interests of the customer; and [5] [s]ervice to the end user of the product or service.

*Id.*

76. *Id.* at 8.

77. *Id.* at 8. The Guidebook continues:

[t]he need of source selection boards to conduct extensive interviews . . . or conduct other investigations to verify an offeror’s past performance, should be greatly reduced. Because the contractor will have been offered the opportunity to comment on the ratings as they were prepared, further comment in the proposal, or during discussions, if held, will usually not be necessary.

*Id.* at 9.

78. *See id.* at 1 (providing Table of Contents).

evaluation factor for award versus a "responsibility criterion."<sup>79</sup> When used as an evaluation factor for award, past performance "should be included in the solicitation as a factor against which the offerors' *relative* rankings will be compared."<sup>80</sup> On the other hand, when past performance is expressed as a minimum requirement that all firms must meet, with no comparison of the relative merits of the evaluation, past performance is "considered part of the responsibility determination."<sup>81</sup> In the case of a small business, this determination is subject to the Small Business Administration ("SBA") review pursuant to the Certificate of Competency program.<sup>82</sup>

OFPP's Guidebook, Chapter Two, continues by noting that it is "best" to set forth past performance as a "stand-alone" factor, not to integrate consideration of past performance with the other non-price factors.<sup>83</sup> The concern is that the impact of the past performance factor otherwise can be lost.<sup>84</sup>

Furthermore, evaluation factors for award should include six "general considerations: Quality of product or service, timeliness of performance, cost control, business practices, customer (end user) satisfaction, and key personnel past performance."<sup>85</sup> For new companies that have no relevant company experience, "it will be the quality of the past performance of their key management personnel that will indicate the risk of good performance and become the basis of the past performance evaluation."<sup>86</sup>

In addition, Chapter Two of the OFPP Guidebook addresses the particular problem of the "relevancy" of the available past performance information. Agencies are told that "the issue of relevancy should play a key role" and that "[i]t is inefficient [sic] to consider data just because it is available."<sup>87</sup> However, the Guidebook does not suggest how "relevancy" is to be determined. Where subcontractors will perform critical aspects of the contract, subcontractor past performance also should be evaluated "to determine the overall risk of the prime contractor performing the contract."<sup>88</sup> Subfactors under the major evaluation factor of "past performance" include "those actions of a contractor that can be

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79. *See id.* at 11.

80. *Id.* at 12 (emphasis added).

81. *Id.*

82. *See id.*

83. *See id.*

84. *See id.* at 12.

85. *Id.* at 13.

86. *Id.* at 14.

87. *Id.*

88. *Id.*

reasonably asked of a reference.”<sup>89</sup> Examples of subfactors and corresponding questions for references are:

[1] Management responsiveness—Is the offeror cooperative, business-like and concerned with the interests of the customer?

[2] Contract change proposals—What is the contractor’s history of contract change proposals? This includes changes that lower the overall cost or improve performance—timely and accurate proposals for equitable adjustments—changes that have been withdrawn or dismissed as invalid.

[3] Substitution of key personnel—What is the contractor’s history on changing the key personnel proposed in the offer?

[4] Emergency responsiveness—Has the offeror responded in a credible manner to emergency service requirements?

[5] Overall satisfaction—Would you do business with this contractor again, if you had a choice?<sup>90</sup>

In weighing past performance as an evaluation factor for an award, the OFPP Guidebook states that it should be ranked “to ensure that it is meaningfully considered.”<sup>91</sup> Specifically, OFPP recommends that past performance be “at least equal in significance to any other non-cost evaluation factor.”<sup>92</sup> In a numeric rating system, past performance should be weighted at twenty-five percent or more.<sup>93</sup> OFPP reports that the Labor Department has in some cases rated past performances at forty to fifty percent, and that the Air Force “intends to make past performance equal to the color code which indicates relative scores in price, technical and management.”<sup>94</sup>

Chapter Three of the OFPP Guidebook provides specific suggestions for Sections L (Instructions to Offerors) and M (Evaluation Factors for Award) in solicitations as they relate to past performance information.<sup>95</sup> One of the most important points is that contractors should not be allowed to “cherry pick,” or rather, to put forward only their most favorable references.<sup>96</sup> Thus, Section L should ask only for a list of the previous contracts and contact points.<sup>97</sup> The solicitation should contain a copy of the questionnaire

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89. *Id.* (explaining that the idea is that “[t]he subfactors in the solicitation will be the basic questions on a questionnaire to use for interviewing references or reviewing any written evaluations provided by the references”).

90. *Id.* at 16.

91. *Id.*

92. *Id.*

93. *See id.*

94. *Id.* at 17.

95. *See id.* at 19-25.

96. *See id.* at 19.

97. *See id.* at 19-20.

agency evaluators will use.<sup>98</sup> Section M should "stipulate the percentage score, or relative importance, that past performance will receive"<sup>99</sup> and how offerors having "no" past performance will be evaluated.<sup>100</sup>

In addition, when addressing the use of previously-completed contractor performance evaluations compiled by agencies in making source selection decisions, OFPP Guidebook Chapter Three contains a problematic suggestion concerning adverse information. "Since contractors will already have had a chance to rebut evaluations and obtain review at a level above the contracting officers, and such information will be included in the file, the source selection team would rarely need to solicit additional information from the references."<sup>101</sup>

OFPP Guidebook Chapter Three also provides sample language for Sections J (List of Attachments), L, and M. Section L (Instructions to Offerors) includes draft language to the effect that newly formed offerors "without prior contracts should list contracts and subcontracts . . . for all key personnel."<sup>102</sup> Offerors are asked to list only the key identifying information concerning the contract.<sup>103</sup>

Specific language is also set forth in a specimen of Section M. This example describes a hypothetical point-scored evaluation scheme that rates past performances at thirty-five percent of the non-cost evaluation factors.<sup>104</sup> These factors include enumerated subfactors in generally descending order together with narrative description of what is required to receive an "excellent" rating under each subfactor.<sup>105</sup>

Chapter Four, entitled "Obtaining Information on a Contractor's Past Performance," discusses reference checks, the use of agency evaluations completed on previous contracts, and questionnaires and survey forms.<sup>106</sup> OFPP emphasizes that when conducting reference check interviews, all evaluation team members should ask the questions to potential contractors exactly as they appear on the

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98. *See id.* at 20.

99. *Id.*

100. *See id.*

101. *Id.* at 31.

102. *Id.* at 22.

103. *See id.* (stating that the pertinent information in a contract would include the name of contracting activity, contract number, type, dollar value, nature of work, contracting officer and telephone, program manager and telephone, administrative contracting officer, and major subcontractors).

104. *See id.* at 23-24.

105. *See id.*

106. *See id.* at 27-33.



questionnaire.<sup>107</sup> "At least two references should be contacted on each previous contract effort."<sup>108</sup> Specific warnings are given to the effect that references have a natural inclination "to give an upward bias to ratings."<sup>109</sup> Hence, evaluators must ask enough questions to differentiate between a "good" and an "excellent" performance.<sup>110</sup>

Based on an informal interview with OFPP Deputy Associate Administrator David Muzio on March 27, 1997, it is evident that OFPP is concerned that a species of "inflation" could easily affect such ratings.<sup>111</sup> OFPP's hope is that when a contractor has met all aspects of the contract requirements, the contracting agency will assign an average rating.

Chapter Four concludes with a paragraph addressing "Discussions on Past Performance."<sup>112</sup> The OFPP Guidebook emphasizes that many awards are made without discussions. When discussions are conducted, however, the source selection team must give offerors the opportunity to discuss reference information on which the offeror "has not had a previous opportunity to comment."<sup>113</sup> The Guidebook states that once contractor performance evaluations become commonly available throughout the Federal Government, discussions, if any, will need to be conducted only with respect to reference information obtained from state and local governments and private sector references.<sup>114</sup>

"Rating Past Performance" of contractors as a part of the award process is addressed in OFPP Guidebook Chapter Five.<sup>115</sup> OFPP emphasizes that the ratings are intended to assess "performance risk."<sup>116</sup> The final rating could be a color code, a number, or other means capable of indicating a *relative* ranking of proposals.<sup>117</sup> OFPP admits that a past performance rating "is not a precise mechanical process and will usually include some subjective judgment."<sup>118</sup>

OFPP explains that rarely should an offeror have "no" available past performance information.<sup>119</sup> "[O]n the rare occasion that no

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107. See *id.* at 28.

108. *Id.* at 29.

109. *Id.* at 30.

110. See *id.*

111. Interview by author and Tenley A. Carp, Esq. with David Muzio, OFPP Deputy Associate Administrator, in Washington, D.C. (May 27, 1997) [hereinafter Muzio Interview].

112. See OFPP GUIDEBOOK, *supra* note 71, at 33.

113. *Id.*

114. See *id.*

115. See *id.* at 35-36.

116. See *id.* at 35.

117. See *id.*

118. *Id.*

119. See *id.* at 36.

relevant experience exists within the offeror's organization, the offeror's lack of past performance should be treated as an unknown performance risk."<sup>120</sup> An "average score" is suggested as a means of providing such an offeror a "neutral" rating.<sup>121</sup> Again, the contracting agency should obtain past performance information regarding similar contracts previously handled by the offeror's key personnel and evaluate it accordingly.<sup>122</sup>

Finally, OFPP Guidebook Chapter Six addresses "Contractor Performance Reports"<sup>123</sup> as the method by which "each federal department and agency must develop a cost effective way to record and disseminate contractor performance information."<sup>124</sup> OFPP encourages "voluntary development of a uniform government-wide format."<sup>125</sup> A specimen on an interagency-developed report form is provided at Appendix Three as "one possible approach."<sup>126</sup> The one basic limitation is that "all rating systems be translatable into five basic ratings: excellent, good, fair, poor, and unsatisfactory."<sup>127</sup> There is also an exceptional rating titled "excellent plus."<sup>128</sup> Six areas for ratings are specified: quality, timeliness, cost control, business relations, customer satisfaction, and key personnel.<sup>129</sup>

Where the contractor wishes to submit a rebutting statement challenging the agency's Contractor Performance Report and an agreement cannot be reached on the rating, a review by at least one person ranked a level above the contracting officer is required.<sup>130</sup> The decision resulting from the review must be in writing and issued within fifteen days after receipt of the rebuttal statement.<sup>131</sup> Both the rebuttal statement and the decision on review must be attached to the performance evaluation report and provided to other agencies requesting a reference check.<sup>132</sup>

Contracting officials must place completed evaluations in the

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120. *Id.* (describing how a past performance might receive a "neutral" rating).

121. *See id.*

122. *See id.*

123. *See id.* at 37-43.

124. *Id.* at 37.

125. *Id.*

126. *Id.* at app. 3.

127. *See id.* at 37.

128. *See id.* According to an interview with OFPP Deputy Associate Administrator David Muzio on March 27, 1997, OFPP is considering the relative merits of the present recommendation—a five-tier rating system—versus a ten-point or ten-tier system. The purpose of moving to a ten-point scale would be to avoid a perceived risk of rating inflation. *See Muzio Interview, supra* note 111.

129. *See* OFPP GUIDEBOOK, *supra* note 71, at 38-39.

130. *See id.* at 42.

131. *See id.*

132. *See id.*

contract file, in a separate file, or in a database where they are readily accessible.<sup>133</sup> The Guidebook reiterates that under FAR § 42.1503(b), contracting officials should mark contractor performance evaluations with "Source Selection Information" as they may be used to support future source selection decisions.<sup>134</sup>

Appendices attached to the OFPP Guidebook provide agencies with example forms of performance evaluations for completed contracts.<sup>135</sup> Also included with the Guidebook is a twenty-eight question "Business Management Past Performance Questionnaire" for use in collecting past performance information to be used in a competitive contract award process.<sup>136</sup>

## II. AGENCIES' EFFORTS TO COMPILE USABLE PAST PERFORMANCE INFORMATION

The Executive Branch Agencies have put forward a substantial effort to compile past performance information and to use it rationally in making source selection decisions. The most fully developed options, as of this writing, include those implemented by the Department of Defense, the Air Force, the Navy, the Defense Logistics Agency, the Environmental Protection Agency, and the National Institutes of Health.

### A. *Department of Defense*

In a Memorandum for Service Acquisition Executives, Commander in Chief Special Operations Command, and Directors of Defense Agencies, dated February 20, 1997, (the "February 1997 Memorandum"), Principal Under Secretary of Defense for Acquisition and Technology, R. Noel Longuemare stated that the Past Performance Coordinating Council (the "PPCC"), established by the Department of Defense ("DOD"), has determined that in accumulating contract performance information as specified by FAR Subpart 42.15, "neither a single standard system for collection of [past performance information] nor dollar thresholds, without regard to the nature of the specific business area or sector, are desirable."<sup>137</sup> DOD thus will pursue a decentralized approach to collecting this information. The DOD initiative is "to strive for a reasonable degree of uniformity of [past performance information],

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133. *See id.*

134. *See id.* at 42-43.

135. *See id.* at app. 2.

136. *See id.* at app. 3.

137. *See* 67 Fed. Cont. Rep. (BNA) 323 (Mar. 17, 1997).

within business sectors, to ensure fair and equitable treatment of all contractors."<sup>138</sup> The February 1997 Memorandum directed defense components to become an "Integrated Product Team" to "develop a uniform management approach to the use and collection of [past performance information], including 'a process for deciding how business areas are defined and how [past performance information] is to be collected and shared . . .'"<sup>139</sup>

During November, 1997, DOD's Undersecretary of Defense for Acquisition and Technology, Jacques S. Gansler, issued another memorandum (the "November 1997 Memorandum") formalizing DOD's policy for collection of contractor past performance information.<sup>140</sup> Information is to be collected by DOD components in different ways for different "key business sectors" and "unique business sectors."<sup>141</sup> For all types of businesses, the rating levels will be "exceptional, very good, satisfactory, marginal, and unsatisfactory."<sup>142</sup> In addition, the November 1997 Memorandum explained that contracting officials must provide a narrative discussion in past performance ratings to assist in determining relevance in future source selections.<sup>143</sup>

In July 1998, the Deputy Under Secretary of Defense (Acquisition and Reform) promulgated a draft "Guide to Collection and Use of Past Performance Information" (the "DOD Guidebook") for use by the entire DOD acquisition workforce, which "explains best practices for both use of past performance information during source selection and ongoing performance as well as collection of the information."<sup>144</sup> A "Past Performance Top Ten List" enumerates guiding principles for the collection and use of past performance information throughout DOD.<sup>145</sup> Key principles include that the narrative portion is the "most critical aspect" of a past performance assessment, that performance assessments are a combined responsibility of the contracting team and the customer, and that all past performance information should be verified with a second source.<sup>146</sup>

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138. *Id.*

139. *Id.*

140. *See Gansler Calls for Tailoring Collection of Contractor Performance Information by Sector*, 68 Fed. Cont. Rep. (BNA) 588, (Dec. 8, 1997).

141. *See id.*

142. *See id.*

143. *See id.*

144. Stan Soloway, *Foreward* to DEPARTMENT OF DEFENSE, A GUIDE TO COLLECTION AND USE OF PAST PERFORMANCE INFORMATION at ii (1998), available at <<http://www.acq.osd.mil/ar/#hot>> [hereinafter DOD Guidebook] (on file with author).

145. *See id.* at iv.

146. *See id.*

*B. Contractor Performance Assessment Reports or "CPARS"*

The Air Force<sup>147</sup> and the Navy<sup>148</sup> use a "Contractor Performance Assessment Reporting System" ("CPARS") to track contractor past performance information. At present, CPARS are limited to contracts for major weapon systems or service contracts valued in excess of \$5 million.<sup>149</sup> The Air Force CPARS reports assign the contractor an adjectival rating: red, yellow, green and blue, with blue being the best.<sup>150</sup>

*C. Defense Logistics Agency—"Automated Best Value Model"*

One computerized approach to evaluating contractor performance is the Defense Logistics Agency ("DLA") "automated best value model" ("ABVM") scoring system.<sup>151</sup> The ABVM compiles past performance data and converts it into a numeric score for each contractor, representing the average of the vendor's "delivery" score and "quality" score.<sup>152</sup> The delivery score is based on the vendor's delivery record during the twelve-month period ending sixty days prior to the date the score is posted.<sup>153</sup> These scores are made available to each vendor on an electronic bulletin board each month.<sup>154</sup> DLA encourages vendors to challenge the scores at any time, but preferably before the next monthly scores are posted because award decisions are based on the posted ABVM scores.<sup>155</sup>

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147. The Air Force CPARS was originally promulgated as a proposed rule at 53 Fed. Reg. 9455 (1988), which added 32 C.F.R. pt. 838, "Air Force Systems Command Construction Performance Assessment." See 53 Fed. Reg. 30,253 (1988) (final rule). Air Force CPARS was expanded to service contracts in a proposed rule. See 55 Fed. Reg. 9733 (1990). These regulations were withdrawn at 61 Fed. Reg. 4351 (1996), in view of a then-pending proposal to cover the subject matter in the Defense FAR Supplement. However, Air Force CPARS remains in use today. See DOD Guidebook, *supra* note 144, at 42 (Appendix I: Automated Past Performance Information Systems).

148. The Navy CPARS was implemented pursuant to an October 16, 1997 memorandum issued by the Office of the Assistant Secretary of the Navy for Research, Development and Acquisition. The document is available on the Internet at <<http://www.navsea.navy.mil/acquisition-reform/cpars1.htm>>.

149. See DOD Guidebook, *supra* note 144, at 42 (\$5,000,000 threshold). The coverage of weapons systems and service contracts is described in the Federal Register issuances cited in note 147.

150. See Teledyne Brown Engineering Comp. Gen., B-258078 *et al.*, 94-2 CPD 223 (1994) (describing the adjectival rating system). See also ECC International Corporation, Comp. Gen. B-277422 *et al.*, 98-1 CPD ¶ 45 (1997).

151. See DOD Guidebook, *supra* note 144, at 43.

152. See *id.* The ABVM program is fully explained at <<http://www.dsccl.dla.mil/Programs/abvm/index.html>>. The scoring methodology may be found at <<http://www.dscr.mid/procurement/abvm/ABVMnet1.html>>, found on an Internet site administered by DLA's Defense Supply Center Richmond.

153. Rotair Industries, Inc., Comp. Gen. B-276435.2, 97-2 CPD ¶ 17 at 2 n.1.

154. See <<http://www.dsccl.dla.mil/Programs/abvm/index.html>> (visited Jan. 1999).

155. See *id.* GAO has held that a contractor's failure to file any bid protest based upon perceived defects in an ABVM past performance evaluation before the due date for receipt of

#### *D. Environmental Protection Agency*

On September 16, 1998, the Environmental Protection Agency ("EPA") issued a proposed rule formalizing EPA's contractor evaluation process.<sup>156</sup> The proposal would revise EPA Acquisition Regulation ("EPAAR")<sup>157</sup> §§ 1509.170-172 through 1509.170-178, adding requirements for use of a specific Contractor Performance Report<sup>158</sup> for rating quality, cost control, timeliness of performance, and business relations on a "zero" to "five" scale.<sup>159</sup> A new contract clause, entitled "Contractor Performance Evaluation," would be inserted in all EPA contracts with estimated dollar values exceeding \$100,000.<sup>160</sup> EPA has borrowed liberally from the National Institutes of Health ("NIH") system,<sup>161</sup> including the actual NIH Contractor Performance Report form itself.<sup>162</sup> EPA will employ the NIH past performance database to record contractor past performance histories and to research contractor performance information for use in making source selection decisions.<sup>163</sup>

#### *E. National Institutes of Health*

The National Institutes of Health has implemented a computerized past performance database which allows NIH personnel to access questionnaires quickly and efficiently.<sup>164</sup> NIH Personnel prepare "Contractor Performance Reports" upon completion of each contract pursuant to FAR Subpart 42.15,<sup>165</sup> and the results are stored in an on-line database.<sup>166</sup> The NIH Contractor Performance Report requires the rater to assign numerical ratings and to provide narrative discussion addressing four areas: quality of product or service, cost control, timeliness of performance, and business relations.<sup>167</sup> The numerical ratings and related narrative are included in the system as is information indicating where the contractor's rebuttal, if any, may

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initial proposals for a new contract renders the protest untimely under GAO's bid protest rules. See 4 C.F.R. § 21.2(a)(1) (1998); Dayton-Grayton—Reconsideration, Comp. Gen. B-279553.3, 98-2 CPD ¶ 322, 1998 U.S. Comp. Gen. LEXIS (1998).

156. 63 Fed. Reg. 49,530 (1998).

157. 48 C.F.R. Ch. 15.

158. 63 Fed. Reg. at 49,534.

159. See *id.* at 49,534-35.

160. See *id.* at 49,531 (proposed 48 C.F.R. § 1509.170-1), 49,532 (proposed 48 C.F.R. § 1552.209-76).

161. See *infra* part II.E.

162. 63 Fed. Reg. at 49,534 (showing EPA's duplication of the NIH form).

163. See *id.* at 49,531 (proposed 48 C.F.R. § 1509.170-5(a)-(c)).

164. See generally *NIH Launches On-Line Contractor Performance Database, Invites Governmentwide Participation*, 67 Fed. Cont. Rep. (BNA) 77 (Jan. 27, 1997) (describing the NIH system).

165. See *id.*

166. See *id.*

167. See *id.*

be found, and information identifying the contractor's point of contact.<sup>168</sup>

### III. THE EMERGING CASE LAW

#### A. *Principles Guiding Decisions on Past Performance Problems*

The General Accounting Office has amassed a great deal of experience in deciding bid protests when protesters have raised issues related to past performance. Past performance issues played an important role in the outcome of approximately 500 GAO decisions issued since December 31, 1992.<sup>169</sup> Reported court decisions containing meaningful discussion of past performance in a procurement context are far fewer in number.

Protesters bringing past performance issues to GAO have had little success thus far. Of all the GAO decisions, protests were sustained in only twenty-three instances; a success rate of about four percent.<sup>170</sup> Moreover, in only one court decision has a court ruled in favor of a protesting offeror in a past performance contention.<sup>171</sup>

In the few instances where protests have been sustained, the winning issue has fallen into one of four broad categories: (1) disregard of past performance evaluation criteria; (2) unsupported evaluation of a protester's or the awardee's past performance information; (3) unreasonable past performance evaluations; and (4) inadequate discussions of unfavorable past performance information.<sup>172</sup> First, however, it is useful to provide a background in order to understand the emerging legal principles.

With few exceptions, GAO has consistently applied existing principles of procurement law in deciding protests where contentions involve past performance evaluations. GAO's standard of review in these cases, however, may effectively deprive the protester of any chance for meaningful review. Its unwillingness to question the validity or correctness of the underlying past performance data raises a concern that past performance rules may result in *de facto* debarments in some cases, and undermine the competitive process in others. Moreover, to date, the courts have not provided a more

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168. *See id.*

169. *See* OFPP GUIDEBOOK, *supra* note 71. This date was chosen because it generally coincides with the January 11, 1993, final issuance of OFPP Policy Letter 92-5. The research for this article considered GAO and court cases issued to the public as of December 31, 1998.

170. *See infra* Part III.B (citing relevant cases and providing discussion).

171. *See infra* notes 452-75 (discussing *Latecoere International Inc. v. United States Department of the Navy*, 19 F.3d 1342 (11th Cir. 1994)).

172. *See* discussion *infra* Part III.B.

hospitable forum for protesters challenging procurement outcomes based upon past performance evaluations.

1. *Past performance: What does the term mean to the procuring agencies?*

The OFPP's definition of past performance<sup>173</sup> has been adopted *verbatim* or without substantive change in a large number of cases. For example, in *PMT Services, Inc.*,<sup>174</sup> the DLA's evaluation criteria closely tracked the formulation of past performance in the OFPP Policy Letter 92-5:

Evaluation of past performance will be a subjective assessment based on a consideration of all relevant facts and circumstances. It will not be based on absolute standards of acceptable performance. The Government is seeking to determine whether the offeror has consistently demonstrated a commitment to customer satisfaction and timely delivery of services . . . . By past performance, the Government means the offeror's record of conforming to specifications and to standards of good workmanship; the offeror's adherence to contracts schedules, including the administrative aspects of performance; the offeror's reputation for reasonable and competitive behavior and commitment to customer satisfaction; and generally, the offeror's business-like concern for the interest of the customer. [The Government] will also consider an offeror's performance on same or similar contracts in terms of waste quantities, variety of pick up locations and waste streams, performance timeframes, and complexities of the services provided.<sup>175</sup>

A large number of other cases demonstrate this close adherence to OFPP's guidance.<sup>176</sup>

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173. See Final Issuance of OFPP Policy Letter 92-5, 58 Fed. Reg. 3573, 3575 (1993); see also *supra* Part I.A. (discussing OFPP's past performance initiatives).

174. Comp. Gen. B-270538.2, 96-2 CPD ¶ 98, at 2, *recon. denied*, Comp. Gen. B-270538.5, 96-2 CPD ¶ 194 (1996) (sustaining the protest based on the agency's unreasonable evaluation of past performance and source selection).

175. *Id.*

176. See, e.g., UNICCO Gov't Servs., Inc., Comp. Gen. B-277658, 97-2 CPD ¶ 134 (1997) (explaining that past performance pertains to customer satisfaction, adherence to legal requirements, and ethics compliance versus "experience," which deals with similarity of past contracts); HLC Indus., Inc., Comp. Gen. B-274374, 96-2 CPD ¶ 214 (1996) (stating that a proper inquiry focuses on "to what extent the [offeror's] past performance has been satisfactory . . . ; offeror's cooperative behavior and commitment to customer satisfaction with the government, public and private agencies, [and] [t]he timeliness of delivery taking into account excusable delays . . ."); Dynamic Aviation—Helicopters, Comp. Gen. B-274122, 96-2 CPD ¶ 166, at 2 (1996) (reporting that past performance subfactors included: "a) quality of service; b) timeliness and responsiveness of performance; c) commitment to customer satisfaction; d) quality awards and certifications; e) problems; and f) cost control"); PW Constr., Inc., Comp. Gen. B-272248 *et al.*, 96-2 CPD ¶ 130, at 5 (1996) (explaining that the factors evaluated "offeror's capability to successfully complete projects of similar scope and complexity and with an emphasis on timeliness of performance, quality of work, cost controls, and



2. *What latitude does the agency have in defining the type of past performance an offeror must have demonstrated?*

Agencies have wide latitude in specifying the type or extent of past performance an offeror must demonstrate in order to be eligible to participate in a negotiated acquisition process. For example, in *Leon D. DeMatteis Construction Corp.*,<sup>177</sup> GAO turned back a protester's challenge to solicitation requirements for construction of a new federal courthouse in Brooklyn, New York. Specifically, the Request for Proposals ("RFP") required the contractor to demonstrate that it had completed at least three projects as a prime contractor in the past ten years where the facility was a courthouse, civic building, museum, library, embassy, hospital, corporate headquarters, or office building.<sup>178</sup> Also, the facility had to be a minimum of 400,000 gross square feet, not less than ten stories above grade for each project, and a contract dollar value of not less than \$100 million for each

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cooperation"); *Cardinal Scientific, Inc.*, Comp. Gen. B-270309, 96-1 CPD ¶ 70, at 6 (1996) (defining past experience as the "offeror's record of conforming to specification/commercial product descriptions and to standards of good workmanship; adherence to contract schedules; and reputation for reasonable and cooperative behavior"); *Contract Int'l, Inc.*, Comp. Gen. B-270102 *et al.*, 96-1 CPD ¶ 53, at 4 (1996) (holding that an evaluation would compare offeror to others based on "reputation for satisfying its customers by delivering quality work in a timely manner at a reasonable cost," including "offeror's reputation for integrity, reasonable and cooperative conduct, and commitment to customer satisfaction"); *Fluor Daniel, Inc.*, Comp. Gen. B-262051 *et al.*, 95-2 CPD ¶ 241, at 11 (1995) (evaluating an experience or past performance to determine "how well the offeror has performed on past contract of a similar nature and magnitude."). In *Fluor Daniel, Inc.*, the subfactors of past performance included "a) related corporate and technical experience on contracts of similar nature, magnitude, and complexity; b) ability to meet schedule and cost constraints; c) ability to achieve program objectives; d) quality of past services; e) outside inputs on offeror's schedule, cost, and quality performance." *Fluor Daniel, Inc.*, Comp. Gen. B-262051 *et al.*, 95-2 CPD ¶ 241, at 11 (1995); see also *Moore Med. Corp.*, Comp. Gen. B-261758, 95-2 CPD ¶ 204, at 3 (1995) (stating past performance evaluation assessed "offeror's reputation for conforming to specifications and to standards of good workmanship, for adherence to contract schedules (including the administrative aspects of performance), for reasonable and cooperative behavior and commitment to customer satisfaction, and for having a business-like concern for the interests of the customer," and emphasizing the "depth, breadth, relevancy, and currency of [the offeror's] work experience. . ."); *Advanced Envtl. Tech. Corp.*, Comp. Gen. B-259252, 95-1 CPD ¶ 149 (1995) (quoting OFPP language regarding past performance with the exception of a reference to cost performance and "behavior"); *Laidlaw Envtl. Servs., Inc.*, Comp. Gen. B-256346, 94-1 CPD ¶ 365 (1994) (referring closely to OFPP language); *SDA, Inc.*, Comp. Gen. B-256075 *et al.*, 94-2 CPD ¶ 71, at 2 (1994) (detailing quality of past performance in terms of "timeliness and technical success"); *Daun Ray Casuals, Inc.*, Comp. Gen. B-255217.3 *et al.*, 94-2 CPD ¶ 42 (1994) (referring substantially to the OFPP language except for a reference to cost performance); *Tennier Indus., Inc.*, Comp. Gen. B-252338, 93-1 CPD ¶ 471 (1993) (using language similar to OFPP); *Centre Mfg. Co., Inc.*, Comp. Gen. B-251665, 93-1 CPD ¶ 340 (1993) (same); *JCI Envtl. Servs.*, Comp. Gen. B-250752.3, 93-1 CPD ¶ 299 (1993) (quoting language of OFPP); *Kings Point Indus., Inc.*, Comp. Gen. B-249616, 92-2 CPD ¶ 395 (1992) (tracking closely the language of OFPP).

177. Comp. Gen. B-276877, 97-2 CPD ¶ 36 (1997).

178. See *id.* at 3 (explaining that the basis for this specific criterion is to demonstrate "a firm's overall coordination and subcontracting responsibilities . . .").

project.<sup>179</sup> Despite the contractor's claim that these requirements were unduly restrictive, GAO stated that the government enjoys broad discretion in the selection of evaluation criteria and declined to object "so long as the criteria used reasonably relate to the agency's minimum needs . . . ."<sup>180</sup>

3. *How does past performance figure in the source selection process—as an indicator of "risk," or of technical merit?*

One point emphasized by OFPP in Policy Letter 92-5 is that past performance, as an evaluation factor for award, is designed to assess the "risk" associated with how the offeror will perform the contract once it has been awarded.<sup>181</sup> Specifically, OFPP states: "Past performance information should be used to assess risk."<sup>182</sup>

*Dragon Services, Inc.*,<sup>183</sup> provides a good example of the type of case in which past performance is clearly and unambiguously utilized in a solicitation to assess performance risk. In awarding a contract for nutrition care services at an Army Hospital, the government stipulated four factors to be considered: technical capability, managerial capability, price, and performance risk.<sup>184</sup> A "Performance Risk Assessment Group" ("PRAG") conducted the risk assessment, assigning ratings of "low, moderate, or high" risk to each proposal based largely on past performance.<sup>185</sup> GAO found the resultant "moderate" risk for the low-price offeror justified the procuring agency's award at a substantial price premium to another offeror which received a "low" risk rating.<sup>186</sup>

Numerous cases indicate that many agencies have understood OFPP's "risk" guidance and attempted to follow it. For example, in *Boeing Sikorsky Aircraft Support*,<sup>187</sup> a U.S. Special Operations Forces

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179. *See id.*

180. *Id.* at 4. GAO denied a protest challenging an agency's formulation of past performance criteria, which, in the aggregate, were assigned greater weight than price. *See Braswell Services Group, Inc.*, Comp. Gen. B-276694, 97-2 CPD ¶ 18 at 1 (1997). The past performance evaluation in *Braswell* encompassed eighteen different aspects of the offeror's past performance. *See id.*; *see also* *ENDMARK Corp.*, Comp. Gen. B-278139, 97-2 CPD ¶ 179 (1997) (explaining that a solicitation requirement that an offeror list its subcontractors' support service contracts performed or completed in past three years is not unduly restrictive of competition).

181. *See* Final Issuance of OFPP Policy Letter 92-5, 58 Fed. Reg. 3573 (1993).

182. *Id.* at 3576.

183. Comp. Gen. B-255354, 94-1 CPD ¶ 151 (1994).

184. *See id.* at 2.

185. *See id.* (noting that price was not to be scored, but would be considered as a risk of performance).

186. *See id.* at 6 (concluding that the evaluation was reasonable and consistent with the stated criteria).

187. Comp. Gen. B-277263.2 *et al.*, 97-2 CPD ¶ 91 (1997).

solicitation categorized past performance as an element of the "Performance Risk" factor. Likewise, in *GEC-Marconi Electronic Systems Corporation*,<sup>188</sup> relevant "present and past performance" was considered "in assessing risk."<sup>189</sup> In addition, in *Computer Systems Development Corp.*,<sup>190</sup> the agency gave past performance, the single most heavily weighted of five (5) non-price factors, both a "color code" adjectival rating<sup>191</sup> as well as a risk assessment.

Other cases, however, do not explicitly refer to a "risk" factor. This omission makes it difficult to judge whether the agency saw past performance as a matter of risk assessment. For example, in *Consultants on Family Addiction*,<sup>192</sup> the most important factor, quality of services, included (in descending order of importance) the subfactors "*capacity to perform*, proposed approach, quality of staff, *ability to provide the range of services*," and others.<sup>193</sup> Such terminology appears ambiguous, and suggests that agency personnel who developed the evaluation criteria may not have completely grasped

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188. Comp. Gen. B-276186 *et al.*, 97-2 CPD ¶ 23 (1997).

189. See *id.* at 2; see also *PCT Services, Inc.*, Comp. Gen. B-279168, 98-2 CPD ¶ 152 (1998) (contending that past performance evaluation was made to "assess past performance rule"); *Best Foam Fabricators, Inc.*, Comp. Gen. B-275436, 97-1 CPD ¶ 78 (1997) (using separate technical and risk ratings, the awardee's proposal received an excellent (low) risk rating based on twelve current contracts with only two delinquencies and another ten earlier contracts with no delinquencies); *SEAIR Transp. Servs., Inc.*, Comp. Gen. B-274436, 96-2 CPD ¶ 224, at 4-5 (1996) (stating that the Air Force factors clearly referenced "performance risk" in terms of the offeror's current and past work record as one of the three criteria for analyzing the technical areas of a proposal); *Cessna Aircraft Co.*, Comp. Gen. B-261953.5, 96-1 CPD ¶ 132, at 3 (1996) (reporting that the Air Force's past performance evaluation directed "proposal and performance risk"); *Caltech Serv. Corp.*, Comp. Gen. B-261044.4, 95-2 CPD ¶ 285, at 2-3 (1995) ("[e]ach subfactor was also to be evaluated for proposal risk—to assess the risk associated with an offeror's proposed approach—and for performance risk—to assess the probability of successful performance based on the 'offeror's relevant past and present performance.'"); *United Int'l Eng'g Inc.*, Comp. Gen. B-257607.3, 95-2 CPD ¶ 108, at 2 (1995) (using "performance risk," as a major evaluation factor, an evaluation which would "make a performance risk assessment based upon each offeror's and his subcontractor's current and past records of performance as they relate to the probability of successful completion of the required effort"); *Decision Sys. Techs., Inc.*, Comp. Gen. B-257186 *et al.*, 94-2 CPD ¶ 167 (1994); *NCI Info. Sys., Inc.*, Comp. Gen. B-257186 *et al.*, 94-2 CPD ¶ 167, at 3 (1994) (explaining that "performance risk" was rated separately from the management, technical, and cost factors "to assess the probability of successful performance based on the offeror's past performance"); *Lockheed Aircraft Serv. Co.*, Comp. Gen. B-255305 *et al.*, 94-1 CPD ¶ 205, at 2 (1994) (stating that "performance risk" was used to assess "the probability of the offeror successfully accomplishing the proposed effort based on . . . demonstrated present and past performance"); *TRI-COR Indus., Inc.*, Comp. Gen. B-252366.3, 93-2 CPD ¶ 137, at 3 (1993) (reporting that the Army's past performance evaluation was expressed "through a risk assessment on a scale of high, moderate, or low risk").

190. Comp. Gen. B-275356, 97-1 CPD ¶ 91 (1997).

191. The ratings included the following: "blue" defined as "exceed[ing] specified performance or capability in a beneficial way," and "green" defined as "meet[ing] evaluation standards and any weaknesses are readily correctable." *Id.* at 2 n.1.

192. Comp. Gen. B-274924.2, 97-1 CPD ¶ 80 (1997).

193. *Id.* at 4 (emphasis added).

the concept of comparative performance "risk" versus a particular offeror's "responsibility."

*American Combustion Industries, Inc.*<sup>194</sup> involved an evaluation scheme in which four separate major criteria each directly addressed an aspect of past performance and comprised eighty percent of the scored non-price criteria.<sup>195</sup> Nothing in GAO's decision indicated whether "risk" was the focus of this evaluation, although clearly past performance was a comparative evaluation among the offerors.<sup>196</sup>

In most cases, GAO will not consider post-award protests attacking the evaluation factors.<sup>197</sup> As a result, GAO does not appear to be an available forum for refocusing the agencies on OFPP's original intent—that past performance be a means of making informed, comparative assessments of performance risk.

#### 4. *Agencies must act reasonably and follow the stated evaluation criteria*

In cases addressing protester challenges to past performance evaluations in source selections, GAO has followed a well established principle of limited review. GAO's typical formulation of the standard is presented in *Wind Gap Knitwear*.<sup>198</sup> In that case, Wind Gap

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194. Comp. Gen. B-275057.2, 97-1 CPD ¶ 105 (1997).

195. The breakdown of the criteria included: thirty percent of past performance on building construction; twenty percent of past performance on phased refurbishing; twenty percent of past performance on personnel; and ten percent past performance of construction schedule adherence. See *id.* at 2.

196. In *DIGICON Corp.*, past performance was the most important criterion. See *DIGICON Corp.*, Comp. Gen. B-275060 *et al.*, 97-1 CPD ¶ 64 (1997). GAO's decision provides no indication as to whether the focus was on risk, though again, clearly a comparative evaluation was conducted. *ValueCAD* involved an evaluation scheme where "past performance, capacity, key personnel, and the offeror's experience" were considered in descending order. GAO's decision is unclear as to whether the agency was assessing "risk" or something else. See *ValueCAD*, Comp. Gen. B-272936, 96-2 CPD ¶ 176 (1996) (noting the decision that *ValueCAD* was not among the highest-rated proposals despite its offer of the lower price).

In *Morrison Knudsen Corp.*, GAO sustained the protest but past performance was not a separate evaluation factor. Rather, under the technical approach (involving nine subfactors), past performance was "evaluated as a general consideration as it relates to the above subfactors." *Morrison Knudsen Corp.*, Comp. Gen. B-270703, 96-2 CPD ¶ 86 at 2 (1996). In *Wind Gap Knitwear*, the past performance evaluation served twin purposes, one suggesting risk, the other suggesting a more non-risk orientation: "evaluation of the offeror's credibility regarding its proposal representations and evaluation of the relative capability of the offerors." *Wind Gap Knitwear*, Comp. Gen. B-261045, 95-2 CPD ¶ 124, at 2 (1995). *John Brown U.S. Servs., Inc.* involved an evaluation of the "quality" of the offeror's past performance, to be used "to evaluate the credibility of the offeror's approach . . . and as one means of evaluating the relative capabilities of offerors." *John Brown U.S. Servs., Inc.*, Comp. Gen. B-258158 *et al.*, 95-1 CPD ¶ 35, at 4 (1994). No explicit reference to "risk" is to be found. See *id.*; see also *Daun Ray Casuals, Inc.*, Comp. Gen. B-255217.3 *et al.*, 94-2 CPD ¶ 42 (1994) (reporting that past performance was evaluated in connection with "determining the credibility of proposals and each offeror's relative capability").

197. 4 C.F.R. § 21.2(a)(1) (stating that protests based on alleged defects in evaluation criteria generally must be protested prior to an award).

198. Comp. Gen. B-261045, 95-2 CPD ¶ 124 (1995).

claimed that the Defense Logistics Agency's past performance evaluation of the awardee, Daun Ray Casuals, Inc., was irrational. The RFP set forth a best-value selection scheme listing technical factors as more important than price, and "experience/past performance" as the less important of two technical subfactors.<sup>199</sup> The past performance evaluation turned on an assessment of the offeror's experience producing the same or similar clothing articles within the last two years and was intended to serve twin purposes:<sup>200</sup> First, to judge the offeror's "credibility" regarding proposal representations; and second, to evaluate the relative capability of the competing firms.<sup>201</sup> In rejecting the protester's challenge that the awardee's "highly acceptable" rating was improper due to alleged poor delivery performance on past contracts, GAO set forth the controlling legal standards:

The evaluation of technical proposals is primarily the responsibility of the contracting agency since the agency is responsible for defining its needs and the best method of accommodating them, and it must bear the burden of any difficulties resulting from a defective evaluation. It is not a function of our Office to reevaluate proposals; rather, we review the agency's evaluation of proposals only to ensure that it was fair, reasonable, and consistent with the evaluation criteria stated in the solicitation. Where a solicitation requires the evaluation of offerors' past performance, an agency has discretion to determine the scope of the offerors' performance histories to be considered, provided all proposals are evaluated on the same basis and consistent with the solicitation requirements.<sup>202</sup>

GAO also has frequently stated that a protester's "mere disagreement" with the evaluation is not a basis for protest.<sup>203</sup>

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199. See *id.* at 1-2.

200. See *id.* at 2.

201. See *id.*

202. *Id.* at 3 (citations omitted).

203. See, e.g., *Cobra Technologies Inc., Comp. Gen. B-280475 et al.*, 1998 U.S. Comp. Gen. WL 743567 (1998) (stating that a protester's mere disagreement does not establish that the evaluation was unreasonable); *Rockhill Indus., Inc., Comp. Gen. B-278797*, 98-1 CPD ¶ 79, at 5 (1998) (stating that the protester's disagreement does not itself render the evaluation unreasonable); *DIGICON Corp., Comp. Gen. B-275060 et al.*, 97-1 CPD ¶ 64, at 7 (1997) (holding that mere disagreement does not provide any basis to question the evaluation); *HLC Indus., Inc., Comp. Gen. B-274374*, 96-2 CPD ¶ 214, at 3 (1997) (stating that "[m]ere disagreement with the agency's evaluation does not itself render the evaluation unreasonable"); *Hughes Georgia, Inc., Comp. Gen. B-272526*, 96-2 CPD ¶ 151, at 4 (1996) (holding that "[a]n offeror's mere disagreement with the agency does not render the evaluation unreasonable"); *GZA Remediation, Inc., Comp. Gen. B-272386*, 96-2 CPD ¶ 155, at 4 (1996) (stating that the protester's disagreement with the agency does not make the evaluation unreasonable); *PW Constr., Inc., Comp. Gen. B-272248 et al.*, 96-2 CPD ¶ 130, at 3 (1996) (remarking that a protester's disagreement with an agency's technical evaluation does not render the evaluation unreasonable).

There is nothing remarkable about GAO's standard of review. Dozens of comparable GAO cases have recited it regardless of whether the protester challenged its own past performance rating or the rating of the awardee.<sup>204</sup> The standard of review in court cases is

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204. See e.g., *Caterpillar Inc., Comp. Gen. B-280362 et al.*, 1998 U.S. Comp. Gen. LEXIS 329 (1998) (stating GAO will examine agency evaluation only to ensure it was reasonable and consistent with stated evaluation criteria); *SDV Telecomm., Comp. Gen. B-279919*, 98-2 CPD ¶ 34, at 2 (1998) (holding that GAO examines evaluation and selection decisions to ensure they were reasonable and consistent with stated criteria); *Hard Bodies, Inc., Comp. Gen. B-279543*, 98-1 CPD ¶ 172 (1998) (stating GAO reviews only to determine whether evaluation was "reasonable and consistent" with evaluation criteria); *Xeno Technix, Inc., Comp. Gen. B-278738 et al.*, 98-1 CPD ¶ 110, at 2 (1998) (asserting that evaluations will only be questioned when they lack a reasonable basis or conflict with stated evaluation criteria); *U.S. Technology Corp., Comp. Gen. B-278584*, 98-1 CPD ¶ 78, at 5 (1998) (stating that OFPP will only determine whether the evaluation was reasonable and comported with evaluation criteria); *Compania De Asesoría Y Comercio, Comp. Gen. B-278358*, 98-1 CPD ¶ 26, at 5 (1998) (stating that in reviewing evaluations OFPP does not reevaluate the proposals but merely ensures that the evaluation was reasonable and consistent with evaluation criteria); *BFI Waste Sys. of Neb., Inc., Comp. Gen. B-278233*, 98-1 CPD ¶ 8 (1998); *J&E Assoc., Inc., Comp. Gen. B-278187*, 98-1 CPD ¶ 42, at 2-3 (1998) (remarking that in reviewing an evaluation, OFPP will look at the record to determine if the evaluation was reasonable and consistent with evaluation criteria); *International Consultants, Inc. et al., Comp. Gen. B-278165 et al.*, 98-1 CPD ¶ 7, at 3 (1998) (declaring that evaluations will only be questioned if the record shows that it was unreasonable or inconsistent with evaluation criteria); *Dawco Constr., Inc., Comp. Gen. B-278048.2*, 98-1 CPD ¶ 32, at 3 (1998) (explaining that examination of an agency's evaluation only consists of ensuring that the evaluation was unreasonable and consistent with evaluation criteria); *Mechanical Contractors, S.A., Comp. Gen. B-277916*, 97-2 CPD ¶ 121, at 6 (1997) (stating that the "[o]ffice will not sustain a protest unless the protestor demonstrates a reasonable possibility that it was prejudiced by the agency's actions" and sustaining a protest where the protestor was prejudiced by multiple material errors); *ECG, Inc., Comp. Gen. B-277738*, 97-2 CPD ¶ 153, at 6 (1997) (asserting that there is no evidence in the record that the agency's evaluation was improper and agency has discretion in how it structures its evaluation as long as it is reasonable and follows evaluation criteria); *UNNICO Gov't Servs., Inc., Comp. Gen. B-277658*, 97-2 CPD ¶ 134, at 6-7 (1997) (concluding that the agency's evaluation was reasonable and evaluations need not be totally objective but must be reasonable and have a rational relationship to the evaluation criteria); *Crown Clothing Corp., Comp. Gen. B-277505.2*, 97-2 CPD ¶ 127, at 3-4 (1997) (upholding agency's evaluation as reasonable and consistent with evaluation criteria); *Court Copies & Images, Inc., Comp. Gen. B-277268*, 97-2 CPD ¶ 85, at 3 (1997) (holding that evaluation was reasonable and record supports agency's findings); *Boeing Sikorsky Aircraft Support, Comp. Gen. B-277263.2 et al.*, 97-2 CPD ¶ 91, at 7 (1997) (sustaining the protest because the agency failed to conduct meaningful discussions, but holding that agency's past performance evaluation was reasonable and consistent with evaluation criteria); *Pearl Properties, Inc., Comp. Gen. B-277250.2*, 97-2 CPD ¶ 80, at 4 (1997) (holding that the record establishes that agency's evaluation was consistent with evaluation criteria and was reasonable); *Richard M. Milburn High School, Comp. Gen. B-277018*, 97-2 CPD ¶ 53, at 3-4 (1997) (finding no basis in the record to question the reasonableness of the evaluation); *Rotair Indus., Inc., Comp. Gen. B-276435.2*, 97-2 CPD ¶ 17, at 3-4 (1997) (holding that Rotair was on notice of "price/past performance tradeoff" and that agency would assess "best possible delivery" and that agency's determination was reasonable); *Computer Sys. Dev. Corp., Comp. Gen. B-275356*, 97-1 CPD ¶ 91, at 3 (1997) (finding nothing unreasonable or objectionable in agency's evaluation); *H.F. Henderson Indus., Comp. Gen. B-275017*, 97-2 CPD ¶ 27 (1997) (stating that the agency evaluation of "performance risk"/"past performance" examined only "to ensure that it was reasonable and consistent with the solicitation's stated evaluation criteria."); *Roy F. Weston, Inc., Comp. Gen. B-274945 et al.*, 97-1 CPD ¶ 92 (1997) (explaining that GAO does not question evaluations which are reasonable and follow stated evaluation criteria); *Consultants on Family Addiction, Comp. Gen. B-274924.2*, 97-1 CPD ¶ 80 (1997) (explaining that GAO does not review proposal *de novo*, the evaluation must be reasonable and consistent with the stated

similar.<sup>205</sup>

evaluation criteria and applicable statutes and regulations, and that relative merits of proposals are a matter of administrative discretion); Continental Serv. Co., Comp. Gen. B-274531, 97-1 CPD ¶ 9 (1996) (using a nearly verbatim recitation of quoted language from *Wind Gap Knitwear*); SEAIR Transp. Servs., Inc., Comp. Gen. B-274436, 96-2 CPD ¶ 224, at 5 (1996) (finding that the Air Force reasonably determined that one contender posed a low performance risk and holding that the merit of proposals is left to the discretion of the agency unless it is unreasonable or inconsistent with stated evaluation criteria); ValueCAD, Comp. Gen. B-272936, 96-2 CPD ¶ 176, at 2-3 (1996) (stating that record supports agency's evaluation that EagleMapping's proposal was superior to that of ValueCAD's and that agency acted reasonably); Hughes Georgia, Inc., Comp. Gen. B-272526, 96-2 CPD ¶ 151, at 4 (1996) (announcing that the record provided no evidence that the agency's evaluation was reasonable); Hughes Missile Sys. Co., Comp. Gen. B-272418 *et al.*, 96-2 CPD ¶ 221, at 6-7 (1996) (concluding that an agency's evaluation of past performance must be reasonable and that in this case, the Air Force reasonably determined that Hughes's prior performance had been deficient); PW Constr., Inc., Comp. Gen. B-272248 *et al.*, 96-2 CPD ¶ 130, 3 (1996) (denying protest because agency evaluation was reasonable, consistent with evaluation criteria, and fair); Volmar Constr., Inc., Comp. Gen. B-272188.2, 96-2 CPD ¶ 119, at 3 (1996) (finding that agency's rationale for "highly satisfactory" rating demonstrated that agency evaluation was reasonable); Macon Apparel Corp., Comp. Gen. B-272162, 96-2 CPD ¶ 95, at 3 (1996) (holding that agency's use of protester's past delinquencies on contracts in evaluating protester's proposal was reasonable); Laidlaw Envtl. Servs. (GS), Inc., Comp. Gen. B-271903, 96-2 CPD ¶ 75, at 4 (1996) (holding that agency's technical evaluation was reasonable where protester had past performance problems); Quality Elevator Co., Inc., Comp. Gen. B-271899, 96-2 CPD ¶ 89, at 3 (1996) (concluding that where an agency looked at its own direct knowledge of a protester's past performance and only contacted one of the protester's references, then the agency evaluation was reasonable); Smith of Galetton Gloves, Inc., Comp. Gen. B-271686, 96-2 CPD ¶ 36 (1996) ("Where a solicitation requires the evaluation of offeror's past performance, an agency has discretion to determine the scope of the offeror's performance histories to be considered, provided all proposal are evaluated on the same basis and consistent with the solicitation requirements.") (quoting *Wind Gap Knitwear*); American CASA/National Air, Comp. Gen. B-271274 *et al.*, 96-1 CPD ¶ 251, at 4 (1996) (determining that agency's evaluation of proposal under past performance subfactor was reasonable); Systems Integration & Dev., Inc., Comp. Gen. B-271050, 96-1 CPD ¶ 273, at 3 (1996) (deciding that agency's evaluation did not use any unstated evaluation factors and was reasonable and consistent with stated evaluation criteria); Morrison Knudsen Corp., Comp. Gen. B-270703, 96-2 CPD ¶ 86, at 5 (1996) (stating that when an agency clearly violates procurement requirements the GAO will "resolve any doubts concerning prejudicial effect in favor of the protestor" and finding that the agency prejudiced the protestor by its "unsupported selection rationale"); Moheat Envtl. Servs., Inc., Comp. Gen. B-270538.2 *et al.*, 96-2 CPD ¶ 98, *recon. denied*, Comp. Gen. B-270538.5, 96-2 CPD ¶ 194, at 2 (1996) (denying a request for reconsideration of a decision in favor of the protestor because the agency's judgement was not reasonable or in accordance with evaluation criteria); Cardinal Scientific, Inc., Comp. Gen. B-270309, 96-1 CPD ¶ 70, 5 (1996) (holding that the agency's determination was reasonable); Ogden Support Servs., Inc., Comp. Gen. B-270012.2, 96-1 CPD ¶ 177, at 7 (1996) (sustaining a protest because the agency's determination of the awardee's technical superiority was not reasonably supported by the record) (1996); Criterion Corp., Comp. Gen. B-266050, 96-1 CPD ¶ 217, at 2-3 (1996) (asserting that agency's evaluation of awardee's proposal as superior was reasonable); Cessna Aircraft Co., Comp. Gen. B-261953.5, 96-1 CPD ¶ 132, at 7 (1996) (finding that agency's evaluation of Cessna's proposal as a "green" rating under "system safety" was reasonable and consistent with evaluation criteria); Pannesma Co., Ltd., Comp. Gen. B-251688, 93-1 CPD ¶ 333, at 4 (1993) (finding agency's evaluation that protester's proposal was adequate but did not deserve an exceptional rating, was reasonable).

205. The Claims Court's standard of review is established by 28 U.S.C. § 1491(b)(4) (1994), which cross references the familiar standard of judicial review set forth in the Administrative Procedure Act (5 U.S.C. § 706(2))—the agency's actions must have been arbitrary and capricious or otherwise not in accordance with law. See *Cubic Applications, Inc. v. United States*, 37 Fed. Cl. 345, 362 (1997) (denying the plaintiff's claim because the agency's past performance evaluation had not been shown to be arbitrary and capricious).

*Hughes Missile Systems Company*<sup>206</sup> is a particularly good example of how GAO applies the “reasonable and consistent with evaluation factors” rule. The case involved an Air Force procurement for definition and development of the Joint Air-to-Surface Standoff Missile (“JASSM”).<sup>207</sup> Hughes Missile Systems protested two separate awards, to McDonnell Douglas Aerospace Corporation and Lockheed Martin Integrated Systems, Inc., challenging the past performance, cost, and technical evaluations.<sup>208</sup> Past performance, including past technical performance<sup>209</sup> and past affordability performance,<sup>210</sup> was weighted most heavily, being twice as important as “technical performance” and “affordability.”<sup>211</sup> Past performance was evaluated on the basis of three contracts or programs for each of the five different subfactors under the overall past performance criterion.<sup>212</sup> The solicitation specifically described what prior contracts and programs would be considered “similar” for evaluation purposes.<sup>213</sup> The Air Force reserved the right to obtain information from various sources, including “Contractor Performance Assessment Reports” (“CPAR”), the other services, and the offerors themselves.<sup>214</sup>

Hughes’s past performance rating of “marginal” resulted from “a weakness with respect to ability to perform to cost/schedule,” while the other offerors, Lockheed Martin and McDonnell Douglas, were rated “most strongly” and “consistently good” respectively.<sup>215</sup> The Source Selection Authority (“SSA”) chose the awardees after concluding that only Lockheed Martin and McDonnell Douglas were “consistently good-to-excellent performers” and that only they were rated acceptable under “cost/schedule performance.”<sup>216</sup> The SSA felt that schedule and cost problems attributed to Hughes under the Advanced Medium Range Air-to-Air Missile (“AMRAAM”) program and the Tomahawk cruise missile program precluded a higher

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206. Comp. Gen. B-272418 *et al.*, 96-2 CPD ¶ 221 (1996).

207. *See id.* at 1 (noting that Hughes protested Air Force’s award of contracts to Lockheed Martin and McDonnell Douglas).

208. *See id.*

209. *See id.* at 2 (reporting that past technical performance was divided into product performance, computer software, and aircraft integration).

210. *See id.* (noting that past affordability performance was divided into manufacturing and cost/schedule).

211. *See id.* (noting that “technical performance” includes key performance parameters and integrated master plan and schedule).

212. *See id.* at 5.

213. *See id.* (quoting the RFP that “[w]henver possible, the Government will gather past performance [data] on contracts/programs which are similar to the JASSM program”).

214. *See id.*

215. *See id.* at 3.

216. *See id.* at 4.



rating.<sup>217</sup>

In protesting its past performance rating as unreasonable, Hughes contended that the Air Force's evaluation of its prior work on the Tomahawk cruise missile had been "superficial" and unreasonable when it concluded that the cost growth "would inevitably lead to schedule delays . . . ."<sup>218</sup> Rejecting this argument, GAO seemed to accept at face value the content of the evaluation record bearing on Hughes's past performance.<sup>219</sup> In other words, as long as documentation tending to support the Air Force's evaluation was present in the file, GAO was not willing to go beyond that information to test its validity. "The Air Force reasonably determined that Hughes's cost/schedule performance on the [Tomahawk] program had been materially deficient. The record shows that the Air Force relied on information received from the Navy . . . ."<sup>220</sup>

GAO discussed Hughes's response to its determination only in a general way. Despite a fact-finding hearing in the case, GAO's decision exhibits an unwillingness to question the contents of the file as long as the right words are to be found on paper somewhere in the record.<sup>221</sup>

Hughes further contended that the Air Force fell short in failing to consider the complexity of the products being developed when evaluating past performance.<sup>222</sup> GAO rejected this argument, noting that the agency had provided worksheets to potential offerors with

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217. See *id.* (reporting that the SSA was particularly concerned about Hughes's cost and schedule problems because these programs were of similar scope to JASSM's).

218. *Id.* at 6.

219. See *id.* at 7.

220. *Id.* GAO also explained that:

[T]he Navy [Tomahawk] program office rated both Hughes's cost and schedule performance as a "2" on a scale of 1-4, with "4" indicating an ability to perform with little or no government oversight and "1" indicating an inability to perform . . . . The agency also obtained specific information and documents from the [Tomahawk] office which supported the Navy's determination that Hughes had encountered significant cost/schedule problems in its performance . . . . Further, the information available to the Air Force . . . reasonably indicated that Hughes was encountering performance delays that could ultimately delay delivery of the [Tomahawk] improvements . . . .

*Id.*

221. See *id.* at 9. GAO stated:

In our view, the Air Force could (and did) reasonably attribute the potential 3½-month funding-based delay in the first instance to Hughes's failure to properly cost its proposed [Tomahawk] contract effort . . . . Having reasonably determined that Hughes was experiencing serious cost and schedule problems on the [Tomahawk] contract for which it bore significant responsibility, and in view of Hughes's 9-month schedule delay in its performance on the AMRAAM program, the Air Force reasonably evaluated Hughes's past cost/schedule performance as marginal . . . .

*Id.*

222. See *id.* at 10 (reporting Hughes's argument that the agency overemphasized program similarity instead of product similarity).

the draft RFP in order to assist the agency in identifying "relevant" past contracts.<sup>223</sup> The worksheets generally "indicated the agency's position that for purposes of evaluating past cost/schedule performance, program similarity would be more significant than product similarity."<sup>224</sup> As a result, GAO found nothing unreasonable with the Air Force considering programs for products dissimilar in complexity as a relevant factor of predicting future cost/schedule performance.<sup>225</sup>

This basic principle—that an agency's past performance evaluation will not be disapproved so long as it is reasonable and comports with the stated evaluation criteria—has, thus, been repeatedly applied.<sup>226</sup> Even incumbent contractors, in recompeting for their current contracts, are entitled to no more evaluation credit than is afforded by the solicitation.<sup>227</sup>

5. *Past performance/cost trade-offs must be reasonable and consistent with stated evaluation criteria*

The FAR procedures for competitive negotiation expressly contemplate a "tradeoff process" in determining whether the government's best interest is served by making an award to offerors other than the lowest priced offeror or the highest technically rated offeror.<sup>228</sup> Therefore, tradeoff decisions often must be made to judge whether a superior past performance rating will overcome a competitor's price advantage. Again, GAO has resorted to conventional principles in deciding such cases.<sup>229</sup>

In *USA Electronics*,<sup>230</sup> GAO rejected a challenge to the protester's own past performance evaluation and approved the award to the offeror with superior technical and past performance ratings despite

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223. See *id.* at 10-11.

224. *Id.* at 11.

225. See *id.*

226. See *id.* at 6 (stating that offeror's performance risk will be reviewed "to ensure that it was reasonable and consistent with stated evaluation criteria"). See, e.g., *Dragon Servs., Inc. Comp. Gen. B-255354*, 94-1 CPD ¶ 151 (1994) (reviewing an offeror's evaluation to ensure that it is reasonable and consistent with stated evaluation criteria); *Instrument Control Serv., Inc. Comp. Gen. B-247286*, 92-1 CPD ¶ 407 (1992) (stating that "[o]ur office... will object to a contracting agency's determination of its need ... if the determination is shown to be unreasonable").

227. See, e.g., *Modern Tech. Corp. Comp. Gen. B-278695 et al.*, 1998 U.S. Comp. Gen. LEXIS 69 (1998) (holding that the agency is not to give "extra credit" to a successful incumbent where the agency has given such a contractor the maximum rating available under the solicitation); see also, e.g., *Hughes Missile Sys. Co.*, 96-2 CPD ¶ 221, at 6 (requiring each offeror to provide data on past performance so that the agency may equally evaluate offers).

228. See *Hughes Missile Sys. Co.*, 96-2 CPD ¶ 221, at 3 (discussing the "trade of process" and how it was applied during evaluation).

229. See *infra* notes 230-54 and accompanying text.

230. *Comp. Gen. B-275389*, 97-1 CPD ¶ 75 (1997).

a small price advantage to the protester. GAO explained:

In a best value procurement, price is not necessarily controlling in determining the offer that represents the best value to the government. Rather, that determination is made on the basis of whatever evaluation factors are set forth in the RFP, with the source selection official often required to make a cost/technical tradeoff to determine if one proposal's technical superiority is worth the higher cost that may be associated with that proposal. In this regard, price/past performance tradeoffs are permitted when such tradeoffs are consistent with the RFP evaluation scheme.<sup>231</sup>

As would be expected, GAO has frequently approved selection decisions in favor of offerors having high past performance ratings despite occasionally significant cost premiums.<sup>232</sup> In each such case,

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231. *Id.* at 3 (citations omitted). GAO further stated that:

[W]here, as here, an RFP identifies past performance and price as the evaluation criteria and indicates that an offeror with good past performance can expect a higher rating than an offeror without such a record of performance, proposals must be evaluated on that basis, and ultimately the selection official must decide whether or not a higher-priced offeror with a better past performance rating represents the best value to the government.

*Id.*; see also *U.S. Tech. Corp.*, Comp. Gen. B-278584, CPD 1998 U.S. Comp. Gen. LEXIS 66 (1998) (assessing past performance as being a "more important" factor than price, and finding that "perceptual past performance" did not justify price); *Nomura Enterprise, Inc.*, Comp. Gen. B-277768, 97-2 CPD ¶ 148 (1997) (reporting that past performance superiority justified price premium associated with awardee's proposal); *Trend W. Technical Corp.*, Comp. Gen. B-275395.2, 97-1 CPD ¶ 201 (1997) (stating that giving the tradeoff and award to the higher price offeror was reasonable where the protester's past performance superiority was overcome by protester's inadequate proposed staffing); *Engineering and Computation, Inc.*, Comp. Gen. B-275180.2, 97-1 CPD ¶ 47 (1997) (holding that cost/past performance tradeoffs are permitted when such tradeoffs are consistent with RFP); *Creative Apparel Assocs.*, Comp. Gen. B-275139, 97-1 CPD ¶ 65 (1997) (denying the protest in a situation where the agency awarded the contract to a low-price offeror despite the protester's advantage in technical/past performance factors and explaining that the tradeoff is reasonable where agency met "the test of rationality and consistency with the established evaluation factors"); cf. *Excalibur Sys., Inc.*, Comp. Gen. B-272017, 96-2 CPD ¶ 13 (1996) (reporting that contracts can be properly awarded to lowest price offeror for whom current past quality information was not available).

232. See *Caterpillar Inc.*, Comp. Gen. B-280362 *et al.*, 1998 U.S. Comp. Gen. WL 694539 (1998) (approving a \$7.26 million or twenty-nine percent premium); see also *Nomura Enter., Inc.*, Comp. Gen. B-277768, 97-2 CPD ¶ 148 (1997) (asserting that past performance superiority justified \$3.47 million or sixty-two percent price premium); *SWR, Inc.*, Comp. Gen. B-276878, 97-2 CPD ¶ 34 (1997) (allowing "relatively small" price premium); *TMI Servs., Inc.*, Comp. Gen. B-276624.2, 97-2 CPD ¶ 24 (1997) (allowing a \$187,914 or eleven percent cost premium); *Science and Eng'g Servs., Inc.*, Comp. Gen. B-276620, 97-2 CPD ¶ 43 (1997) (approving a \$193,138 or 2.3 percent cost premium); *Rotair Indus., Inc.*, Comp. Gen. B-276435.2, 97-2 CPD ¶ 17 (1997) (permitting a fifty dollar per unit or nineteen percent cost premium); *GEC-Marconi Elec. Sys. Corp.*, Comp. Gen. B-276186 *et al.*, 97-2 CPD ¶ 23 (1997) (permitting a \$3.33 million or twenty-three percent cost premium); *Computer Sys. Dev. Corp.*, Comp. Gen. B-275356, 97-1 CPD ¶ 91 (1997) (allowing a \$1.2 million or twenty-one percent cost premium); *Creative Apparel Assocs.*, Comp. Gen. B-275139, 97-1 CPD ¶ 64 (1997) (reporting \$1.5 million or twenty percent cost premium); *DIGICON Corp.*, Comp. Gen. B-275060 *et al.*, 97-1 CPD ¶ 64 (1997) (approving \$2.6 million or nine percent cost premium); *H.F. Henderson Indus., Comp. Gen. B-275017*, 97-1 CPD ¶ 27 (1997) (allowing \$1.4 million or eighteen percent cost premium); *Dynamic Aviation—Helicopters*, Comp. Gen. B-274122, 96-2 CPD ¶ 166 (1996) (permitting \$29,650 or six percent cost premium); *Myers Investigative and Sec. Servs., Inc.*,

GAO found the selection decision to be reasonable and consistent with the stated evaluation criteria.<sup>233</sup>

Specifically, in *Brunswick Defense*,<sup>234</sup> GAO denied a protest challenging an award which involved a cost tradeoff resulting in an eighteen million dollar or twenty-five percent price premium.<sup>235</sup> Brunswick objected to the award of a Navy contract to Beech Aircraft for supersonic, high altitude expendable targets for enemy threat simulation.<sup>236</sup> Beech was the original supplier and had held contracts for this item for nearly thirty years.<sup>237</sup> The RFP involved a best value selection scheme with three factors in descending order: price, technical, and past performance/systemic improvement.<sup>238</sup> The

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Comp. Gen. B-272947.2, 96-2 CPD ¶ 114 (1996) (upholding \$52,421 or two percent cost premium); Macon Apparel Corp., Comp. Gen. B-272162, 96-2 CPD ¶ 95 (1996) (conceding \$409,548 or sixteen percent cost premium); Quality Elevator Co., Inc., Comp. Gen. B-271899, 96-2 CPD ¶ 89 (1996) (approving \$194,378 or thirty percent cost premium); Smith of Galetton Gloves, Inc., Comp. Gen. B-271686, 96-2 CPD ¶ 36 (1996) (permitting \$73,478 or ten percent cost premium); Omega World Travel, Inc., Comp. Gen. B-271262.2, 96-2 CPD ¶ 44 (1996) (approving travel rebate of five percent by protester versus only 2.01 percent by awardee which equaled a premium of 149 percent); Systems Integration & Dev., Inc., Comp. Gen. B-271050, 96-1 CPD ¶ 273 (1996) (conceding \$66,218 or sixteen percent cost premium); Criterion Corp., Comp. Gen. B-266050, 96-1 CPD ¶ 217 (1996) (allowing \$2.2 million or thirteen percent cost premium); Federal Envtl. Servs., Inc., Comp. Gen. B-260289, 95-1 CPD ¶ 261 (1995) (allowing \$870,000 or fifteen percent cost premium); Executive Closers, Inc., Comp. Gen. B-259848, 95-1 CPD ¶ 184 (1995) (upholding fifteen million dollar or three percent cost premium for each real estate closing); Advanced Envtl. Tech. Corp., Comp. Gen. B-259252, 95-1 CPD ¶ 149 (1995) (conceding \$110,000 or fourteen percent cost premium); John Brown U.S. Servs., Inc., Comp. Gen. B-258158 *et al.*, 95-1 CPD ¶ 35 (1995) (permitting \$276,321 or two percent cost premium); United Int'l Eng'g, Inc., Comp. Gen. B-257607.3, 95-2 CPD ¶ 108 (1995) (permitting \$4.6 million or 3.3 percent cost premium on a \$146 million program); Hawk Servs., Inc.; A-Bear's Janitorial Serv., Comp. Gen. B-257299.4 *et al.*, 95-2 CPD ¶ 91 (1995) (upholding \$7.3 million or eighteen percent cost premium); Young Enters., Inc., Comp. Gen. B-256851.2, 94-2 CPD ¶ 159 (1994) (allowing \$249,144 or four percent cost premium); Dragon Servs., Inc., Comp. Gen. B-255354, 94-1 CPD ¶ 151 (1994) (upholding \$562,169 or forty-two percent cost premium where low offeror had "moderate" risk versus "low" risk for awardee); Corvac, Inc., Comp. Gen. B-254757, 94-1 CPD ¶ 14 (1994) (admitting \$89,690 or eight percent cost premium); Corvac, Inc., Comp. Gen. B-254222, 93-2 CPD ¶ 294 (1993) (conceding \$96,000 or eight percent cost premium); Chem-Services of Indiana, Inc., Comp. Gen. B-253905, 93-2 CPD ¶ 262 (1993) (granting 13.4 percent cost premium); Macon Apparel Corp., Comp. Gen. B-253008, 93-2 CPD ¶ 93 (1993) (upholding \$559,227 or seven percent cost premium); TRI-COR Indus., Inc., Comp. Gen. B-252366.3, 93-2 CPD ¶ 137 (1993) (accepting \$2.1 million or six percent cost premium); Pannasma Co., Ltd., Comp. Gen. B-251688, 93-1 CPD ¶ 333 (1993) (permitting \$1.4 million or two percent cost premium); Martech USA, Inc., Comp. Gen. B-250284.2, 93-1 CPD ¶ 110 (1993) (conceding \$324,967 or seventeen percent cost premium); Federal Envtl. Servs., Inc., Comp. Gen. B-250135.4, 93-1 CPD ¶ 398 (1993) (approving \$630,000 or twenty percent cost premium). *But see* Randolph Eng. Sunglasses, Comp. Gen. B-280270, 98-2 CPD ¶ 39 (1998) (GAO approval as reasonable agency determination that a forty percent price premium did not justify award to an offeror with "excellent" past performance where the awardee's rating was "good").

233. *See infra* note 253 (discussing relevant cases).

234. Comp. Gen. B-255764, 94-1 CPD ¶ 225 (1994).

235. *See id.* at 3.

236. *See id.* at 1.

237. *See id.*

238. *See id.* at 2.

solicitation called for review of information in existing government data bases, data from other contracting offices, and from on-site surveys.<sup>239</sup> The information bearing on past performance was used to assess risk.<sup>240</sup> GAO observed that there was a dramatic disparity between the offerors' past performance/systemic improvement evaluations. Beech, the awardee, was "highly satisfactory" with "low performance risk," while Brunswick was "unacceptable" with a "high performance risk."<sup>241</sup> Brunswick's past performance problems were significant indeed. Of five flights under one contract, three failed due to "low thrust" and fell to the ground.<sup>242</sup> Of two additional missile flights following corrective action, one failed, leaving Brunswick with a success rate of only forty-three percent.<sup>243</sup> The evaluators were concerned that Brunswick had not isolated the problem.<sup>244</sup>

The Source Selection Authority, concerned about the price premium, deferred the selection decision and awaited more test flights.<sup>245</sup> Three additional launches resulted in two successes and another failure.<sup>246</sup> The new failure involved an "excess thrust" problem or quick burn-out, as opposed to the low thrust problem on the earlier tests.<sup>247</sup> By the end of the tests, Brunswick's success rate was only fifty percent.<sup>248</sup> During discussions, Brunswick did not convince the Navy that it had identified the problem.<sup>249</sup> By contrast, Beech's success rate was ninety-six percent.<sup>250</sup> Finding that the excess failure rate would likely translate into a cost of thirty-three million dollars based on 392 anticipated flights, the SSA decided to award the contract to Beech.<sup>251</sup>

GAO had little problem upholding this award. Simply stated, GAO found that the evaluation and resulting source selection was

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239. *See id.*

240. *See id.* (noting that a performance risk assessment would help to evaluate the effectiveness of the offeror in resolving any problems).

241. *See id.* at 3.

242. *See id.*

243. *See id.* (comparing to Beech's ninety-six percent flight reliability rate for missiles launched in the past eleven quarters).

244. *See id.* (explaining that the inability to correct the low thrust problem "evidenced 'a lack of effective corrective action'").

245. *See id.* at 4.

246. *See id.*

247. *See id.*

248. *See id.*

249. *See id.* at 6 (citing the agency's concern that Brunswick had a "fix it when it breaks" attitude instead of conducting a full investigation into the flight failures and preparing to prevent similar future failures).

250. *See id.* at 7.

251. *See id.*

reasonable and complied entirely with the stated evaluation criteria.<sup>252</sup> The Navy's past performance/systemic improvement evaluation "amply supported the protester's unacceptable performance rating and the tradeoff decision in favor of a more reliable, higher-priced proposal."<sup>253</sup>

However, in a few cases, because of various defects in the evaluation process or inadequate discussions related to past performance, GAO sustained protests against awards made to offerors at higher prices than the protester.<sup>254</sup> Each of these cases is considered in detail in Part III below.

6. *When is the past performance evaluation factor actually a matter of the offeror's responsibility?*

These decisions draw a seemingly clear distinction between responsibility, on the one hand, and past performance as a non-cost comparative evaluation factor for award, on the other. When a comparative evaluation between offerors is performed, past performance is a non-cost evaluation factor. By contrast, a responsibility determination involves no comparison between competing offerors, but only a general inquiry into whether the offeror is reputable and is capable of performing.<sup>255</sup>

252. See *id.* at 9.

253. *Id.* at 12; see also *Nomura Enters., Inc., Comp. Gen. B-277768*, 97-2 CPD ¶ 148 (1997) (approving a sixty-two percent premium (\$3.47 million) because on-time delivery quality of missile warhead metal parts was deemed paramount to price considerations); *JCI Envtl. Servs. Comp. Gen. B-250752.3*, 93-1 CPD ¶ 299 (1993) (denying the low-priced offeror's protest despite its 43.6 million price cost/price advantage, where the Defense Logistics Agency had agreed to pay a 127 percent premium for hazardous waste removal even though price was more important than technical and past performance under the evaluation scheme).

254. See *Holiday Inn-Laurel—Protest and Request for Costs, Comp. Gen. B-270860.3 et al.*, 96-1 CPD ¶ 259, *recon. denied*, 96-2 CPD ¶ 23 (1996) (sustaining protest due to failure to follow evaluation criteria where award involved a \$714,000/26 percent price premium); *PMT Servs., Inc., Comp. Gen. B-270538.2*, 96-2 CPD ¶ 98, *recon. denied*, *Comp. Gen. B-270538.5 et al.*, 96-2 CPD ¶ 194 (1996) (sustaining protest due to unreasonable evaluation where award involved \$1 million/49 percent price premium); *Alliant Techsystems, Inc.; Olin Corp., Comp. Gen. B-260215.4 et al.*, 95-2 CPD ¶ 79 (1995) (sustaining protest due to lack of meaningful discussion; amount of premium redacted); *Ashland Sales & Serv., Inc., Comp. Gen. B-255159*, 94-1 CPD ¶ 108 (1994) (sustaining protest due to unsupported proposal evaluation where award involved a \$130,490/13 percent price premium).

255. See generally 15 U.S.C. § 637(b)(7)(A) (listing the elements of responsibility as "capability, competency, capacity, credit, integrity, perseverance, and tenacity"); 13 C.F.R. §§ 124.313, 125.5 (explaining the Certificate of Competency ("COC") program which certifies the named business as possessing the responsibility to perform the Government contract); FAR, 48 C.F.R. § 19.601(a) (listing "competency, capability, credit, integrity, perseverance, tenacity and limitations on subcontracting" as elements of responsibility); *Nomura Enter., Inc., Comp. Gen. B-277768*, 97-2 CPD ¶ 148 (1997) (rejecting a small business concern's contention that a comparative assessment of past performance was actually a responsibility determination that should have been referred to the SBA); *SWR, Inc., Comp. Gen. B-276878*, 97-2 CPD ¶ 34 (1997) (finding a small business concern to be "nonresponsible" by a procuring agency based on Sec. 8(b)(7) of the Small Business Act).

An interesting, though unsuccessful strategy, concerning a responsibility determination was devised by counsel in *Hughes Georgia, Inc.*<sup>256</sup> to challenge an award to a small business. Hughes lost the contract based on a \$4.4 million price difference, where the small business awardee received a "neutral and [therefore] acceptable" past performance rating.<sup>257</sup> The evaluation criteria included only cost and "past performance risk."<sup>258</sup> The small business won only because the Army's nonresponsibility determination was overturned when the SBA issued a Certificate of Competency ("COC").<sup>259</sup> Hughes contended that what was supposed to have been a responsibility determination for the small business had in effect been converted into a comprehensive technical evaluation.<sup>260</sup> Hughes argued that it was therefore improper for the Army to refer the small business awardee's responsibility to the SBA.<sup>261</sup>

Rejecting Hughes's argument, GAO took the opportunity to discuss the difference between a past performance risk evaluation and a responsibility determination:

The findings of the pre-award survey that [the winning offeror's] lacked the necessary . . . equipment [ ] and facilities . . . or the ability to obtain them, concern Ainslie's responsibility . . . . While traditional responsibility factors may be used as technical evaluation criteria in a negotiated procurement when the agency's needs warrant a comparative evaluation of those areas . . . , here the RFP did not include technical evaluation factors. Thus, neither the inclusion of agency technical personnel in the conduct of the pre-award survey nor the recommendation of "no award" . . . could arguably convert this clear responsibility process into a technical evaluation . . . . Since the SBA has exclusive jurisdiction to determine the responsibility of a small business, our Office generally does not review either the contracting officer's decision to refer a responsibility question to the SBA, or the SBA's decision to issue a COC . . . .<sup>262</sup>

The reverse situation occurred in *Smith of Galetton Gloves, Inc.*,<sup>263</sup> where

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256. Comp. Gen. B-272526, 96-2 CPD ¶ 151 (1996).

257. See *id.* at 4.

258. See *id.*

259. See *id.* at 3 (reporting that the COC was based upon copies of the solicitation, drawing packages and specifications, survey reports and findings, an abstract of the proposals, and an opinion of Ainslie's capability).

260. See *id.* at 5-6 (stating that "Hughes contends that the pre-award survey team's finding that Ainslie lacked the technical expertise and equipment . . . constituted a determination that Ainslie's proposal was technically unacceptable . . . . Thus, in Hughes's view, referral to the SBA was improper. This argument is without merit").

261. See *id.* at 1.

262. *Id.* at 5-6.

263. Comp. Gen. B-271686, 96-2 CPD ¶ 36 (1996).

a small business claimed that it could not be downgraded under the past performance evaluation factor unless the agency referred the matter to the SBA for a COC.<sup>264</sup> GAO rejected the argument, addressing the distinction between responsibility versus past performance as a non-cost evaluation factor:

The requirement for referral does not apply here. While the past performance criterion is a responsibility-type factor, it was not applied on a pass/fail basis. Rather, each proposal . . . was comparatively evaluated under this factor, and assigned a comparative adjectival rating. That means that the agency did not in essence make a responsibility determination, but simply integrated its relative assessment of past performance into its overall determination of which proposal was more advantageous to the government. In such circumstances, there was no need for referral to the SBA . . . .<sup>265</sup>

Thus, information that bears on contractor responsibility may permissibly be considered in an "integrated assessment" including past performance as an evaluation criterion for award.

In *Cessna Aircraft Co.*,<sup>266</sup> the Source Selection Official was found to have properly considered and resolved issues related to the awardee's prior plea agreement in evaluating that offeror's past performance.<sup>267</sup> GAO did not consider the plea agreement to raise an issue of "responsibility."<sup>268</sup> This is the only way GAO would even consider the issue, given the fact that in most cases GAO does not entertain protests challenging affirmative determinations of responsibility.<sup>269</sup>

Some cases involving the distinction between past performance as a matter of responsibility as opposed to a non-cost evaluation factor are difficult to understand. For example, in *SEAIR Transportation Services, Inc.*,<sup>270</sup> a small business set aside solicitation which did not provide for scoring of the past performance factor, but did list past performance as the third most important factor following the management and technical criteria.<sup>271</sup> The agency rated both offerors in past

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264. See *id.* at 1.

265. *Id.* at 7.

266. Comp. Gen. B-261953.5, 96-1 CPD ¶ 132 (1996).

267. See *id.* (noting that the plea agreement was based on a subcontractor's payment of a contingent fee to a foreign official under a past Foreign Military Sales contract).

268. See *id.*

269. See 4 C.F.R. § 21.5(c) (1997) (stating that "an affirmative determination of responsibility will not be reviewed absent a showing of possible bad faith on the part of government officials or that definitive responsibility criteria in the solicitation were not met").

270. Comp. Gen. B-252266, 93-1 CPD ¶ 458 (1993) (denying SEAIR's protest of award of a contract to Phoenix Management for maintenance of aircraft and aircraft ground support equipment).

271. See *id.* at 2 (listing evaluation factors in order of importance and describing price as the least important).



performance as “satisfactory” based solely on the information in their proposals without, however, checking references or sending questionnaires to outside sources.<sup>272</sup> The protester claimed that the Army violated the solicitation by failing to evaluate past performance at all.<sup>273</sup> Only after the protest was filed with the Army and the Army forwarded the protest to the SBA did the Army make reference inquiries concerning the awardee.<sup>274</sup> The protester felt that it had been prejudiced by the government’s knowledge of the awardee’s subcontractor (the incumbent) without looking into the past performance of the protester and its subcontractor.<sup>275</sup> On their face, all protests appeared to be respectable contentions. However, GAO denied the protest.<sup>276</sup> Because the Army already had selected the awardee before the past performance inquiries were made, GAO concluded that “we view this as being part of the agency’s responsibility determination . . . .”<sup>277</sup>

While *Pacific Utility Equipment Company*,<sup>278</sup> is a case involving noncompliance with a “definitive responsibility criterion” as opposed to a case involving past performance as a non-cost evaluation factor, the agency’s handling of experience, past performance, and responsibility was hard to differentiate. The National Oceanic and Atmospheric Administration (“NOAA”) employed two-step formal advertising to purchase all-terrain tracked vehicles. At step one, technical proposals, the NOAA rated the awardee “capable of being made acceptable,” without, however, ascertaining whether the awardee met a solicitation requirement that it had sold four units of the offered product during the preceding two years.<sup>279</sup> The awardee’s past performance questionnaire listed four “manufactured track vehicle contracts.”<sup>280</sup> NOAA judged the awardee “responsible” based on the questionnaire response.<sup>281</sup> The protester claimed that the awardee’s step-one proposal was unacceptable because it had not sold four of the offered units during the two-year period.<sup>282</sup> GAO agreed that the awardee was not qualified, and explained that because the

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272. See *id.* at 3.

273. See *id.* at 2

274. See *id.* at 4 (reporting SEAIR’s complaint that Phoenix lacked the required experience for a contract and was “overly dependent on [an] ‘ostensible subcontractor’ as joint venturer”).

275. See *id.* at 4.

276. See *id.* at 1.

277. *Id.* at 7.

278. Comp. Gen. B-259942, 95-2 CPD ¶ 114 (1995) (sustaining protest and explaining how the agency improperly rated awardee’s proposal as technically acceptable).

279. See *id.* at 2.

280. See *id.* at 3.

281. See *id.*

282. See *id.*

two-year requirement may have limited competition significantly, it had to be regarded as a basic or essential requirement for qualification for phase two, sealed bidding.<sup>283</sup> The "manufactured track vehicles" claimed by the awardee were not of the same type as those offered.<sup>284</sup> Moreover, the awardee's answer to the questionnaire showed that the customer had made the purchase outside the two-year window permitted by the solicitation.<sup>285</sup> Thus, GAO held that the awardee's offer was not acceptable because it had failed to meet the requirement.<sup>286</sup> The author classifies this decision as a responsibility case and not a comparative past performance evaluation factor case. The sole issue was whether the awardee met an objective qualification for award on a "pass/fail" basis.<sup>287</sup>

### 7. *May point scoring systems be utilized in past performance evaluations?*

GAO has frequently approved agency use of point scoring in past performance evaluations when the point scoring schemes were rational. There are numerous cases that involve point scored evaluations of past performance.<sup>288</sup>

In GAO's view, the fact that individual evaluators produce differing point scores in the past performance rating is not an indication of procurement error. Reference checks necessarily involve some degree of subjectivity.<sup>289</sup> In addition, GAO has no difficulty denying

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283. See *id.* at 3-4 (stating that the requirement was to "ensure the reliability of the vehicle and the availability of the parts").

284. See *id.* at 4 (explaining that the language of the requirement could not be interpreted to allow for selling of any model type within the last twenty-four months).

285. See *id.* at 5.

286. See *id.* at 6 (concluding that "there is no evidence that RV Specialties satisfied the requirement that it have sold four of the models offered within the previous 24 months, and thus it should not have been determined acceptable under Step One or permitted to bid on Step Two").

287. See *Smith of Galetton Gloves, Inc.*, Comp. Gen. B-271686, 96-2 CPD ¶ 36 (1996) (determining it unnecessary to use a pass/fail evaluation over a comparative past performance evaluation).

288. See *USA Elecs.*, Comp. Gen. B-275389, 97-1 CPD ¶ 75, at 2 (1997) (using Automated Best Value Model ("ABVM") scores of 71.3 out of 100 and 100 out of 100 and awarding contract to 100 out of 100); *United Ammunition Container, Inc.*, Comp. Gen. B-275213, 97-1 CPD ¶ 58, at 2 (1997) (denying protest and finding agency's evaluation reasonable where agency determined that 93 out of 100 and 97.2 out of 100 scores were technically equal and awarded contract to the lower evaluated price); *HSG-Holzmann Technischer Servs. GmbH; HSG-GeBe*, Comp. Gen. B-274992.2; B-274993.2, 97-1 CPD ¶ 87, at 4 (1997) (describing past performance of thirteen and fifteen out of fifteen points under the two RFPs); *Quality Elevator Co.*, Comp. Gen. B-271899, 96-2 CPD ¶ 89 (1996) (stating a past performance of 200 out of 1,000 total points); *Contrack Int'l, Inc.*, Comp. Gen. B-270102, B-270102.2, 96-1 CPD ¶ 53 (1996) (reporting past performance of sixty out of 108 total points); *Executive Closers, Inc.*, Comp. Gen. B-259848, 95-1 CPD ¶ 184 (1995) (describing past performance of forty out of 100 technical evaluation points).

289. See *Continental Serv. Co.*, Comp. Gen. B-274531, 97-1 CPD ¶ 9, at 3 (1996) (explaining that evaluating past performance is the primary responsibility of the contracting agency); see

protests where an agency takes the offeror's past performance and complexity of the past effort into consideration when adjusting tentative point scores.<sup>290</sup>

Thus, in one disturbing case, *Moore Medical Corp.*,<sup>291</sup> GAO upheld a seemingly arbitrary point scoring method. The Department of Veterans Affairs ("DVA") adjusted the points assigned to the protester, which had received the highest technical and price scores, based on the lowest price, by a "level of confidence assessment rating" ("LOCAR") factor.<sup>292</sup> The protester's LOCAR, which reflected the contracting officer's subjective level of confidence in the offeror's ability to perform as promised, was only 0.50 because the contracting officer felt the offeror had significantly underbid the contract and had only half a chance of fulfilling the promises made in the proposal.<sup>293</sup> Because this method cut the protester's points in half,<sup>294</sup> GAO upheld this decision. GAO found that it was not unreasonable for the contracting officer to conclude that most of the protester's experience was not relevant and had been gained as a subcontractor.<sup>295</sup>

There is, however, one reported case, *American Development Corp.*,<sup>296</sup> in which GAO felt the point scoring system was used unreasonably. The procuring agency had adjusted the raw point scores by a "relevance" of past performance factor.<sup>297</sup> The more "relevant" the past performance on a prior contract, the greater the impact of that contract on the final evaluation.<sup>298</sup> In substance, however, the agency's approach improperly rewarded an offeror for a "relevant" contract in which its performance had been poor, but failed to reward other offerors for good or even excellent past performance in less relevant contracts.<sup>299</sup>

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also HLC Indus., Inc., Comp. Gen. B-274374, 96-2 CPD ¶ 214 (1996) (denying protest because Agency acted reasonably in determining that ten point difference attributable to past performance ratings was decisive).

290. See *Hughes Missile Sys. Co.*, Comp. Gen. B-272418 *et al.* 96-2 CPD ¶ 221 (1996) (denying protest against evaluation of past performance where consideration of agency was reasonable).

291. Comp. Gen. B-261758, 95-2 CPD ¶ 204 (1995).

292. See *id.* at 2 (explaining that rating reflects government's confidence in offeror's promises).

293. See *id.* at 4.

294. See *id.*

295. See *id.* at 7. This was one of the truly remarkable decisions reviewed in the course of developing this Article.

296. Comp. Gen. B-251876.4, 93-2 CPD ¶ 49 (1993).

297. See *id.* at 6.

298. See *id.* at 7 (explaining how relevance was calculated).

299. See *id.* at 10.

8. *How thoroughly must the evaluators check the offeror's references?*

As discussed, OFPP's Best Practices Guidebook states in Chapter Three that because offerors have already had the opportunity to rebut information in agency past performance files and databases, it is rarely necessary for the agency to inquire further about such information sources.<sup>300</sup> What about references supplied by the offeror in the proposal? Is it necessary for the evaluation team to check each such reference, and if so, to what extent?

GAO has made it clear that the agency has no obligation to check all references provided by an offeror. Thus, in *HLC Industries, Inc.*,<sup>301</sup> GAO denied the protest despite the fact that the Bureau of Prisons checked only one of the protester's references. GAO postulated: "There is no requirement that all references listed in a proposal be checked."<sup>302</sup>

A more remarkable case is *Advanced Data Concepts, Inc.*<sup>303</sup> GAO denied the protest even though none of the offeror's references returned the past performance questionnaire to the agency.<sup>304</sup> The contractor's argument—that the DOE violated the letter and spirit of FAR Part 42.15 by failing to require the references to respond<sup>305</sup>—has a certain force. GAO held that there was no demonstrated prejudice because the agency assigned a "neutral" rating and translated it into an "eight" on a ten-point scale.<sup>306</sup>

300. See *supra* note 101 and accompanying text.

301. Comp. Gen. B-274374, 96-2 CPD ¶ 214 (1997).

302. *Id.* at 7; see also *Black & Veatch Special Projects Corp.*, Comp. Gen. B-279492-2, 98-1 CPD ¶ 173 (1998) (stating there is no legal requirement that all references listed in a proposal be checked); *Braswell Services Group, Inc.*, Comp. Gen. B-278921.2, 98-2 CPD ¶ 10 (1998) (same); *Jason Assoc. Corp.*, Comp. Gen. B-278689 *et al.*, 1998 U.S. Comp. Gen. LEXIS 61 (1998) (denying a protest based on failure to check all references listed and stating no legal requirement to do so); *U.S. Tech. Corp.*, Comp. Gen. B-278584, 1998 U.S. Comp. Gen. LEXIS 66 (1998) (stating no requirement to contact all past performance references for a valid review of past performance to stand); *ValueCAD*, Comp. Gen. B-272936, 96-2 CPD ¶ 176 (1996) (asserting no requirement for an agency to check all listed references in a proposal, especially where the written proposal did not meet stated technical requirements); *Quality Elevator Co.*, Comp. Gen. B-271899, 96-2 CPD ¶ 89 (1996) (denying protest partly because the agency checked only one reference for each offeror); *Advanced Envtl. Tech. Corp.*, Comp. Gen. B-259252, 95-1 CPD ¶ 149 (1995) (denying a protest where one reference of three was contacted to evaluate past performance because agency had no requirement to contact all references and proposal did not meet technical requirements); *SDA Inc.*, Comp. Gen. B-256075, B-256206, 94-2 CPD ¶ 71, at 7 n.8 (1994) (denying protest because agency had no requirement to investigate independently the accuracy of information obtained from references); *Dragon Servs., Inc.*, Comp. Gen. B-255354, 94-1 CPD ¶ 151 (1994) (stating no requirement to obtain information regarding performance of earlier contracts in addition to most recent contract); *Questech, Inc.*, Comp. Gen. B-236028, 89-2 CPD ¶ 407 (1989) (asserting no legal requirement that all references listed in proposal be checked).

303. Comp. Gen. B-277801.4, 98-1 CPD ¶ 145 (1998).

304. See *id.* at 7.

305. See *id.* at 9.

306. See *id.* at 10.

Moreover, references in a new proposal need not be rechecked where the agency inquired about the same reference in connection with an earlier competition.<sup>307</sup> Further, to the extent that the agency has prior experience of its own with the offeror, the agency can be its own reference.<sup>308</sup> The burden rests on the offeror to ensure that the references it supplies in connection with a competitive procurement actually do respond to the procuring agency's reference inquiries.<sup>309</sup>

#### 9. May reference questionnaires be utilized?

GAO does not object to the use of past performance questionnaires by agencies in conducting source selections.<sup>310</sup> For example, in *Continental Services Company*,<sup>311</sup> the Defense Fuel Supply Center used a twenty-question survey, of which twelve questions pertained to the offeror's contract compliance, responsiveness, ability, willingness, training, technical expertise, safety, pollution prevention, equipment, cooperation, and overall performance.<sup>312</sup> Scores of one for unsatisfactory, two for satisfactory, or three for good, were to be assigned.<sup>313</sup> The remaining eight questions, to be answered yes or no, sought information concerning statutory violations, corrective action requests, cure notices, failure to correct deficiencies, default terminations, requests for equitable adjustment, financial problems, and whether the reference would award the offeror another contract.<sup>314</sup> Offerors were given the opportunity to respond to

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307. See *Laidlaw Envtl. Servs., Inc.*, Comp. Gen. B-256346, 94-1 CPD ¶ 365 (1994) (denying protest because review was reasonable and consistent with past performance evaluation scheme set forth in solicitation).

308. See *Omega World Travel, Inc.*, Comp. Gen. B-271262.2, 96-2 CPD ¶ 44 (1996) (denying protest and explaining that evaluator's personal knowledge may be considered in evaluating past performance); see also *Advanced Data Concepts, Inc.*, Comp. Gen. B-258322.5 *et al.*, 96-1 CPD ¶ 8, at 7 (1995) (confirming that personal knowledge may be considered in evaluation).

309. See *Consolidated Eng'g Servs., Inc.*, Comp. Gen. B-277273, 97-2 CPD ¶ 86, at 2 (1997) (rejecting the contention that the agency "should have made a better effort to contact the references [the offeror] provided in its proposal . . . It was the protester's responsibility—not the agency's—to obtain and provide accurate information regarding its prior contracts"); see also *PCT Services, Inc.*, Comp. Gen. B-279168, 98-1 CPD ¶ 152 (1998) (indicating that the agency did not act improperly where a contractor reference simply did not respond to a past performance questionnaire).

310. See *SWR, Inc.*, Comp. Gen. B-276878, 97-2 CPD ¶ 34 (1997) (supporting the use of past performance questionnaires); *Orlando Business Telephone Sys., Inc.*, Comp. Gen. B-275053.5 *et al.*, 97-1 CPD ¶ 217 (1997); *Computer Sys. Dev. Corp.*, Comp. Gen. B-275356, 97-1 CPD ¶ 91 (1997); *Northport Handling, Inc.*, Comp. Gen. B-274615, 97-1 CPD ¶ 3 (1996); *Continental Serv. Co.*, Comp. Gen. B-274531, 97-1 CPD ¶ 9 (1996); *Caltech Serv. Corp.*, Comp. Gen. B-261044.4, 95-2 CPD ¶ 285 (1995); *Aqua-Chem, Inc.; Gizmo, Inc.*, Comp. Gen. B-249516.2 *et al.*, 93-1 CPD ¶ 389 (1993); *CTA Inc.*, Comp. Gen. B-253654, 93-2 CPD ¶ 218 (1993).

311. Comp. Gen. B-274531, 97-1 CPD ¶ 9 (1996).

312. See *id.* at 2; see also *SEAIR Transp. Servs., Inc.*, Comp. Gen. B-274436, 96-2 CPD ¶ 224 (1996) (upholding the use of the twenty-question survey and denying the protest).

313. See *id.*

314. See *id.*

information developed during the survey process.<sup>315</sup> Largely because of the contracting officer's independent validation of several survey ratings, GAO found the past performance ratings assigned to be reasonable.<sup>316</sup>

*10. What do the cases say about evaluating firms with no relevant corporate past performance?*

Under OFPP Policy Letter 92-5,<sup>317</sup> FASA,<sup>318</sup> and the FAR,<sup>319</sup> offerors having no relevant past performance are to be rated neutrally—in a manner that neither helps nor hurts the offeror's chances of receiving award. The issue is the inherent fairness of this rule. An inexperienced firm could receive a higher "neutral" rating than a firm with significant experience and success, but with a problem arising from such matters as having submitted claims to the government or having received a disputed cure notice for alleged nonperformance.

GAO has not expressed any basic problem with assigning neutral ratings to new firms. In *Hughes Georgia, Inc.*,<sup>320</sup> one offeror had no relevant contracts and was given a "neutral and acceptable" rating.<sup>321</sup> GAO found it reasonable to assign this rating because the offeror had no past contracts for the "same or similar hardware."<sup>322</sup> In *Excalibur Systems, Inc.*<sup>323</sup> GAO also stated that it did not believe that the use of "neutral" evaluations precluded past-performance/price trade-offs, particularly where a high past performance firm was selected rather than a "neutral" firm.<sup>324</sup>

The GAO found that the requirement to assign "neutral" evaluations was not appropriate, however, where a joint venture as an entity has no past performance, but the venturers individually do have records of past performance. GAO held in *Ralph G. Moore & Associates*,<sup>325</sup> that under such circumstances, it is proper to rate the

315. See *id.* at 3.

316. See *id.* at 7 (stating that "[w]e see nothing objectionable here; each procurement is a separate transaction and the prior past performance evaluation data need not govern the current evaluation process where the current evaluation information was obtained from a reasonable and appropriate source").

317. See *supra* Part I.A (discussing OFPP past performance initiatives).

318. See *supra* Part I.B (discussing the Federal Acquisition Streamlining Act of 1994).

319. See *supra* Part I.C (discussing FAR coverage of past performance information).

320. Comp. Gen. B-272526, 96-2 CPD ¶ 151 (1996) (denying the protest and allowing evaluation based only on price and past performance).

321. See *id.* (explaining that a rating of "unknown risk" would be considered "neutral and acceptable").

322. See *id.* at 4.

323. Comp. Gen. B-272017, 96-2 CPD ¶ 13 (1996).

324. See *id.* at 3.

325. Comp. Gen. B-270686 *et al.*, 96-1 CPD ¶ 118 (1996).

joint venture based on the constituent companies.<sup>326</sup> Likewise, where key personnel of the offeror have previously worked on relevant contracts, past performance may be rated based on that experience and a neutral rating need not be assigned.<sup>327</sup>

In a few cases, resourceful protesters have attempted to argue that they in fact have no truly "relevant" past performance or experience, and accordingly, were entitled to a neutral rating rather than one less favorable. In *Creative Apparel Associates*,<sup>328</sup> the protester unsuccessfully argued that it should have been assigned a neutral past performance rating because it previously had never manufactured any end item for a U.S. Government agency or a commercial customer.<sup>329</sup> GAO found that the protester had been performing another firm's contracts pending approval of a novation agreement and therefore it did, in fact, have relevant past contracts.<sup>330</sup> Also, in *Executive Court Reporters, Inc.*,<sup>331</sup> GAO rejected this same argument when it found that the protester had fifteen years of experience in "electronic court reporting," despite its contention that it had not previously handled reporting for the federal and state courts, including the Tax Court, the awarding entity.<sup>332</sup>

In one troublesome case, *Moore Medical Corp.*,<sup>333</sup> the agency dramatically downgraded an offeror lacking past performance instead of rating the offeror "neutral." The case involved a contract award from DVA for medical and surgical supplies.<sup>334</sup> Because the offeror lacked relevant experience in medical and surgical supplies, having supplied only pharmaceuticals, and because the agency felt that the offered prices were too low, the contracting officer applied a LOCAR factor of 0.50 to the party with the otherwise highest point score among offerors.<sup>335</sup> This adjustment was critical in eliminating the protester from the competition. GAO improperly approved this evaluation in the face of former FAR § 15.608(a)(2)(iii), which as

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326. See *id.* at 4.

327. See *Consultants on Family Addiction*, Comp. Gen. B-274924.2, 97-1 CPD ¶ 80 (1997) (denying protest because Agency's evaluation of awardee's technical proposal was superior to protestor's based in part on staff capabilities is reasonable). But see *Hawk Servs., Inc.; A-Bear's Janitorial Serv.*, Comp. Gen. B-257299.4, B-257299.5, 95-2 CPD ¶ 91, at 4 (1995) (concluding that the protester was not entitled to past performance rating based on its managers' experience/past performance where solicitation "provided only for the evaluation of the offeror's past performance").

328. Comp. Gen. B-275139, 97-1 CPD ¶ 65 (1997).

329. See *id.* at 4.

330. See *id.*

331. Comp. Gen. B-272981 *et al.*, 96-2 CPD ¶ 227 (1996).

332. See *id.* at 5-6.

333. Comp. Gen. B-261758, 95-2 CPD ¶ 204 (1995).

334. See *id.* at 1.

335. See *id.* at 4.

noted required a "neutral" rating for firms lacking relevant past performance.<sup>336</sup> Because the decision did not discuss the "neutral" issue at all, it is assumed that the protester did not think of the argument and that it did not otherwise occur to GAO.<sup>337</sup>

*11. Should the agency consider past performance information concerning the offeror's parent company, affiliate, or predecessor company?*

Where the past performance of a predecessor firm is relevant to the RFP requirements, the agency not only may, but must consider such a factor in assigning a past performance rating.<sup>338</sup> No problems with agencies considering past performance information concerning predecessor companies have arisen through case precedent.<sup>339</sup>

Questions are sometimes raised, however, about the propriety of awarding evaluation credit for the past performance of the offeror's parent company or affiliated companies, or conversely, for attributing an affiliate's poor past performance to the offeror in a new competition. GAO addressed this issue in *ST Aerospace Engines Pte., Ltd.*<sup>340</sup> In that case, the Coast Guard downgraded the protester's proposal for a contract for engine reduction gearboxes based upon an affiliated company's late deliveries of overhauled propellers under another contract.<sup>341</sup> GAO sustained the protest and in explaining the reasoning behind its decision, it stated:

In determining whether one company's performance should be attributed to another, the agency must consider not simply whether the two companies are affiliated, but the nature and the extent of the relationship between the two—in particular, whether the workforce, management, facilities, or other resources of one may affect contract performance by the other. In this regard, while it would be appropriate to consider an affiliate's performance record

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336. See FAR, 48 C.F.R. § 15.608(a)(2)(iii) (1997).

337. See, e.g., *California Resources, Comp. Gen. B-280176*, 98-2 CPD ¶ 61, 1998 U.S. Comp. Gen. LEXIS 298 (1998) (stating, inexplicably, that the agency's evaluations reasonably determined that an offeror's quote was unacceptable due to the offeror's failure to furnish references establishing relevant experience).

338. See *id.* § 15.305(a)(2)(iii).

339. See generally *YKK (U.S.A.), Inc., Comp. Gen. B-280447*, 98-2 CPD ¶ 68, 1998 U.S. Comp. Gen. LEXIS 292 (1998) (holding that an agency may properly consider the experience of a predecessor firm); *Creative Apparel Assocs., Comp. Gen. B-275139*, 97-1 CPD ¶ 65 (1997) (involving a bankrupt predecessor whose assets were acquired by the offeror); *Laidlaw Envtl. Servs. (GS), Inc., Comp. Gen. B-271903*, 96-2 CPD ¶ 75 (1996) (considering experience with controlling other owned facilities in past performance evaluation). In particular, crediting a successor firm with a past performance rating based on a predecessor's performance has been found to be appropriate where the predecessor's personnel and assets have been acquired by the successor firm submitting an offer under the instant procurement. See *Oklahoma County Newspapers, Inc., Comp. Gen. B-270849*, B-270849.2, 96-1 CPD ¶ 213 (1996).

340. *Comp. Gen. B-275725*, 97-1 CPD ¶ 161 (1997).

341. See *id.* at 2.



where it will be involved in the contract effort... [citations omitted], it would be inappropriate to consider the affiliate's record where that record does not bear on the likelihood of successful performance by the offeror [citations omitted].<sup>342</sup>

GAO did not object to the FAA awarding positive evaluation credit to an offeror for an affiliate's past performance in *Fluor Daniel, Inc.*<sup>343</sup> Raytheon Support Services Company received a "low" risk assessment rating based, in substantial part, on the successful past performance of its parent company, Raytheon Service Company.<sup>344</sup> The two corporations shared the same top management and many support functions, and the record showed that the affiliate would provide "management effort" on an "interdivisional basis."<sup>345</sup> GAO stated that crediting the affiliate's past performance on this basis was not objectionable where the RFP did not expressly state that the past performance of affiliates would not be considered.<sup>346</sup> According to GAO, "[w]here the experience of an affiliated corporation is clearly related to an offeror's proposed contract performance, it may be reasonable for an agency to give credit for the affiliate's related experience."<sup>347</sup>

Similarly, in *Wackenhut International, Inc., and Wackenhut de Guatemala, S.A. v. United States*,<sup>348</sup> the Court of Federal Claims held that the Department of State did not abuse its discretion in considering past performance information for a parent company where the actual in-country security guard services would be performed at a U.S. Embassy by a newly-organized Guatemalan subsidiary.<sup>349</sup>

While an agency apparently may consider an affiliate's past performance, it is not required to do so. Where the agency declines to evaluate the affiliate's past performance for all offerors, GAO does not seem prepared to sustain a protest even where a protester turns up derogatory information concerning an awardee's affiliate. Thus,

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342. *Id.*

343. Comp. Gen. B-262051 *et al.*, 95-2 CPD ¶ 241 (1995).

344. *See id.* at 4.

345. *See id.* at 12.

346. *See id.*

347. *Id.* at 12; *cf.* Macon Apparel Corp., Comp. Gen. B-253008, 93-2 CPD ¶ 93 (1993) (reporting that it is proper to rate an offeror "extremely marginal" in past performance based on the poor performance of affiliated companies where the key management position in the offeror's proposal was to be staffed by the same individual who had been in charge of the affiliates' past contracts).

348. 40 Fed. Cl. 93 (1998).

349. *See id.* at 78,666 ("Thus, DOS did not act improperly [by]... not barring Intercon's arrangement to use its newly created Guatemalan subsidiary as a branch office to assist in contract performance.").

in *Federal Environmental Services, Inc.*,<sup>350</sup> GAO stated that the agency "has discretion to determine the scope of the offerors' performance histories to be considered"<sup>351</sup> and that it was "reasonable for the agency to have limited the scope of its review of offerors' past performance to that of the entities submitting proposals."<sup>352</sup>

*12. Should the agency consider past performance information concerning proposed subcontractors?*

A subcontractor's past performance information can be highly relevant to the evaluation and, according to the FAR, should be taken into account in the evaluation where the subcontractor "will perform major or critical aspects of the requirement" and "when such information is relevant to the instant acquisition."<sup>353</sup> As stated in *GZA Remediation, Inc.*,<sup>354</sup> "[a] proposed subcontractor's prior contracts properly may be considered under relevant evaluation factors where the RFP allows for the use of subcontractors to perform the contract and does not prohibit the consideration of a subcontractor's contracting history in the evaluation of proposals."<sup>355</sup> As a result, GAO denied the protest contention that the agency erred in considering subcontractor past performance data.<sup>356</sup>

350. Comp. Gen. B-250135.4, 93-1 CPD ¶ 398 (1993).

351. *Id.* at 12.

352. *Id.*; see also *Pannesma Co.*, Comp. Gen. B-251688, 93-1 CPD ¶ 333 (1993) (holding that a parent company's marginal performance under the incumbent contract justified a "moderate risk" to "high risk" rating for the subsidiary).

353. FAR, 48 C.F.R. § 15.305(a)(2)(iii) (1997).

354. Comp. Gen. B-272386, 96-2 CPD ¶ 155 (1996).

355. *Id.* at 3; see also *SEAIR Transp. Servs., Inc.*, Comp. Gen. B-252266, 93-1 CPD ¶ 458 (1993).

356. See *GZA Remediation, Inc.*, 96-2 CPD ¶ 155 at 3; see also *Wackenhut Services, Inc.*, Comp. Gen. B-276012.2, 98-2 CPD ¶ 75, 1998 U.S. Comp. Gen. LEXIS 313 (1998) (indicating it is proper to consider a proposed subcontractor/term member's past performance where the firm will be involved in the contract effort); *Magnum Products, Inc., Amida Industries, Inc.*, Comp. Gen. B-277917 *et al.*, 97-2 CPD ¶ 160 (1997) (stating that "as a general rule, the experience of a technically qualified subcontractor may be used to satisfy experience requirements for a prospective prime contractor"); *PW Constr., Inc.*, Comp. Gen. B-272248 *et al.*, 96-2 CPD ¶ 130 (1996) (involving an agency's consideration of the good "track record" in past performance of the awardee and its proposed subcontract team); *Olin Corp.*, Comp. Gen. B-260215.4 *et al.*, 95-2 CPD ¶ 79 (1995) (describing an agency that made extensive use of subcontractor past performance information in choosing the awardee); *Calspan Corp.*, Comp. Gen. B-258441, 95-1 CPD ¶ 28 (1995) (indicating that a request for proposals issued by the National Aeronautics and Space Administration for a contract award included "relevant experience and past performance" as one of four evaluation factors, and that the source selection official's evaluation of that fact was correct); *SRS Techs.*, Comp. Gen. B-258170.3, 95-1 CPD ¶ 95 (1995) (confirming that NASA officials did not act improperly by providing source selection officials with data regarding contact applicant's relevant experience and past performance in successive presentations in order to discover weaknesses); *Cleveland Telecomm. Corp.*, Comp. Gen. B-257294, 94-2 CPD ¶ 105 (1994) (explaining that an agency may consider an offeror's subcontractor's abilities in its evaluation); *Alliant Techsystems, Inc.*, Comp. Gen. B-260215, 95-2 CPD ¶ 79 (1995) (recognizing that past performance of offeror for

However, where the agency has good reasons for requiring the prime contract offeror itself to have the relevant experience or past performance, it may decline to consider subcontractors. Thus, in *Decision System Technologies, Inc.; NCI Information Systems, Inc.*,<sup>357</sup> GAO denied a protest objecting to the Air Force's exclusion of subcontractors in its past performance risk evaluation:

[W]here an agency has legitimate reasons for concluding that the successful offeror itself must possess the relevant experience in order to ensure successful performance of the contract it may, consistent with the RFP, consider only the offeror's experience in the evaluation of proposals, and not that of its proposed subcontractors . . . .<sup>358</sup>

GAO found it reasonable to consider only the prime contractor's past performance and experience under the program management subfactor because the small business offeror would remain responsible for performance of the prime contract.<sup>359</sup>

Further, based upon GAO's decisions in *Federal Environmental Services, Inc.*<sup>360</sup> and *Kings Point Industries, Inc.*,<sup>361</sup> it is not necessarily improper to downgrade an offeror's past performance where the offeror was not itself at fault, but as the prime contractor, it was responsible for all aspects of performance, including a deficient subcontractor.<sup>362</sup>

While the performance of subcontractors may ordinarily be

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an Army contract was a relevant evaluation subfactor, and that offerors could reasonably expect to be appraised of past performance deficiencies, particularly where offerors had consented to allow the agency to discuss such evaluations with the offeror).

357. Comp. Gen. B-257186 *et al.*, 94-2 CPD ¶ 167 (1994).

358. *Id.* at 5 (citations omitted).

359. *See id.*

360. Comp. Gen. B-260289, 95-1 CPD ¶ 261 (1995) (denying protests of a contract awarded for disposal and removal of hazardous waste, and indicating that protests were based on improper past performance evaluations).

361. Comp. Gen. B-249616, 92-2 CPD ¶ 395 (1992) (denying protest of award of contract for 42,000 flyer's aramid drawers, and stating that the challenger argued that the awarding agency improperly evaluated its past performance).

362. *See* Federal Envtl. Servs., 95-1 CPD ¶ 261, at 5 (1995) (holding that "[a] prime contractor is responsible for the performance of its subcontractors" and finding that the subcontractor's misconduct was so serious that the agency had a reasonable basis to conclude that the prime contractor had not properly supervised its subcontractor); *Kings Point Indus. Inc.* 92-2 CPD ¶ 395, at 4 ("[A] prime contractor generally is responsible for all of the work performed under its contracts with the government, including that of suppliers."). In *United International Engineering, Inc.*, Comp. Gen. B-257607.3, 95-2 CPD ¶ 108 (1995), GAO found that the Army acted reasonably in rating a disadvantaged small business firm as "high performance risk" for battlefield automated systems support. *See id.* at 4. While the offeror's proposed subcontractors had all been rated satisfactory, the offeror proposed to subcontract only thirty-seven percent of this effort. *See id.* at 7. The rating was found reasonable because, among other reasons, on a prior contract the offeror had "demonstrated an inability to plan, develop, and implement procedures which result in the delivery of high quality products and services on schedule and within budget." *Id.* at 5 (citing report of prior contracting officer).

considered, in *Morrison Knudsen Corp.*,<sup>363</sup> it was held to be unreasonable to credit an awardee for "superior subcontractor approach" and past performance where the awardee did not commit to use the subcontractors named in the proposal.<sup>364</sup> Rather, the offeror indicated that subcontractor selection would be completed after award.<sup>365</sup>

On the other hand, without fully explaining the rationale, GAO found to the contrary in *Caltech Service Corp.*<sup>366</sup> The GAO held that the Air Force did not act unreasonably in refusing to grant the protester a favorable past performance rating under a "security subfactor" when the offeror planned to subcontract certain areas of work to the incumbent contractor.<sup>367</sup> While the offeror did plan to subcontract with the incumbent, the proposed subcontract would not include the security area.<sup>368</sup> However, the offeror did plan to hire the former subcontractor's employees and integrate them into its work force.<sup>369</sup> Based on these facts, the GAO found that a neutral rating under this subfactor was proper.<sup>370</sup>

*13. To what extent may the agency rely on past performance information provided by other agencies and non-U.S. Government sources?*

OFPP Policy Letter 92-5<sup>371</sup> expresses every intention that agencies consider all types of past performance information from other agencies and from commercial customers.<sup>372</sup> Precedent supports this intention.<sup>373</sup>

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363. Comp. Gen. B-270703, 96-2 CPD ¶ 86 (1996).

364. See *id.* at 4.

365. See *id.*

366. Comp. Gen. B-261044.4, 95-2 CPD ¶ 285 (1995) (discussing a case involving a disadvantaged small business which was set-aside).

367. See *id.* at 7 (explaining that the subcontractor was only hired for fire protection/crash rescue, not for other areas of the security subfactor).

368. See *id.*

369. See *id.*

370. See *id.* ("[T]he agency reasonably determined that Caltech's proposal should not receive an enhanced or low performance risk rating for other areas."). *Oceanometrics, Inc.*, Comp. Gen. B-278647.2, 98-1 CPD ¶ 159 (1998), is consistent with *Caltech Services Corp.* While the subcontractor was highly rated, it would have performed only 25 percent of the contract work. GAO stated that while the agency may consider the past performance of a subcontractor, "the key consideration is whether the experience is reasonably predictive of the offeror's performance." *Id.* at 5; see also *Xeno Technix, Inc.*, Comp. Gen. B-278738, 98-1 CPD ¶ 110 (1998) (explaining the propriety of Navy determination not to credit a prime contractor for past performance of a proposed subcontractor where the subcontractor would perform less than one percent of the work).

371. 58 Fed. Reg. 3573 (1993).

372. See *id.* at 3576 ("Data on a contractor's performance may be obtained from a variety of sources . . . . Information on contracts outside the agency may be obtained from . . . other contracting activities including private firms.").

373. There are several cases in which agencies properly relied on past performance

In *Centre Manufacturing Co.*,<sup>374</sup> GAO rejected the protester's contention that the agency was precluded from considering commercial past performance information where the awardee had previously manufactured clothing items for the private market. GAO stated:

The RFP focused on evaluating an offeror's past performance not only for evidence of producing an item in conformance with government specifications but more generally for evidence of the offeror's overall reliability and capability. Thus, while . . . the RFP referred to "the offeror's record of conforming to [g]overnment specification requirements" as one element of past performance, the solicitation also defined past performance to include the offeror's adherence to contract schedules; its reputation for "reasonable and cooperative behavior and commitment to customer satisfaction"; and the offeror's concern for its customer's interests. These factors all are elements of a contractor's performance regardless of whether a commercial or a government contract is involved . . . .<sup>375</sup>

*14. What limitations, if any, apply to the agency's use of contractor performance information databases?*

GAO has not expressed any reservations concerning agencies relying on information derived from contractor performance databases. Significant reliance by agencies on past performance information found in databases has been an issue in numerous protests.<sup>376</sup>

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information based on contracts or subcontracts with other U.S. Government agencies. See *HLC Indus., Inc.*, Comp. Gen. B-274374, 96-2 CPD ¶ 214, at 3 (1997) (reporting reliance by Bureau of Prisons upon Postal Service information); *Hughes Missile Sys. Co.*, Comp. Gen. B-272418 *et al.*, 96-2 CPD ¶ 221, at 6-8 (1996) (describing reliance by Air Force upon Navy information); *Quality Elevator Co.*, Comp. Gen. B-271899, 96-2 CPD ¶ 89, at 19-21 (1996) (noting a reliance by the Commerce Department on State Department information); *Cessna Aircraft Co.*, Comp. Gen. B-261953.5, 96-1 CPD ¶ 132 (1996) (upholding reliance by Air Force on Navy information). There are also instances in which agencies relied upon reference or past performance information supplied by non-U.S. Government customers. See *American Combustion Indus., Inc.*, Comp. Gen. B-275057.2, 97-1 CPD ¶ 105, at 10-11 (1997) (expressing no concern with the consolidation of information obtained from James Madison University, but sustaining a protest based on the agency's failure to provide offeror an opportunity to rebut this unfavorable reference); *GZA Remediation, Inc.*, Comp. Gen. B-272386, 96-2 CPD ¶ 155, at 3-4 (1996) (relying upon information from an unidentified commercial customer); *Contract Int'l Inc.*, Comp. Gen. B-270102 *et al.*, 96-1 CPD ¶ 53, at 4-5 (1996) (relying upon past performance information from Government of Qatar); *US Defense Sys., Inc.*, Comp. Gen. B-260702 *et al.*, 95-2 CPD ¶ 22, at 4-6 (1995) (using information from private-sector security guard service clients including hospitals, convention center, and airports); *Ashland Sales & Serv., Inc.*, Comp. Gen. B-255159, 94-1 CPD ¶ 108, at 4 (1994) (upholding reliance upon unidentified commercial customers).

374. Comp. Gen. B-251665, 93-1 CPD ¶ 340 (1993).

375. *Id.* at 4.

376. See *Rotair Indus., Inc.*, Comp. Gen. B-276435.2, 97-2 CPD ¶ 17, at 2 (1997) (supporting

15. *What do the cases have to say concerning negotiations addressing the offeror's past performance information?*

Not surprisingly, in numerous cases, protesters have contended that the agency failed to conduct meaningful discussions concerning adverse information developed in reference checks or in past performance files and databases.<sup>377</sup> As noted in *American Combustion Industries, Inc.*,<sup>378</sup> nothing in the regulations or past performance decisions changes the basic principle that if the agency has invoked FAR § 15.306(a)(3), and notified offerors that a contract may be awarded based on the initial proposals without negotiations, then negotiations are not required.<sup>379</sup>

The most debatable theme found in the negotiations cases is the notion that some aspects of past performance are purely historical in nature, and that agencies need not pursue discussions in such cases because historical facts simply do not change. Closely allied with this principle is the idea that once the offeror has had an opportunity to rebut unfavorable past performance information pursuant to the routine procedures in FAR Subpart 42.15, no new opportunity to discuss the information is required as a part of the discussions process during a competitive procurement. These principles have created

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the use of Defense Logistics Agency "Automated Best Value Model" database); Best Foam Fabricators, Inc., Comp. Gen. B-275436, 97-1 CPD ¶ 78, at 1 (1997) (allowing reliance upon Air Force "Blue Ribbon Program" for negotiated spare parts acquisition); USA Elects., Comp. Gen. B-275389, 97-1 CPD ¶ 75, at 1 (1997) (permitting the use of Defense Supply Center "Automated Best Value Model" score calculated monthly for each contractor); H.F. Henderson Indus., Comp. Gen. B-275017, 97-1 CPD ¶ 27, at 2 (1997) (conceding Air Force reliance on "Mechanization of Contract Administration System"); Hughes Missile Sys. Co., 96-2 CPD, at 5 (accepting reliance on the Air Force's "Contractor Performance Assessment Reports" database); PW Constr., Inc., Comp. Gen. B-272248 *et al.*, 96-2 CPD ¶ 130, at 5-6 (1996) (supporting reliance on the unidentified Navy performance database); Rockwell Int'l Corp., Comp. Gen. B-261953.2 *et al.*, 96-1 CPD ¶ 34, at 11 (1995) (upholding reliance on the Air Force's "Contractor Performance Assessment Reports" database); Hi-Shear Tech. Corp., Comp. Gen. B-258814.2, 95-1 CPD ¶ 250, at 2 (1995) (accepting reliance on the Air Force's "Blue Ribbon Program"); John Brown U.S. Servs., Inc., Comp. Gen. B-258158 *et al.*, 95-1 CPD ¶ 35, at 7 n.5 (1994) (permitting reliance upon the unidentified Navy "computerized database containing past performance information"); Brunswick Defense, Comp. Gen. B-255764, 94-1 CPD ¶ 225, at 2 (1994) (describing reference to "existing government data bases" in instructions to offerors); Lockheed Aircraft Serv. Co., Comp. Gen. B-255305 *et al.*, 94-1 CPD ¶ 205, at 10 (1994) (reporting reliance on Defense Logistics Agency "MOCAS" database).

377. See *infra* Part III.B.4 (discussing the few cases in which GAO has agreed with protest contentions regarding discussions).

378. Comp. Gen. B-275057.2, 97-1 CPD ¶ 105 (1997).

379. See *id.* at 10 n.5. In addition, procuring agencies are not required to conduct discussions regarding an offeror's past performance in source selections utilizing "simplified acquisition procedures." See M3 Corp., Comp. Gen. B-278906, 98-1 CPD ¶ 95, 1998 U.S. Comp. Gen. LEXIS 151 (Apr. 1, 1998) (stating that an agency is not required to engage in discussions regarding a protestor's negative past performance references under simplified acquisition procedures); cf. FAR, 48 C.F.R. § 13.106-2(b)(1) (1997) (stating that conduct of discussions is not required in purchases exceeding the micro-purchase threshold).

much protest disputation in GAO and in at least one reported court decision.<sup>380</sup>

At first, GAO routinely held that discussions regarding adverse information of offerors were not required as to matters which were "historical" in nature and allegedly could not be changed as a result of discussions.<sup>381</sup> However, in *American Combustion Industries, Inc.*, GAO subsequently found that this line of decisions had been effectively overruled by former FAR § 15.610(c)(6).<sup>382</sup> This former FAR section provided that offerors generally must be given a reasonable opportunity to discuss "past performance information from references on which the offeror had not had a previous opportunity to comment."<sup>383</sup>

However, a decision of the U.S. Court of Federal Claims calls GAO's interpretation of former FAR § 15.610(c)(6) into question. In *Cincom Systems, Inc. v. United States*,<sup>384</sup> the Court stated that former FAR § 15.610(c)(6) "cannot be interpreted to apply to a reference that plaintiff itself has provided."<sup>385</sup> The Court opined that the opportunity to comment on past performance information referenced in FAR § 15.610(c)(6) is available only where the government, pursuant to former FAR § 15.608(2)(ii), has independently discovered unfavorable past performance information concerning the offeror.<sup>386</sup> Further, the current FAR, in § 15.306(d)(3), affords offerors in the competitive range an express opportunity to rebut past performance problems that agencies have turned up in their evaluations only where the weakness, deficiency, or

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380. *Cincom Sys., Inc. v. United States*, 37 Fed. Cl. 663 (1997).

381. See *Moore Med. Corp.*, Comp. Gen. B-261758, 95-2 CPD ¶ 204, at 7 (1995) ("The prior experience of an offeror is an aspect of its proposal that is generally not subject to improvement . . . . [C]onsequently, agencies are not always obligated to discuss weaknesses identified in prior experience."). Similarly, in *Appalachian Council, Inc.*, GAO held that where offerors knew that references might be checked, the protester was not entitled to discussions addressing references that provided unfavorable comments. See *Appalachian Council, Inc.*, Comp. Gen. B-256179, 94-1 CPD ¶ 319, at 12 (1994). GAO stated that information from references is "essentially historical in nature" and the protester is "generally unlikely to be able to make a significant contribution to its interpretation." *Id.*; see also *SDA, Inc.*, Comp. Gen. B-256075 *et al.*, 94-2 CPD ¶ 71, at 7 n.9 (1994) (reiterating the prior holding that an agency may contact references and consider their replies without permitting the offerors to rebut the information and without further investigation into the accuracy of the information); *Dragon Servs., Inc.*, Comp. Gen. B-255354, 94-1 CPD ¶ 151, at 7 (1994) ("An agency's evaluation of past performance may be based upon the procuring agency's reasonable perception of inadequate prior performance, even where the contractor disputes the agency's interpretation of the facts.").

382. See *American Combustion*, 97-1 CPD ¶ 105, at 11.

383. 48 C.F.R. § 15.610(c)(6) (1996), revised by 62 Fed. Reg. 51,224 (1997) (effective Oct. 10, 1997).

384. 37 Fed. Cl. 663 (1997).

385. *Id.* at 676 n.39.

386. See *id.*

other perceived problem with the proposal "could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award."<sup>387</sup>

Another concern is whether the contracting officer has discretion to determine whether a perceived past performance problem could be changed or adequately explained by an offeror without first actually hearing the offeror's explanation? For example, where the purported past performance problem is based on erroneous data pertaining to another company with a similar name, or to a remote affiliate, can the offeror be penalized by a poor past performance rating it has had no opportunity to see, much less confront? Answers to such questions will have to await consideration in further GAO and Court decisions.<sup>388</sup>

Discussions are not required in all situations. While an agency is required to conduct meaningful discussions concerning "weaknesses [in past performance] that, unless corrected would prevent an offeror from having a reasonable chance for award,"<sup>389</sup> under the rationale of *Quality Elevator Company*, discussions are not required where, despite arguably unfavorable past performance information, the offeror is still rated "very good" in that area.<sup>390</sup> Similarly, in *Caltech Services Corp.*,<sup>391</sup> GAO stated, "[w]here, as here, a proposal is considered to be acceptable [under the past performance factor] and in the competitive range, the agency is not obligated to discuss every aspect of the proposal that receives less than the maximum possible rating."<sup>392</sup> Further, in conducting discussions relative to past performance, an agency is not required to provide offerors with the verbatim comments set forth in past performance surveys the agency has received.<sup>393</sup> The agency need only identify the categories of past performance problems that relate to the specific problems noted in

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387. 48 C.F.R. § 15.306(d)(3) (1997).

388. See *JCI Envtl. Servs., Comp. Gen. B-250752.3*, 93-1 CPD ¶ 299 (1993) (holding that the Defense Logistics Agency was not required to give the protester an opportunity to discuss a prior termination for default where the same agency had recently obtained the protester's response in another pending procurement).

389. *Quality Elevator Co., Comp. Gen. B-271899*, 96-2 CPD ¶ 89, at 7 (1996).

390. See *id.* at 7. In *Morrison Knudsen Corp.*, in which GAO sustained the protest on other grounds, GAO noted that, assuming the agency saw a past performance weakness as a "significant weakness" in a proposal, it was required to advise the offeror accordingly during discussions. See *Morrison Knudsen Corp., Comp. Gen. B-270703*, 96-2 CPD ¶ 86, at 4 (1996); see also *Advanced Envtl. Tech. Corp., Comp. Gen. B-259252*, 95-1 CPD ¶ 149, at 10 (1995) ("[C]ontracting officials must advise offerors of deficiencies in their proposals and afford offerors an opportunity to submit revised proposals . . .") (citation omitted).

391. *Caltech Servs. Corp., Comp. Gen. B-261044.4*, 95-2 CPD ¶ 285 (1995).

392. *Id.* at 7 (citation omitted).

393. See *Voices R Us, Comp. Gen. B-274802.2*, 97-2 CPD ¶ 170, at 3 (1997).



these surveys.<sup>394</sup>

16. *Does the evaluation of past performance involve a risk of de facto debarment?*

a. *GAO's experience with actual allegations of de facto debarment*

In a few cases, protesters have explicitly alleged *de facto* debarment as a result of an agency's past performance ratings. This type of allegation is understandable because the same, unfavorable past performance information is used repetitively by the agencies and presumably has the same negative effect on any evaluator who may come across it in evaluating proposals for a new contract. Given the extraordinary burden of proof that GAO utilizes in such cases, it is not surprising that GAO has denied each such protest.

In *Dynamic Aviation—Helicopters*,<sup>395</sup> a small business claimed bias and *de facto* debarment in connection with its past performance evaluation in a negotiated procurement.<sup>396</sup> Citing the absence of evidence of bias, GAO gave the agency the benefit of the presumption that government officials act in good faith, stating “[w]e do not attribute unfair or prejudicial motives to them on the basis of inference or supposition.”<sup>397</sup>

Similarly in *SDA, Inc.*,<sup>398</sup> the protester received devastatingly poor reference reports from two sources.<sup>399</sup> As a result, GAO rejected the protester's contention that GSA “is attempting to punish SDA for filing legitimate claims under the disputes provisions of prior contracts”<sup>400</sup> and that this was a “form of *de facto* debarment.”<sup>401</sup> GAO disposed of the case by simply stating that “the agency followed the evaluation criteria” and acted reasonably in downgrading the protester's past performance based on the uniformly poor

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394. *See id.*

395. Comp. Gen. B-274122, 96-2 CPD ¶ 166 (1996).

396. *See id.* at 2, 4 (discussing protester's contentions for why it should have been awarded the contract based on its lowest-price offer).

397. *Id.* at 4.

398. Comp. Gen. B-256075 *et al.*, 94-2 CPD ¶ 71 (1994).

399. *See id.* at 4-5. “Reference A” stated that the customer would not work with the protester again “if [we] have a choice.” “Reference B” stated that while the protester's quality was “good,” the company “spends a lot of time on minute details [and] will charge [the] government for all possible delays.” Regarding schedule compliance, “Reference A” stated that the contract had been performed on time but the protester was “very difficult to work with.” “Reference B” stated: “Yes, on time [but] can't trust them to perform without a lot of hassle [and] unnecessary delays.” One evaluator wrote: “All references were very displeased . . . . I was seriously advised not to work with them. No good qualities identified.” *Id.*

400. *Id.* at 5-6.

401. *Id.* at 8.

recommendations.<sup>402</sup>

In *JCI Environmental Services*,<sup>403</sup> the protester claimed *de facto* debarment when the Defense Logistics Agency awarded the contract to another firm at a \$3.6 million price premium due to a poor past performance rating for the protester.<sup>404</sup> Rejecting the argument, GAO stated:

A contracting agency may not exclude a firm from contracting with it without following the procedures for suspension or debarment by making repeated determinations of nonresponsibility as part of a long-term disqualification effort. Here, the agency has not found JCI nonresponsible. Rather, in each solicitation under which JCI has submitted a proposal, it has been considered eligible for award. JCI has not been selected for award because it did not present the best value in part due to the agency's assessment of JCI's past performance. The agency's determinations were based upon technical evaluations, and not responsibility, and JCI's failure to receive the awards does not constitute *de facto* debarment. While JCI cannot change its past performance, it can submit a past performance proposal to highlight its relevant experience and explain its prior unacceptable performance. Moreover, we find no evidence of bias or discrimination on this record. Where a protester alleges bias on the part of procurement officials, the protester must prove that the officials intended to harm the protester. In the absence of such proof, contracting officials are presumed to act in good faith.<sup>405</sup>

Despite GAO's statements in the cited cases, once a contractor has received poor contract performance ratings, the practical difficulty of explaining or refuting the adverse reports may very well result in exclusion of certain contractors from government contracting.

*b. What success, if any, have protesters had in rebutting adverse past performance ratings?*

In answering the general question whether the use of past performance as an evaluation factor in source selections may have the effect of debarring contractors, perhaps the more appropriate question is whether a protester who challenges its own past performance rating has any real prospect of successfully rebutting the agency's evaluation in GAO or in the courts.

An examination of those decisions in which GAO has sustained

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402. See *id.* at 7.

403. Comp. Gen. B-250752.3, 93-1 CPD ¶ 299 (1993).

404. See *id.* at 1, 8.

405. *Id.* at 8-9 (citations omitted).

protests reveals, seemingly without exception, situations where the source selection involved a clearly erroneous or unreasonable award decision on the face of the record before GAO. Each of these cases is discussed in detail below. Close examination shows, however, that currently no protester has succeeded in challenging the correctness or validity of the underlying past performance information itself.

The protester's inability to win such cases appears to be a logical result of GAO's fundamental approach. GAO simply stops the analysis when it has found that the evaluation score, color code, adjectival, or other assigned rating has some arguable support in the protest record. Consequently, in *Hughes Missile Systems Co.*,<sup>406</sup> GAO stated in seemingly categorical fashion, "[a]n evaluation of past performance may be based on the agency's reasonable perception of inadequate prior performance, even where the contractor disputes the agency's interpretation of the facts."<sup>407</sup>

GAO does not seem interested in going behind the write-up of the past performance evaluation to examine the legitimacy of the past performance information supplied to the evaluator. GAO seem concerned with whether that information came from an agency database, from contract files, or from reference checks and questionnaires utilized by the evaluators.

In *Cessna Aircraft Company*,<sup>408</sup> the protester obtained a ruling from the Armed Services Board of Contract Appeals ("ASBCA") in its favor with regard to some of the performance problems and cost overruns, which had resulted in its less than ideal past performance rating.<sup>409</sup> However, the protester's response to discussion items may not have taken full advantage of the opportunity to advise the government of the ASBCA results.<sup>410</sup> Furthermore, in *Rockwell International Corp.*,<sup>411</sup> GAO brushed off Rockwell's explanations of perceived past performance problems,<sup>412</sup> as well as its contention that at the time

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406. Comp. Gen. B-272418 *et al.*, 96-2 CPD ¶ 221 (1996).

407. *Id.* at 6-7 (citations omitted); see also *Braswell Services Group, Inc.*, Comp. Gen. B-278921.2, 98-2 CPD ¶ 10 (stating an "agency may base a past performance evaluation on its reasonable perception of inadequate prior performance even where the contractor disputes the agency's interpretation of the facts"); *Cessna Aircraft Co.*, Comp. Gen. B-261953.5, 96-1 CPD ¶ 132, at 17 (1996) (same); *Quality Fabricators, Inc.*, Comp. Gen. B-271431, 96-2 CPD ¶ 22, at 6-7 (1996) (holding that a protester failed to rebut information in agency database); *Macon Apparel Corp.*, Comp. Gen. B-272162, 96-2 CPD ¶ 95, at 3 (1996) (stating that protester's "disagreement with this [past performance] assessment by the agency provides no basis for finding that assessment unreasonable") (citation omitted).

408. Comp. Gen. B-261953.5, 96-1 CPD ¶ 132 (1996).

409. See *id.* at 20.

410. See *id.*

411. Comp. Gen. B-261953.2 *et al.*, 96-1 CPD ¶ 34 (1995).

412. See *id.* at 11 (rejecting Rockwell's argument that the past performance down grade was irrelevant where the prior contract has been a developmental contract and the present one was

Contractor Performance Assessment Reports ("CPAR") were prepared, various disputes were pending before the agency.<sup>413</sup> Rockwell contended "that the unfavorable information in the CPAR was a deliberate attempt by the agency to buttress its defense to the pending claims."<sup>414</sup> GAO's response included:

An agency's evaluation of past performance may be based on the procuring agency's reasonable perception of inadequate prior performance, even where the contractor disputes the agency's interpretation of the facts . . . . Based on our review of the record, we think that the "moderate" risk rating assigned Rockwell's proposal under these factors is consistent with the PRAG's conclusions based on the unfavorable information contained in the CPAR.<sup>415</sup>

There are many examples of cases where protesters have unsuccessfully challenged the validity of the underlying past performance information in the context of a GAO protest.<sup>416</sup> These decisions are not necessarily wrong and most are probably right. The point to be made here, however, concerns process. Once a

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a production contract and that Rockwell had taken steps to improve problems encountered under both contracts).

413. *See id.* at 11 n.13.

414. *Id.*

415. *Id.* at 11 (citations omitted).

416. *See* Pearl Properties, Inc., Comp. Gen. B-277250.2, 97-2 CPD ¶ 80, at 4-5 (1997) (holding that a successful appeal to the Board of Contract Appeals did not preclude the agency from considering the underlying facts concerning offeror's deficient performance in subsequent competitive negotiation); MAC's Gen. Contractor, Comp. Gen. B-276755, 97-2 CPD ¶ 29, at 3 (1997) (holding that a contractor's appeal to U.S. Court of Appeals for the Federal Circuit, following unsuccessful an appeal to Armed Services Board of Contract Appeals, did not preclude the agency from considering default termination as indicative of poor past performance). In addition, the fact that a contractor may be appealing does not mean it is unreasonable for the agency to rely on termination as evidence of the firm's past performance. *See id.*; *see also* Neal R. Gross & Co., Inc., Comp. Gen. B-275066, 97-1 CPD ¶ 30, at 3-4 (1997) (holding that the offeror did not persuade GAO that information provided by a reference concerning poor quality of work and disruptive behavior was erroneous); Continental Serv. Co., Comp. Gen. B-274531, 97-1 CPD ¶ 9, at 6 (1997) (rejecting protester's rebuttal to a reference's survey questionnaire despite protester's "explanations and interpretations of events that provide a more favorable view of the protester's past performance and possible mitigating circumstances"); HLC Indus., Inc., Comp. Gen. B-274374, 96-2 CPD ¶ 214, at 5-6 (1996) (rejecting protester's contention that delays under a prior contract were excusable); Dragon Servs., Inc., Comp. Gen. B-255354, 94-1 CPD ¶ 151, at 6-7 (1994) (rejecting protester's rebuttal of "erroneous information" concerning its past performance). GAO decided that "[a]n agency's evaluation of past performance may be based on the procuring agency's reasonable perception of inadequate prior performance, even where the contractor disputes the agency's interpretation of the facts." *Id.* at 10-11 (1994); *see also* Lockheed Aircraft Serv. Co., Comp. Gen. B-255305 *et al.*, 94-1 CPD ¶ 205, at 10-11 (1994) (demonstrating that GAO was not interested in protester's challenge to accuracy of performance information in database); Pannesma Co., Ltd., Comp. Gen. B-251688, 93-1 CPD ¶ 333, at 6 (1993) (reciting the basic principle that a past performance evaluation will be upheld if it is reasonable despite the contractor's position that past performance information is flawed); JCI Envtl. Servs., Comp. Gen. B-250752.3, 93-1 CPD ¶ 299, at 4-5 (1993) (stating that GAO is not interested in hearing reasons why a default termination was allegedly improper).

contractor has unfavorable past performance information in its record, it may be virtually impossible to overcome the negative effects of that information in the contract award process. A GAO protest will not likely provide the ideal forum for a challenge.

The issue addressed here is directly resolved by GAO's decision in *SDA, Inc.*,<sup>417</sup> where GAO stated in denying a request for a hearing on the validity of the protester's past performance information:

[W]e find that the agency reasonably relied upon the references that the protester itself provided in response to the [solicitation]. Since we do not think that the agency had to "go behind" the opinions expressed by the references and conduct further independent investigation as to the adequacy or quality of the protester's performance under four different contracts, we found a hearing unnecessary and denied the request.<sup>418</sup>

GAO further stated: "We do not think the agency was required to conduct further investigation to independently establish the validity of the reports from the references."<sup>419</sup>

Even more indicative of GAO's inhospitable attitude toward challenges to allegedly erroneous past performance information is *Kings Point Industries, Inc.*,<sup>420</sup> where GAO simply and categorically stated: "The question of whether the delays under these [past] contracts . . . were legally excusable is outside of our bid protest jurisdiction."<sup>421</sup>

*c. Is GAO equipped to handle protester challenges to evaluations of past performance?*

Practitioners with experience handling GAO protests know of the limited standards of review in that forum. Most protests are decided on the written record. While protesters may request documents, recent amendments to GAO's rules now require the protester to demonstrate the relevance of the documents before the agency is required to respond.<sup>422</sup> Additional discovery is not available from the awardee except to the extent the awardee's proposal and related documentation are already part of the agency's file on the procurement.<sup>423</sup> Depositions are not available in GAO proceedings<sup>424</sup>

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417. Comp. Gen. B-256075 *et al.*, 94-2 CPD ¶ 71 (1994).

418. *Id.* at 6 n.7.

419. *Id.* at 7 n.9.

420. Comp. Gen. B-249616, 92-2 CPD ¶ 395 (1992).

421. *Id.* at 4.

422. See 4 C.F.R. §§ 21.1(d)(2), 21.3(g), 21.3(h) (1998).

423. See generally 4 C.F.R. pt. 21 (1998).

424. See *id.*

and hearings are not mandatory.<sup>425</sup> When GAO agrees to convene a hearing, usually its scope is limited to whatever specific issue GAO defines as involving a question of fact which cannot otherwise be resolved on the written record.

For these reasons, it is clear that GAO is not currently well-equipped, or even inclined, to be of much help in a protester's search for the truth in investigating and challenging the procuring agency's past performance determinations. These factors combined lead to the conclusion that currently, the use of past performance as an evaluation factor for award does, in fact, create a substantial risk of *de facto* debarment, as well as a certain potential for favoritism and abuse of the procurement process.

*B. Analysis of General Accounting Office and Court Decisions Sustaining Protests Involving Issues of Past Performance*

To date, GAO and the courts have sustained only twenty-four protests where the decision depended in some way on an issue of past performance. These cases can be classified in the following four general categories: failure to follow evaluation criteria relating to past performance, misevaluation of past performance information, other unreasonable evaluation problems, and contract award without meaningful discussions.

*1. Failure to follow evaluation criteria relating to past performance*

The first category of cases in which GAO has sustained protests reveals situations where stated past performance evaluation factors were not followed.

For example, in *NavCom Defense Electronics, Inc.*,<sup>426</sup> GAO sustained a protest against an Air Force award of a contract for repair of the Tactical Air Navigation ("TACAN") system.<sup>427</sup> Past performance and price were the only two evaluation criteria, and they were weighted equally.<sup>428</sup> Past performance was to be evaluated, in part, based on the offeror's past and present performance for "the same or similar efforts specified in the [RFP]."<sup>429</sup> While the protester had extensive experience in repairing the TACAN system, the awardee's

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425. See *id.* at § 21.7(a) (providing that GAO "may conduct a hearing in connection with a protest").

426. Comp. Gen. B-276163, 97-1 CPD ¶ 189 (1997).

427. See *id.* at 5.

428. See *id.* at 2 (explaining further that the RFP did not require submissions for technical proposals because the Air Force believed that any offer considered "responsive and responsible" was technically acceptable).

429. *Id.* (alteration in original) (quoting the RFP).

documented experience was in repairing radio power supplies.<sup>430</sup> All offerors received “low risk” ratings based on the past performance information submitted.<sup>431</sup> The awardee submitted the low price.<sup>432</sup> After reciting the basic principle that the government must follow the stated evaluation factors in making its award decision, GAO held that the record contained no analysis regarding which power supply repair was properly judged “similar” to TACAN system repair.<sup>433</sup> Furthermore, the agency disregarded and effectively waived the same or similar requirement contained in the RFP evaluation criteria.<sup>434</sup>

Another sustained protest involving failure to follow evaluation factors is in *Holiday Inn-Laurel—Protest and Request for Costs*,<sup>435</sup> which involved a contract for lodging and meals. There, GAO awarded costs and sustained a protest where the Army rejected the protester’s \$2.7 million price and set the contract award at \$3.5 million.<sup>436</sup> The protester’s technical evaluation had proved marginal with “poor” past performance.<sup>437</sup> To make matters worse, the Army found the protester nonresponsive, citing both poor past performance and alleged falsification of past performance information in the proposal.<sup>438</sup> Sustaining the protest, GAO found that instead of giving past performance its proper weight as just one among six equal technical evaluation factors, past performance adversely affected the protester’s rating under numerous other evaluation factors.<sup>439</sup> As a result, GAO found that the Army greatly exaggerated the importance of past performance when compared to the weight assigned in Section M of the solicitation.<sup>440</sup>

In another case, *Halter Marine, Inc.*,<sup>441</sup> GAO was prompted to sustain a protest challenging a best-value source selection by the Panama Canal Commission in contracting for a new vessel.<sup>442</sup> While “past

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430. See *id.*

431. See *id.*

432. See *id.* at 3.

433. See *id.* at 5 (concluding that “[i]n the absence of any support in the record for the agency’s assignment of the same low performance risk rating to both offerors, we cannot conclude that the award to Integrity was reasonable”).

434. See *id.* at 5 n.2.

435. Comp. Gen. B-270860.3 *et al.*, 96-1 CPD ¶ 259, *recon. denied*, Comp. Gen. B-270860.5, 96-2 CPD ¶ 23 (1996).

436. See *id.* at 2.

437. See *id.*

438. See *id.* at 3.

439. See *id.* at 4-5 (explaining that the agency failed to weigh the factors equally as stated in the RFP’s statement).

440. See *id.* at 3-4 (stating that “each evaluator improperly downgraded the firm . . . in areas not calling for [past performance] review”).

441. Comp. Gen. B-255429, 94-1 CPD ¶ 161 (1994).

442. See *id.* at 1.

performance" was not expressly listed as one of the four stated evaluation factors, the government required submission of information concerning construction of similar vessels during the past five years under the "experience" factor.<sup>443</sup> Although the agency rated the protester lower than the awardee overall, the "experience" ratings for each were the same.<sup>444</sup> The protester's price was initially a narrow \$22,000 lower than the awardee.<sup>445</sup> The government judged that the anticipated extra cost of quality surveillance, when added to the protester's cost, would offset the price advantage.<sup>446</sup> The Contracting Officer, upon reviewing the proposals, downgraded the protester's past performance to "poor" from "less than satisfactory" and upgraded the awardee to "superior" from "satisfactory."<sup>447</sup> Upon receipt of Best and Final Offers, the protester's cost margin increased to \$53,000 due to a price reduction.<sup>448</sup> At this point, the government made its mistake: it did not consider whether the price reduction overcame the technical superiority of the winning offeror. The technical evaluation committee's calculations indicated that the result might have been different. However, the government had made its final cost technical trade-off based on the initial price difference of \$22,000.<sup>449</sup> Another problem cited by GAO was that the agency gave "overwhelming weight" to past performance in evaluating other factors, including technical merit and quality control, where past performance issues were not identified as considerations in the evaluation scheme.<sup>450</sup> Repeated consideration of past performance information under numerous factors rendered the award decision unreasonable.<sup>451</sup>

Alternatively, *Latecoere International Inc. v. United States Department of the Navy*,<sup>452</sup> an egregious case of bad faith and manipulation in the

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443. See *id.*

444. See *id.* at 3 (stating that both parties received a "6" for experience).

445. See *id.* at 4.

446. See *id.* (reporting that Swiftship's use of a higher grade of aluminum alloy also made their offer a better value for the government).

447. See *id.*

448. See *id.* (explaining that Halter had lowered their price by more than \$30,000).

449. See *id.* at 5-6 (noting that "Halter's price reduction might have offset the claimed value of the Swiftships proposal").

450. See *id.* at 6-7 ("It is fundamental that offerors must be advised of the basis upon which their proposals will be evaluated.").

451. See *id.* at 7. Failure to follow the stated evaluation criteria was an alternative basis of GAO's decision sustaining a protest in *GTS Duratek, Inc.*, Comp. Gen. B-280511.2 *et al.*, 1998 U.S. Comp. Gen. WL 840923, at 16 (1998). This decision primarily turned upon the Comptroller General's holding that it was unreasonable for the Army to ignore clearly relevant past performance information known to one of the technical evaluators who served as the Controlling Officer's Representative under the particular past contract in question. *Id.* at 14. This decision is more fully considered at *infra* Part III.B.3.

452. 19 F.3d 1342 (11th Cir. 1994).



court's eyes, represents the one reported court decision where a performance evaluation issue was resolved in a protester's favor.<sup>453</sup> The U.S. Court of Appeals for the Eleventh Circuit found that the Navy committed prejudicial error by completely ignoring the past performance evaluation factor.<sup>454</sup> The Naval Training Center solicited proposals for "G-Tolerance Improvement Program" pilot training systems.<sup>455</sup> A six-volume proposal was required, including one entire volume devoted solely to past performance.<sup>456</sup> Section M set forth a Best Value selection scheme with technical factors more important than cost/price.<sup>457</sup> The Source Selection Advisory Council ("SSAC") recommended awarding the contract to Latecoere, a French firm, because it was rated superior technically and also had proposed a price of \$20.9 million, compared to \$35.2 million from the other offeror that had been included in the competitive range.<sup>458</sup> Interestingly, the ultimate awardee, ETC, had not even been included in the competitive range initially.<sup>459</sup> Latecoere's proposal had been rated acceptable while the other firm in the competitive range was unacceptable.<sup>460</sup> The Source Selection Authority ("SSA") recommended the award go to Latecoere without discussions.<sup>461</sup>

However, upper Navy management did not wish to award the contract to a non-U.S. firm and would not sign the Business Clearance Memorandum unless discussions were held.<sup>462</sup> After the discussions and following the submission of revised proposals, ETC was priced at \$10.3 million compared to \$11.2 million for Latecoere.<sup>463</sup> Yet, ETC was rated "marginal" under numerous factors, including past performance.<sup>464</sup> The SSAC decided to upgrade the ETC rating to "acceptable" even though the past performance information on ETC suggested that delays of up to nine months were

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453. See *id.* at 1344.

454. See *id.* at 1363-64 (remarking that the Navy, in contradiction to the request for proposals, concluded that past performance was not relevant).

455. See *id.* at 1344-45.

456. See *id.* at 1345.

457. See *id.*

458. See *id.* at 1347.

459. See *id.*

460. See *id.* (stating that Latecoere's proposal was acceptable but ETC's was not).

461. See *id.* (quoting the Selection Authority as saying "[i]t is my opinion that added discussions with all the offerors would not insure that the unacceptable offerors' redesign and resubmittal of their proposals would result in an appreciable technical and cost advantage to the Government").

462. See *id.* at 1348-50 (describing the "Buy American" concerns of the Navy and how the Navy made this decision).

463. See *id.* at 1350.

464. See *id.*

possible.<sup>465</sup> Despite this information, the Navy awarded the contract to ETC.<sup>466</sup> During a meeting between the SSAC and the SSA, the SSA stated that “the American companies might apply political ‘heat’ if the award went to a foreign company.”<sup>467</sup> When the Contracting Officer was asked whether any offerors were likely to protest, she responded that Latecoere was not likely to protest, while ETC was very likely to do so.<sup>468</sup> Thus, the SSA rejected the SSAC’s recommendation of award to Latecoere.<sup>469</sup> The SSA conceded that ETC presented more of a performance risk than Latecoere.<sup>470</sup> GAO denied Latecoere’s protest, and a U.S. district court denied injunctive relief.<sup>471</sup>

The Court of Appeals reversed after finding “overwhelming evidence that the [SSAC’s] manipulation of ETC’s ratings was arbitrary, irrational, improperly motivated, and a clear and prejudicial violation of 48 C.F.R. § 15.608(a). . . .”<sup>472</sup> The Court discovered numerous violations of law, including the Navy’s emphasis on cost to the exclusion of the other, non-cost evaluation factors,<sup>473</sup> and stated that the Navy “effectively scratched the past performance evaluation criteria out of the Solicitation based on the hope that constant government supervision would ensure proper performance.”<sup>474</sup> The Court stated: “[I]nstead of providing adequate support for his decision to equate the two proposals in regard to the offerors’ past performance, [the SSA’s] rationale effectively changed the Solicitation’s terms, a clear and prejudicial violation of procurement regulations.”<sup>475</sup>

## 2. *Mis-evaluation of past performance information: Unsupported evaluation or source selection decision*

GAO has sustained protests in the second category of cases in which selection decision, though not necessarily unreasonable on its

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465. See *id.* at 1350-51.

466. See *id.* at 1353 (stating that the Navy assumed that ETC’s proposal would be equal to Latecoere’s if it was “fleshed-out”).

467. *Id.* at 1351.

468. See *id.* (reporting that ETC had been active and vocal during the procurement process).

469. See *id.*

470. See *id.* at 1352.

471. See *id.* at 1353-54.

472. *Id.* at 1359.

473. See *id.* at 1360. Under 10 U.S.C. § 2305(b)(1) (1994), and 41 U.S.C. § 253b(a) (1994), procuring agencies may make contract awards only in accordance with the evaluation factors stated in the solicitation.

474. *Id.* at 1364.

475. *Id.*

face, proved to be *unsupported* in the documentary record.

In *The Real Estate Center—Costs*,<sup>476</sup> a case that awarded the protester its attorneys' fees, GAO noted that the record contained no support for a Department of Veterans Affairs evaluation, which had assigned the protester "zero" out of a possible ten points under the past performance factor.<sup>477</sup> Simply stated, DVA provided no narrative discussion to support this seemingly arbitrary rating.<sup>478</sup> Yet the record indicated that the protester had been rated "excellent" by the DVA just six months prior to the evaluation in issue, and that the protester had apparently managed 2,000 properties for the agency prior to the subject solicitation.<sup>479</sup>

In *Mechanical Contractors, S.A.*,<sup>480</sup> GAO sustained a protest against award of a contract by the Panama Canal Commission to perform cleaning and painting of miter gate leaves.<sup>481</sup> The technical evaluation included a "performance capability" factor that embraced past performance.<sup>482</sup> The RFP stated that favorable consideration would be given to offerors having either past contracts requiring confined space removal and painting with forced ventilation systems or possessing an official certification by the Steel Structures Painting Council ("SSPC") known as "QP-2."<sup>483</sup> Despite the fact that the protester's subcontractor held the SSPC QP-2 certification, the protester was downgraded significantly under past performance due to fewer relevant past contracts and some instances of late completion.<sup>484</sup> GAO held that the source selection decision was not adequately supported.<sup>485</sup> The contemporaneous evaluation documentation identified only one weakness in the protester's proposal, a lack of experience in the last three years.<sup>486</sup> At the same time, the record contained no indication that the protester had received any evaluation credit for holding the QP-2 certification.<sup>487</sup>

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476. Comp. Gen. B-274081.7, 98-1 CPD ¶ 105 (1998).

477. See *id.* at 3-4 (explaining that the score of "zero" lacked any reasonable basis in the record).

478. See *id.* (stating that the only explanation in the record was that the firm was "resistant to change").

479. See *id.* at 4.

480. Comp. Gen. B-277916, 97-2 CPD ¶ 121 (1997).

481. See *id.* at 1.

482. See *id.* at 1-2 (remarking that past performance was one of five subfactors of "performance capability").

483. See *id.* at 2 (reporting that the timelines and quality of the past performance would also be considered).

484. See *id.* at 2-3.

485. See *id.* at 3.

486. See *id.*

487. See *id.* at 4 (holding that failure to consider the protester's QP-2 certification was "unreasonable and inconsistent with the RFP language").

Moreover, the agency had admittedly considered certain "non-similar" contracts when, in fact, there was only one "similar" contract where the protester's performance had been late.<sup>488</sup> GAO recommended that the agency reevaluate both proposals, properly document the reevaluation, and make a new selection decision.<sup>489</sup>

Similarly, in *Ogden Support Services, Inc.*,<sup>490</sup> and a subsequent protest based on the same procurement, *Ogden Support Services, Inc.*,<sup>491</sup> GAO sustained the protester's challenge to the awardee's higher past performance score.<sup>492</sup> In the first protest, Ogden convinced GAO that the CIA's "near perfect" rating of the awardee's performance was unsupported.<sup>493</sup> Following GAO's initial ruling, the CIA Technical Management Evaluation Team ("TMET") simply reevaluated the information it already had seen.<sup>494</sup> CIA obtained no new past performance information as a part of its reevaluation.<sup>495</sup> The TMET again found the awardee near-perfect in past performance.<sup>496</sup> GAO again sustained Ogden's protest because "CIA's actions . . . ignore[d] our past decision" and because there was no new information or "meaningful rationale" supporting the awardee's high score.<sup>497</sup> For a second time, GAO found that the prior mail and courier service contracts, on which the high rating had been based, were only peripheral and unlike the effort described in the Statement of Work.<sup>498</sup> CIA had not explained why maintenance, janitorial and facilities service contracts, which "only peripherally involve[d] mail or courier service," justified an "excellent" rating.<sup>499</sup> Under the circumstances, the awardee's near perfect past performance score "effectively removed the evaluation weight assigned the past performance criterion."<sup>500</sup> Because the record did not support the awardee's strong past performance rating, CIA lacked "a proper basis" for concluding that the protester and the awardee should be

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488. See *id.* at 4-5.

489. See *id.* at 7.

490. Comp. Gen. B-270012.2, 96-1 CPD ¶ 177 (1996).

491. Comp. Gen. B-270012.3, 96-2 CPD ¶ 137 (1996).

492. See *Ogden Support Servs., Inc.*, 96-1 CPD ¶ 177, at 5 (determining agency based its assessment of past performance scores on insufficient information); *Ogden Support Servs., Inc.*, 96-2 CDP ¶ 137, at 2 (sustaining protest because the agency failed to support its past performance evaluations with a rational basis).

493. See *Ogden Support Servs., Inc.*, 96-1 CPD ¶ 177, at 5-6.

494. See *Ogden Support Servs., Inc.*, 96-2 CPD ¶ 137 at 2-3.

495. See *id.* at 2 (stating that the CIA received no new information prior to reevaluating the past performance of the parties).

496. See *id.* (reporting the CIA evaluators confirmed the awardee's near perfect score).

497. See *id.*

498. See *id.* at 2-3.

499. See *id.* at 3.

500. *Id.*

rated equally on past performance.<sup>501</sup>

In *Morrison Knudsen Corp.*,<sup>502</sup> involving a Defense Nuclear Agency ("DNA") award for dismantling of missile silos in Kazakhstan, "experience [and] record of [past] performance" was one of three subfactors under the most highly rated factor, "technical/management superiority."<sup>503</sup> DNA selected a lower-scored proposal (81.7 versus 87.6 technical points) evaluated at only \$92,088 or 3/10 of one percent lower in price than the protester.<sup>504</sup> DNA reasoned that the protester presented an unacceptable risk due to concerns regarding availability of working equipment in Kazakhstan and unreliable Kazakhstani subcontractors.<sup>505</sup> The SSA awarded the contract to the other offeror because of its supposedly superior subcontracting approach (featuring three Kazakhstani subcontractors the agency approved) and because the protester had incurred a 133 percent overrun on a prior DNA contract due to major subcontractor cost growth.<sup>506</sup> GAO held that DNA's selection was unreasonable because the subcontracting approach of both offerors was not "fundamentally different."<sup>507</sup> While the awardee's best and final offer ("BAFO") named the three subcontractors, resulting in an excellent evaluation, the awardee's BAFO had not in fact committed to using these subcontractors.<sup>508</sup> Both offerors had proposed to complete subcontractor selection following an award of the prime contract.<sup>509</sup> Because the record did not support "crucial" reason for the award the perceived superiority of the awardee in subcontractor approach, GAO sustained the protest.<sup>510</sup>

Likewise, in *PMT Services, Inc.*,<sup>511</sup> GAO sustained a protest against a Defense Reutilization and Marketing Service ("DRMS") award for hazardous waste disposal services. According to GAO, DRMS had no basis for concluding, in evaluating the protester's past performance, that the protester's past contract efforts were not as complex as the

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501. See *id.* at 4 (asserting that Ogden's proposal in fact should be technically superior).

502. Comp. Gen. B-270703, 96-2 CPD ¶ 86 (1996).

503. See *id.* at 2.

504. See *id.* This evaluation came after the protester's price had been increased by \$1.77 million in the cost realism evaluation. See *id.*

505. See *id.* (concluding that "in-country equipment" is usually broken or has been taken apart for spare parts and that imported equipment is more reliable).

506. See *id.* at 2-3 (reporting that the agency viewed these factors as "crucial aspects" of the proposal).

507. See *id.* at 3.

508. See *id.* (stating that this approach was the same as that proposed by the protester).

509. See *id.* at 3-4 (noting that in addition, the three potential subcontractors named by the awardee were also named by the protester).

510. See *id.* at 5-6.

511. Comp. Gen. B-270538.2, 96-2 CPD ¶ 98, *recon. denied*, Comp. Gen. B-270538.5 *et al.*, 96-2 CPD ¶ 194 (1996).

effort called for by the RFP.<sup>512</sup> DRMS stipulated three evaluation factors: technical, past performance, and price.<sup>513</sup> The technical evaluation was "go/no-go," with the remaining factors being evaluated comparatively.<sup>514</sup> Past performance was the most important award factor.<sup>515</sup> One aspect of the past performance evaluation was the "complexities" of the services offered in past efforts.<sup>516</sup> PMT proposed a price of \$2.1 million, compared to \$3.1 million for the awardee, but PMT was rated "marginal" in past performance compared to the awardee's "acceptable" rating under that factor.<sup>517</sup> PMT's proposal cited fifteen hazardous waste disposal contracts in the past two years ranging from very small to a high of \$446,000.<sup>518</sup> The protester's references rated PMT as "excellent" or "satisfactory in all respects."<sup>519</sup> However, DRMS rated PMT "marginal," with a likelihood of a successful performance being poor, "solely because PMT had not previously performed a contract of similar size and 'complexity' . . ."<sup>520</sup> GAO sustained the protest because DRMS had "not defined, either in the RFP or in its protest submissions, what is intended by the term complexity with respect to these services."<sup>521</sup> The agency had not taken into account such factors as degree of care or special handling needed, specific types of waste, size of staff needed, level of reporting and record keeping required, or number of vehicles needed.<sup>522</sup> The agency based its conclusions only on the size of the protester's previous contracts.<sup>523</sup> This information alone did not necessarily "yield a meaningful conclusion about an offeror's probability of future success."<sup>524</sup> On this record, GAO said that the government's evaluation of PMT's past performance was unreasonable.<sup>525</sup>

In *New Breed Leasing Corp.*,<sup>526</sup> GAO sustained a protest against a Navy award for transportation services. The RFP set forth a best value selection scheme, listing past performance, management and

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512. See *id.* at 6 (asserting that the term "complexity" had not been defined in the RFP).

513. See *id.* at 1.

514. See *id.* at 1-2.

515. See *id.* at 2 (reporting that price was a lesser factor).

516. See *id.*

517. See *id.* at 3.

518. See *id.*

519. See *id.*

520. *Id.*

521. *Id.* at 6.

522. See *id.* (acknowledging that the agency had only looked at the size of the contract).

523. See *id.*

524. *Id.*

525. See *id.*

526. Comp. Gen. B-259328, 96-2 CPD ¶ 84 (1995).

administration, and method of operation as equally important technical evaluation factors, the total of which was more important than the price.<sup>527</sup> The Navy awarded a contract to the higher priced offeror, at \$20.4 million, versus the protester's low price at \$20.1 million.<sup>528</sup> The Navy made this selection based on a finding that the \$300,000 price difference "is insignificant when considering the excellent technical rating given to [the awardee]. [The awardee] and [its] major subcontractor offered vast experience in transportation services of similar size and complexity, and had excellent past performance references."<sup>529</sup> However, GAO sustained the protest because the source selection turned on "information that contained uncorrected errors concerning [the protester's] ratings, failed to accurately represent [the awardee's] past performance record, and provided conclusions about the two proposals' technical differences that were inconsistent with the evaluation record . . . ."<sup>530</sup> The protester's past performance rating had been "understated."<sup>531</sup> The favorable results of a reference check with the Postal Service had not been communicated to the Technical Evaluation Board ("TEB"), and the TEB chairman stated in the summary evaluation that if this information had been available to the TEB members, the protester's "very good" past performance rating would have been raised to "excellent."<sup>532</sup> However, the SSA accepted the TEB report as filed, with the protester's past performance rated only "very good."<sup>533</sup> Further, the awardee's past performance rating was unreasonable because the "excellent" rating, based on reference checks for contracts that purportedly were of "similar size and complexity," actually involved much smaller contracts—most valued at less than \$1 million per year compared to the estimated \$4 million per year here.<sup>534</sup> GAO concluded that the awardee in fact had not performed any prior contracts of similar size and complexity, plus the awardee's references rated the firm as "satisfactory."<sup>535</sup> By comparison, the protester had performed a number of multi-million dollar contracts

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527. *See id.* at 2 (explaining that if the technical evaluations are similar, then their price becomes a more important factor).

528. *See id.* at 3-4.

529. *Id.* at 4.

530. *Id.*

531. *See id.* at 4-5 (finding that the ratings should have been "excellent" instead of "very good").

532. *See id.* at 5.

533. *See id.* (remarking that SSB did not discuss New Breed's past performance in its report).

534. *See id.* at 6-7.

535. *See id.* (evaluating the protester's past performance).

with references all either "very good" or "excellent."<sup>536</sup> Hence, the Navy did not accurately report the protester's evaluation to the SSA and the TEB evaluation did not support the stated technical discriminators between the protester and the awardee.<sup>537</sup> Thus the selection was unreasonable and GAO sustained the protest.<sup>538</sup>

*Ashland Sales & Services, Inc.*<sup>539</sup> found that the Defense Personnel Support Center ("DPSC") misevaluated proposals in a competitive procurement for military clothing. Technical factors outweighed price, and "experience/past performance" was the second-most-important factor.<sup>540</sup> DPSC rated the protester "acceptable" in two factors and "marginally acceptable" in all other areas.<sup>541</sup> In evaluating the protester's past performance, DPSC reviewed four prior DPSC contracts with the protester.<sup>542</sup> The protester was the low-price offeror at \$1,007,236 compared to \$1,137,726 for the awardee, whose technical advantage the government felt outweighed the price difference.<sup>543</sup> Ashland's protest claimed inadequate discussions regarding past performance information.<sup>544</sup> Although questions concerning Ashland's past performance on a commercial contract were resolved in the protester's favor, problems on past DPSC contracts were viewed as troublesome.<sup>545</sup> Even after reevaluating the protester's military past performance as a response to the protest, there was no change in the evaluation and DPSC ratified its choice.<sup>546</sup> GAO reviewed the record concerning the protester's past performance, concluding that the record did not support a finding that the protester had been at fault for delivery delays on a contract under which it served as subcontractor.<sup>547</sup> Initially the agency found that the prime contractor had been wholly at fault, based on financial problems.<sup>548</sup> Upon reevaluation of the proposals, however, DPSC changed its mind, rejecting the position that the prime contractor's financial problem led to difficulty in providing cloth for the protester

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536. See *id.* at 7.

537. See *id.* at 8.

538. See *id.*

539. Comp. Gen. B-255159, 94-1 CPD ¶ 108 (1994).

540. See *id.* at 1.

541. See *id.* at 2 (observing that Ashland received an "acceptable" rating for its men's product demonstration model and for quality assurance).

542. See *id.* (reporting that of the four contracts evaluated, three were delinquent).

543. See *id.*

544. See *id.* (stating that Ashland claimed there was a "lack of meaningful discussion" regarding past performance).

545. See *id.* at 3-4.

546. See *id.* at 4.

547. See *id.*

548. See *id.* (explaining that the agency's original evaluation excused Ashland from any responsibility for the delays).



to sew and blaming the late deliveries on the protester.<sup>549</sup> GAO could find no support in the written record for the government's reversal of its prior finding that the protester had not been at fault.<sup>550</sup> The original evaluation results were more reliable than the revised ones.<sup>551</sup> GAO found DPSC's reasoning to be unsupported and could not "tell from the record whether or not the reevaluation was a reasonable one."<sup>552</sup>

### 3. *Other unreasonable evaluation problems*

In the third category of sustained GAO protests, there is some other set of circumstances prompting GAO to hold that the evaluation lacked a reasonable basis—apart from a failure to follow evaluation criteria or to support adequately the past performance evaluation. The most recent sustained protest in this line of cases is GTS Duratek, Inc.<sup>553</sup> Past performance was listed as the most important among three evaluation criteria for award of a contract for disposal of radioactive waste at a Naval shipyard.<sup>554</sup> The Navy evaluated the protester's past performance as "good" based upon five "Contractor Past Performance Data Sheets" submitted with the protester's proposal and responses to surveys obtained by the Navy from three of these five references.<sup>555</sup> However, the Navy failed to consider the protester's past performance on another highly relevant contract for "radioactive metal melt and recycling services" at the same Naval Shipyard (Pearl Harbor) as that which would be served by the new contract. The Navy did not consider this information only because the protester did not submit a Contractor Past Performance Data Sheet on that contract.<sup>556</sup> The contract was discussed, however, in the offeror's past performance proposal.<sup>557</sup> After the filing of the protest, the Navy did obtain a past performance survey for that

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549. See *id.* (detailing that the reevaluation was based on the fact that Ashland had stated that the contractor's financial troubles began in June 1992 rather than January 1992).

550. See *id.* (describing the documentary evidence to the contrary).

551. See *id.*

552. *Id.* at 6. GAO's decision in *Pacific Repair and Fabrication, Inc.*, Comp. Gen. B-279793, 98-2 CPD ¶ 29 (1998), deserves mention among the sustained protests finding unsupported past performance evaluations. GAO found unreasonable the Navy's "Satisfactory" past performance ratings on four of the protest's past contracts, where the Navy had not been able to locate any personnel knowledgeable enough to provide a rating. GAO stated that if the Navy wished to include these contracts in its evaluation at all, it had a duty to obtain information about them that would be adequate to support the evaluation results. *Id.* at 5. However, due to the look of demonstrated prejudice to the protest, the protest was denied. *Id.* at 5, 7.

553. Comp. Gen. B-280511.2 *et al.*, 1998 U.S. Comp. Gen. WL 840923 (1998).

554. See *id.* at 2.

555. See *id.* at 12.

556. See *id.* at 13.

557. See *id.* at 12.

contract, yet maintained before GAO that the additional information did not change the offeror's rating.<sup>558</sup> The GAO nevertheless sustained the protest because "the agency could not reasonably ignore personally known information about [the protester's] prior experience . . . merely because the firm did not submit a Contractor Past Performance Data Sheet for that contract."<sup>559</sup> GAO stated "some information is simply too close at hand to ignore."<sup>560</sup>

In another such case, GAO found the Army's past performance evaluation of the protester unreasonable in the recent *Matter of Trifax Corporation*.<sup>561</sup> The Army downgraded Trifax under the "present and past performance" evaluation factor due to concerns about payment of employee benefits, reports that the firm had issued bad checks to employees, alleged difficulty in recruiting employees on one contract, and the submission of two references, rather than three, as required by the solicitation.<sup>562</sup> As a result, the Army excluded the Trifax proposal from further consideration. Trifax apparently had anticipated the performance issue, bringing these matters to the Army's attention in response to news articles reporting the cited concerns and asserting the reports to be erroneous.<sup>563</sup> While the contracting officer purportedly accepted the protester's explanation that the reported information was erroneous, the protester's evaluation score was still not good enough, in the Army's view, to be considered further in the competition.<sup>564</sup> Based upon its review of the record, GAO found insignificant the qualitative differences between the protester's corrected past performance information and the information regarding other offerors, who remained in the competition. GAO thus sustained the protest on the basis that the Army's past performance evaluation was unreasonable.<sup>565</sup>

The third such case is *SCIEN TECH, Inc.*<sup>566</sup> There, DOE had excluded the protester from the competitive range after checking four of the ten references provided.<sup>567</sup> Notably, the agency had declined to consider the protester's performance as an incumbent contractor for the identical services covered by the instant

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558. See *id.* at 13-14.

559. *Id.* at 14.

560. *Id.*

561. Comp. Gen. B-279561, 98-2 CPD ¶ 24 (1998).

562. See *id.* at 3.

563. See *id.*

564. See *id.* at 3-4.

565. See *id.* at 5.

566. Comp. Gen. B-277805.2, 98-1 CPD ¶ 33 (1998).

567. See *id.* at 3 (noting that SCIEN TECH asserts that the four contracts chosen were smaller and less relevant than other contracts it specified).

solicitation.<sup>568</sup> Recognizing that there is no requirement that all references be checked as a part of the evaluation process,<sup>569</sup> GAO stated that “some information is simply too close at hand to require offerors to shoulder the inequities that spring from an agency’s failure to obtain and consider the information.”<sup>570</sup> Based on this assessment, GAO found that it was unreasonable to exclude the protester from the competitive range without considering its past performance information for the incumbent contract.<sup>571</sup>

In another case, *U.S. Property Management Services Corp.*,<sup>572</sup> GAO found that the Department of Housing and Urban Development (“HUD”) acted unreasonably. In evaluating “prior management experience” (thirty out of one-hundred technical points) and “past performance” (twenty-five out of one-hundred technical points), HUD treated two similarly-situated firms differently.<sup>573</sup> Both the protester and the awardee were newly-formed corporations.<sup>574</sup> Interestingly, just prior to the solicitation in question, the presidents of both firms had worked together as principals of a third company.<sup>575</sup> A business dispute evidently caused a split shortly before proposals were due in response to the instant solicitation.<sup>576</sup> In the technical proposals, each of the two offerors relied on its president’s prior experience and past performance gained while working for the same prior company.<sup>577</sup> In discussing past performance, both proposals identified the same contracts, which had been performed by the prior company for which both individuals had worked.<sup>578</sup> HUD’s Technical Evaluation Panel downgraded the protester because, despite its president’s relevant experience and past performance, it was a newly-formed corporation and had no “corporate” experience.<sup>579</sup> However, the awardee, though it had basically the same experience and past performance as the protester, had not been downgraded for lack of corporate experience.<sup>580</sup> GAO sustained

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568. *See id.*

569. *See supra* Part III.A.8.

570. *SCIENTECH, Inc.*, 98-1 CPD ¶ 33, at 5.

571. *See id.* (holding that not evaluating the protester’s incumbent contract was “patently unfair”).

572. Comp. Gen. B-278727, 98-1 CPD ¶ 88 (1998).

573. *See id.* at 2.

574. *See id.* at 4.

575. *See id.* at 3-4.

576. *See id.* at 4.

577. *See id.*

578. *See id.*

579. *See id.* at 5 (remarking that the SSO considered the awardee more experienced and capable based on its proposed staff).

580. *See id.* at 5-6.

the protest because HUD had not evaluated proposals on an equivalent basis.<sup>581</sup>

In another case of unreasonable evaluation, *ST Aerospace Engines Pte. Ltd.*,<sup>582</sup> the Coast Guard awarded a contract for overhaul of engine reduction gearboxes and torquemeters to the protester's competitor largely because of concerns related to the protester's past performance.<sup>583</sup> However, the past performance issues actually derived from past contract efforts in overhauling propellers by the protester's sister company, which, while it shared common ownership, was located in separate facilities and had separate management and work forces.<sup>584</sup> Since there was no indication in the protester's proposal that either the common parent company or the affiliate would be involved to any degree in performance of the instant contract, GAO held it to be unreasonable for the agency simply to attribute the perceived performance problems of the affiliate to the offeror without determining what relationship, if any, was planned between the offeror and its affiliate on the contract in question.<sup>585</sup>

Furthermore, in *International Business Systems, Inc.*,<sup>586</sup> GAO held that it was irrational for a DVA Contracting Officer to ignore a readily available reference within the agency itself, and then to rate the protester's past performance as merely "good" based on just one of two directly relevant prior contracts to install the same type of telephone system involved in the instant procurement.<sup>587</sup> The Contracting Officer rated the protester only "good," based on just one of two prior contracts, where the contracting officer disregarded the second contract only because "the individual within the agency responsible for completing the form did not do so."<sup>588</sup> In fact, not only was the Contracting Officer herself completely familiar with the protester's past performance on that contract (a nearly identical DVA installation in New England), but she had officially informed the SBA just a few months earlier that the protester's performance there had

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581. See *id.* (reporting that the protester had been prejudiced by this unequal evaluation).

582. Comp. Gen. B-275725, 97-1 CPD ¶ 161 (1997).

583. See *id.* at 2.

584. See *id.*

585. See *id.* at 3-6 (stating that the relationship should have been clarified and that STA Engines should have been given an opportunity to comment on the information).

586. Comp. Gen. B-275554, 97-1 CPD ¶ 114 (1997).

587. See *id.* at 3-5. On re-evaluation of the awardee's past performance, the agency found that it had erred in rating the successful firm "excellent" when in fact it had no relevant past performance and should have been rated only "neutral." See *id.* at 3.

588. *Id.* at 3-4.

been “exemplary.”<sup>589</sup> Given these facts, GAO concluded that it was unreasonable to rate the protester only “good,” and to conclude that this “good” rating was in substance “essentially equal” to the “neutral” rating assigned the awardee.<sup>590</sup> GAO stated that while an agency normally is not required to check all available references, its evaluation here was “overly mechanical” and moreover, “some information is simply too close at hand to require offerors to shoulder the inequities that spring from an agency’s failure to obtain, and consider, the information.”<sup>591</sup>

Finally, in *American Development Corp.*,<sup>592</sup> the Army awarded a contract for modular ferry systems using a best value source selection process.<sup>593</sup> Technical factors were twice as important as price, with past performance (fifteen points) the most heavily weighted of ten technical factors.<sup>594</sup> Section M provided that a “past performance evaluation would assess the probability that an offeror would satisfy the RFP requirements, as indicated by that offeror’s performance record.”<sup>595</sup> The RFP also explicitly stated that if “a source outside the offeror’s proposal provides the government with derogatory past performance information, the offeror will be given the opportunity to rebut or corroborate such information.”<sup>596</sup> The protester received a number of questions during discussions, but none addressing past performance information.<sup>597</sup> While some of the comments for the protester were negative, the protester was never apprised of this and no rebuttal was requested. In addition, prior to receiving the initial proposals, the Army had decided to consider the “relevance” of past contracts in assessing past performance.<sup>598</sup> Worried that a consideration of relevance might give undue preference to offerors with significant experience in the area of modular causeway systems at the expense of smaller firms, the evaluators decided to score past performance in two steps: (1) “calculating the average performance rating based largely on comments received from other government agencies,”<sup>599</sup> and then (2) “assigning a relevance rating,” from zero to

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589. See *id.* at 4 n.1.

590. See *id.* at 6 (asserting that an “exemplary” past performance would at least result in an evaluation of “good”).

591. *Id.* at 5.

592. Comp. Gen. B-251876.4, 93-2 CPD ¶ 49 (1993).

593. See *id.* at 2.

594. See *id.* at 2-3.

595. *Id.* at 3.

596. *Id.* (quoting the RFP).

597. See *id.* at 4.

598. See *id.* at 6-7 (explaining that this decision was based on the fact that information about irrelevant contracts had no bearing on how the offeror would perform the contract).

599. *Id.* at 7.

twenty-seven, for each contract and then multiplying the average performance rating for the firm by the relevance factor to reach the "overall" past performance score.<sup>600</sup> This evaluation had the effect of increasing the awardee's past performance score relative to the protester because of more "relevant" past contracts.<sup>601</sup> While holding that the government had the right to make judgments concerning the "relevance" of the prior contracts cited by the offeror in support of its past performance rating, GAO found that the Army's method did not take into account "the implication of an offeror having performed less than well on a relevant contract."<sup>602</sup> The method used heavily rewarded relevance (by a factor of up to twenty-seven), in that the highest relevance factor was multiplied by the offeror's average performance rating.<sup>603</sup> The relevance factor was not lowered or adjusted where the offeror's performance on a highly relevant contract was substandard.<sup>604</sup> Hence, outstanding performance by the protester on a less relevant contract was overcome by lackluster performance by the awardee on a highly relevant contract.<sup>605</sup> GAO sustained the protest because this method was judged unreasonable.<sup>606</sup>

#### 4. *Evaluations without meaningful discussions*

The only other circumstance in which GAO has sustained protests challenging past performance evaluations is in cases involving inadequate discussions. Typically these cases have involved a situation where the agency did not give the protester the opportunity to rebut unfavorable information obtained as a part of the reference check process. In some cases, the unfavorable information turned up in checking references supplied by the offeror in its own proposal. In others, the information obtained in checking references was generated by the agency itself.

Most recently, GAO sustained a protest based upon inadequate discussions concerning past performance information in *Aerospace Design & Fabrication, Inc.*<sup>607</sup> The redacted decision indicates that NASA had received unfavorable references regarding the protester's

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600. *See id.*

601. *See id.*

602. *Id.* at 10.

603. *See id.* at 10-11.

604. *See id.*

605. *See id.* (quoting the agency as saying, "[i]f one time you've shown you can do it, then you can do it").

606. *See id.* GAO also found that discussions were inadequate in this case, although that point was not essential to GAO's decision sustaining the protest. *See id.* at 11-16.

607. Comp. Gen. B-278896.2 *et al.*, 98-1 CPD ¶ 139 (1998).

performance of a prior contract.<sup>608</sup> Conceding that it had not brought this information to the protester's attention during discussions, NASA contended that the protester had had a prior opportunity to rebut this information in connection with award fee discussions under a prior contract under which the protester had been a subcontractor.<sup>609</sup> GAO agreed generally that award fee discussions under prior contracts can, under certain circumstances, provide an adequate opportunity for a contractor or subcontractor to hear and dispute reports concerning its past performance.<sup>610</sup> However, based upon the testimony adduced at a hearing, GAO determined that in view of its status as a subcontractor under the prior contract in question, and given the fact that normally, subcontractors do not attend award fee discussions between the government and its prime contractor, the protester had not had a meaningful opportunity to rebut the unfavorable information that NASA relied upon in making its award decision.<sup>611</sup>

In *McHugh/Calumet, a Joint Venture*,<sup>612</sup> GAO sustained a protest against an award of a contract for construction of a federal courthouse where GSA had failed to advise the protester, during discussions, of adverse past performance information.<sup>613</sup> Interestingly, the Chairman of the Source Selection Evaluation Board ("SSEB") was also the government's Project Manager for the prior project and was the individual who had reported negatively on the protester.<sup>614</sup> GAO rejected GSA's arguments that former FAR § 15.610(c)(6)<sup>615</sup> did not apply where the reference was from within the procuring agency itself, and that FAR § 15.610(c)(6) did not apply because the protester had previously had the opportunity to comment on this project.<sup>616</sup> GAO held that there was no basis to

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608. See *id.* at 15.

609. See *id.* Under a "cost-plus-award-fee" contract the Government reimburses the contractor's incurred allowable costs, plus pays an "award fee" that generally is based upon the Government's judgmental assessment of the contractor's quality and timeliness of performance during the award fee evaluation period. See FAR, 48 C.F.R. §§ 16.305, 16.404-2.

610. *Aerospace Design*, 98-1 CPD, at 15.

611. See *id.* at 15-16. GAO cited two additional grounds for sustaining this protest: (1) The awardee's proposal contained material misrepresentations of fact concerning the nature of employment commitments received from certain proposed project management personnel prior to submitting the proposal, see *id.* at 5; and (2) latent ambiguity in the solicitation had prompted the protester to provide a less extensive elaboration of its past performance information, see *id.* at 13-14.

612. Comp. Gen. B-276472, 97-1 CPD ¶ 226 (1997).

613. See *id.* at 5. The past performance information included an allegedly "negative working relationship" and "adversarial and opportunistic" and "change-order oriented" attitudes. See *id.*

614. See *id.*

615. See 48 C.F.R. § 15.610 (c)(6) (revised by 62 Fed. Reg. 51, 224, 51, 230 (1997) (effective Oct. 10, 1997)).

616. See *id.* at 7 (noting that problems on the project were "common knowledge" and that

support the argument that former FAR § 15.610(c)(6) was not applicable, and that "the clear language of the regulation conditions the requirement for discussions solely on whether the offeror has had an opportunity to address past performance information and carves out no exceptions based on the source of such information."<sup>617</sup>

In *American Combustion Industries, Inc.*,<sup>618</sup> GAO sustained a protest based on the agency's failure, during discussions, to give the protester an opportunity to rebut unfavorable past performance information.<sup>619</sup> The National Institute of Standards and Technology ("NIST") issued an RFP for construction of a structure housing two boilers.<sup>620</sup> Of six technical evaluation factors, four (aggregating eighty points) were for past performance.<sup>621</sup> Only the protester and the awardee were included in the competitive range. One of the protester's references, named in its proposal, provided a negative report. James Madison University had advised NIST that the protester was "not on time—5 months late—due to slow delivery of boiler and parts due to [the protester]."<sup>622</sup> The agency asked the protester no questions about this reference.<sup>623</sup> GAO rejected the agency's contention that no violation of the regulations occurred because the information from the reference was historical and no response would have changed the facts.<sup>624</sup> GAO cited FAR § 15.610(c)(6), stating that a contracting officer shall "[p]rovide the offeror an opportunity to discuss past performance information obtained from references on which the offeror had not had a previous opportunity to comment."<sup>625</sup> Furthermore, it stated that its decisions denying protests on similar facts because the information was "historical" were no longer controlling; FAR § 16.610(c)(6) had been adopted subsequent to these decisions<sup>626</sup> and expressly required the agency to bring negative

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GSA had repeatedly expressed its lack of confidence in the offeror).

617. *Id.* Notably, in *McHugh/Calumet*, GAO did not discuss the United States Court of Federal Claims' decision in *Cincom Systems, Inc. v. United States*, 37 Fed. Cl. 663, 676 n.39 (1997), to the effect that former FAR, 48 C.F.R. § 15.610(c)(6) does not apply to adverse past performance information obtained from references the offeror itself has supplied.

618. Comp. Gen. B-275057.2, 97-1 CPD ¶ 105 (1997).

619. *See id.* at 2.

620. *See id.*

621. *See id.* (explaining that past performance evaluations included past performance on building construction, past performance on phased refurbishing, past performance of personnel, and past performance of construction schedule adherence).

622. *Id.* at 10.

623. *See id.*

624. *See id.* at 10-11 (rejecting the agency's intention and holding that the cases they cite were decided before FAR § 15.610(c)(6) became effective).

625. *Id.*

626. *See* Federal Acquisition Circular 90-26, 60 Fed. Reg. 16,718, 16,719 (1995) (setting forth an effective date of May 30, 1995).



reference information to the offeror's attention.<sup>627</sup>

In another case, *Alliant Techsystems, Inc.; Olin Corp.*,<sup>628</sup> GAO found that the Army's discussions with the protester had not been meaningful, where the Army's impressions of a subcontractor's past performance on a related program had not been discussed with Alliant.<sup>629</sup> The three evaluation factors were, in descending order: (1) Mission, (2) Performance Risk, and (3) Cost.<sup>630</sup> Performance risk was divided into two subfactors, "experience" and "past performance."<sup>631</sup> The "past performance" subfactor evaluated prior contracts, default contracts, "new corporates," and "corporate continuity."<sup>632</sup> Offerors were required to submit their subcontractors' consents allowing government personnel to discuss the subcontractor's past performance with the prime contractor during pre-award discussions.<sup>633</sup> While all the offerors were rated "green/acceptable" (in terms of technical/risk rating), the rating of the protester (Alliant) was downgraded because of a subcontractor's performance under one prior contract (HYDRA-70 rocket contract).<sup>634</sup> The SSA believed that the protester's lower cost did not offset the perceived past performance problems related to the subcontractor.<sup>635</sup> Alliant contended that had it known of the subcontractor evaluation in question, then it would have fundamentally changed its BAFO.<sup>636</sup> While the heavily-redacted decision does not state what the change would have been, one possibility is that Alliant would have changed subcontractors. The Army admitted that it had not identified problems with the subcontractor during discussions with the protester.<sup>637</sup> GAO rejected the Army's argument that the protester had known about the subcontractor's past performance problems and that because these problems were "historical" and could not be changed by discussions, the failure to discuss the issue was not prejudicial.<sup>638</sup> GAO agreed with the protester that had the protestor known of the agency's

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627. See *id.* at 11.

628. Comp. Gen. B-260215.4 *et al.*, 95-2 CPD ¶ 79 (1995).

629. See *id.* at 2.

630. See *id.* at 2-3.

631. See *id.*

632. See *id.*

633. See *id.*

634. See *id.* at 4-5.

635. See *id.* at 5.

636. See *id.* at 6 (holding that the Army failed to conduct meaningful discussion with Alliant by failing to inform it of the deficiencies in the proposal).

637. See *id.*

638. See *id.* at 7.

concerns, it could have changed its proposal.<sup>639</sup> Due to inadequate discussions, the protest was sustained.<sup>640</sup>

Finally, in *Dawn-Ray Casuals, Inc.*,<sup>641</sup> GAO sustained a protest challenging the Defense Personnel Support Center's ("DPSC") award of a cold-weather clothing contract because the agency failed to conduct meaningful discussions concerning the protester's past performance information.<sup>642</sup> Past performance was the second-most important of four technical evaluation factors.<sup>643</sup> Section M of the RFP expressly stated that "[o]fferors will be given an opportunity to address especially unfavorable reports of past performance . . . ."<sup>644</sup> The protester was rated "acceptable" in this area based on the initial technical evaluation, and for this reason, discussions with the protester did not include any coverage of a perceived problem involving three delinquent contracts.<sup>645</sup> One delinquency had been found excusable, one inexcusable, and one was not counted against the contractor because the subcontractor had been at fault.<sup>646</sup> Based on the BAFO, the protester was rated higher technically than the awardee, and despite a \$136,000 price disadvantage, was initially selected for the award.<sup>647</sup> Following a protest by another firm, however, DPSC reevaluated the protester's past performance information and changed its assessment from excusably delinquent to inexcusably delinquent on seven out of nine contracts.<sup>648</sup> The GAO concluded, therefore, that DPSC should have rated the protester "marginally acceptable" under past performance.<sup>649</sup> The award was therefore reversed, and the protest followed.<sup>650</sup> GAO held that discussions were required with the protester when the agency developed negative reviews of the protester's past performance and changed its earlier past performance evaluation.<sup>651</sup> GAO rejected

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639. *See id.* at 8.

640. *See id.* at 11.

641. Comp. Gen. B-255217.3 *et al.*, 94-2 CPD ¶ 42 (1994).

642. *See id.* at 1.

643. *See id.* at 2.

644. *Id.* (alteration in original) (citing RFP).

645. *See id.* at 3 (reporting that one of the protester's past contracts had been inexcusably delinquent).

646. *See id.*

647. *See id.* at 3-4 (stating that the protester's offer had initially been selected as the best value for the government).

648. *See id.* at 4 (finding that the reevaluation contained a clerical error that had designated the protester's delinquencies as excusable rather than inexcusable).

649. *See id.*

650. *See id.* at 5.

651. *See id.* at 6 (holding that the agency was required to hold discussions with the protester regarding its negative past performance reviews and that failure to do so prejudiced the protester).

DPSC's argument that an opportunity to rebut the unfavorable reports was not required because the information came from within the agency.<sup>652</sup> The RFP language, extending to each offeror the opportunity to address "especially unfavorable" past performance information, made no distinction based on the source of the information.<sup>653</sup> Because the new information resulted in a downgrading of the protester's standing, the information was "especially unfavorable."<sup>654</sup> The protester's explanations of its delays left open the possibility that the agency might have revised its rating had it heard the story.<sup>655</sup> Accordingly, the protest was sustained.<sup>656</sup>

After reviewing the precedent, it is evident that GAO has not been particularly venturesome in sustaining protests. GAO has relied on established principles of government contract law in approaching these cases, granting protesters relief only in cases where the stated evaluation factors clearly were not followed, where the past performance evaluation was not supported by the record, where the selection decision otherwise lacked a rational basis, or where discussions were inadequate. The one court decision,<sup>657</sup> to the extent it addressed a defect in the past performance evaluation, also turned on the failure to follow stated evaluation criteria.<sup>658</sup>

#### IV. A PROPOSAL TO EMPLOY ALTERNATIVE DISPUTE RESOLUTION IN CONTROVERSIES INVOLVING CONTRACTOR PAST PERFORMANCE

The decisions discussed above demonstrate that neither GAO nor the Courts provides an attractive forum for a contractor seeking to challenge adverse determinations regarding its past performance. Obtaining meaningful and timely review of past performance during the actual course of a competitive acquisition is especially difficult because the problem in many instances may not even be known to the contractor before the proposal is submitted. Hence a protest may seem to be the only answer. Even the FAR provisions specifying end-of-contract performance evaluations, as a normal part of the contract

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652. See *id.* at 7.

653. See *id.* (stating that the reports in this case were "sufficiently unfavorable" to trigger the clause in the RFP granting discussions).

654. See *id.*

655. See *id.*

656. See *id.* at 10. In *ST Aerospace Engines Ple. Ltd.*, GAO also held that the Coast Guard denied the protester meaningful discussions when it failed to inform the offeror of adverse past performance information that had been developed concerning an affiliated company. See Comp. Gen. B-275725, 97-1 CPD ¶ 161, at 5 (1997).

657. See *supra* note 452 and accompanying text.

658. See *supra* notes 452-75 and accompanying text (discussing the Eleventh Circuit's decision for the protestor in *Latecoere Int'l*).

administration process, provide only in the most general terms for review of an adverse determination "at a level above the contracting officer," with no time lines given with which such review must be undertaken or completed.<sup>659</sup>

Other forms of seeking administrative or even judicial review seem similarly problematic. One approach might be for the disappointed contractor to pursue the matter under the Contract Disputes Act of 1978.<sup>660</sup> While the precise issue has yet to be decided by any board of contract appeals or court, a contractor's request for further review of a determination regarding its past performance may fall within the definition of a "claim" as set forth in FAR § 33.201, *viz.*, "... a written demand or written assertion . . . seeking, 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 that contract."<sup>661</sup> The Armed Services Board of Contract Appeals ("ASBCA") and the United States Court of Appeals for the Federal Circuit have both held that various nonmonetary claims do confer subject matter jurisdiction under the Contract Disputes Act.<sup>662</sup>

Even these additional remedies would be time consuming and potentially expensive, and as noted, the legal questions regarding the availability of Contract Disputes Act review have not yet been answered. Contractors need speedier review where they are not satisfied with the result of an informal review "at a level above the contracting officer."

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659. See FAR, 48 C.F.R. § 42.1503(b) (1997).

660. 41 U.S.C. § 601 *et seq.* (1998).

661. See FAR, 48 C.F.R. § 33.201, definition of "Claim" (emphasis added.) The Contract Disputes Act itself does not define the term "claim," as recognized by the court in *Garrett v. General Electric Co.*, 987 F.2d 747, 749 (Fed. Cir. 1993).

662. See *Garrett*, 987 F.2d at 748, 752 (holding that the ASBCA had subject matter over a contractor's appeal from a Navy directive to make corrections to defective work); *Malone v. United States*, 849 F.2d 1441, 1445 (Fed. Cir. 1988) (holding that the ASBCA had jurisdiction over a contractor's appeal from a default termination); *Litton Systems, Inc.*, ASBCA No. 37,131, 94-2 B.C.A. (CCH) ¶ 26, 731 (1994) (holding that the ASBCA had jurisdiction over a non-monetary claim involving dispute regarding the contractor's compliance with Cost Accounting Standards); *Skip Kirchdorfer, Inc.*, ASBCA Nos. 40515 *et al.*, 93-3 B.C.A. (CCH) ¶ 25,899 (1993) (holding that the ASBCA had subject matter jurisdiction of a contractor's nonmonetary claim for a time extension). 28 U.S.C. § 1491(a)(2) (1994) provides generally that the United States Court of Federal Claims has jurisdiction to render judgments under the Contract Disputes Act with regard to "any claim by or against, or dispute with, a contractor, . . . 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 . . . ." Even if Contract Disputes Act jurisdiction were found to be lacking, jurisdiction would be present in the U.S. district courts pursuant to the "Federal Question" grant of subject matter jurisdiction in 28 U.S.C. § 1331 (1994). Where such jurisdiction is present, the judicial review provisions of the Administrative Procedures Act, 5 U.S.C. §§ 702, 706 (1994), authorize court review and direct the district courts to set aside agency action found to be arbitrary, capricious, or contrary to law.

The author believes that as a matter of procurement policy, Alternative Dispute Resolution ("ADR") should be freely utilized when, despite the parties' effort to resolve their differences, the contractor is still dissatisfied with the government's past performance evaluation. Congress enacted the Administrative Disputes Resolution Act to set the stage for ADR in resolving public-private disputes.<sup>663</sup> ADR is now firmly established as a part of the FAR as it relates to contract disputes.<sup>664</sup> One forum that is particularly well situated to facilitate ADR and to assist the parties in resolving such disputes is the General Services Administration Board of Contract Appeals ("GSBCA").<sup>665</sup> GSBCA Rule 204 provides that this Board "will make its services available for ADR proceedings in contract and procurement matters involving any agency, regardless of whether the agency uses the Board to resolve its Contract Disputes Act appeals."<sup>666</sup>

Modifying FAR § 42.1503(b) by adding the underlined sentence where indicated below would be advisable to establish a clear policy of using ADR techniques to resolve past performance controversies:

42.1503 Procedures.

\* \* \* \* \*

(b) Agency evaluations of contractor performance prepared under this subpart shall be provided to the contractor as soon as practicable after the completion of the evaluation. Contractors shall be given a minimum of 30 days to submit comments, rebutting statements, or additional information. Agencies shall provide for a review at a level above the contracting officer to consider disagreements between the parties regarding the evaluation. Alternative dispute resolution shall be employed where requested by the contractor when agreement cannot be reached. See 33.214. [Continue as presently worded.]<sup>667</sup>

Such an amendment would make it clear to government agencies that ADR is a preferred method for resolving disagreements concerning end-of-contract performance assessments pursuant to FAR § 42.1503. While the above FAR change would not deal with past performance controversies that arise solely from questionnaire responses obtained by procuring agencies during a solicitation

663. Pub. L. No. 101-552, § 4(b), 104 Stat. 2378 (1990), codified at 5 U.S.C. § 571 *et seq.* (1994).

664. See FAR, 48 C.F.R. § 33.214 (1997), as amended by 63 Fed. Reg. 58,594 (1998).

665. The GSBCA was established pursuant to the Contract Disputes Act of 1978 "as an independent tribunal to hear and decide contract disputes between contractors and the General Services Administration ("GSA") and other executive agencies of the United States." 48 C.F.R. § 6101.0 (1997) (Foreword to the GSBCA Rules of Procedure).

666. GSBCA Rule 204(a), 48 C.F.R. § 6102.4(a) (1997).

667. 48 C.F.R. § 42.1503(b) (1997).

process, in the author's judgment it would, nevertheless, improve the quality of information coming to the government's attention concerning past performance of prospective contractors.

ADR seems like the natural choice in resolving such problems. The government should not be hesitant to engage in ADR in resolving past performance issues for at least two reasons. First, the ADR process will tend to make past performance judgments better. Second, the public interest would be served because, where a contractor obtains timely relief, the number of competitors potentially in a realistic position to win the government's business will be greater.

### CONCLUSION

Since the advent of OFPP Policy Letter 92-5, GAO has rarely granted protests in cases challenging past performance evaluations. In those few cases where GAO protests have been sustained, the Comptroller General has acted because the problems were blatantly demonstrated on the face of the agency record, or were due to a finding of inadequate discussions. GAO has not been willing to go behind the written record in order to test the validity or the correctness of the underlying past performance information upon which source selection decisions have been based. GAO has said that the protester's "mere disagreement" with an agency's data on past performance information is not a basis for protest.

While one reported court decision reflects a success for the plaintiff, the offeror had previously lost that case in both GAO and in U.S. district court before convincing the United States Court of Appeals for the Eleventh Circuit that it had merit. The cost of pursuing justice through these three fora was no doubt very high. In addition, the usual standard of judicial review under the Administrative Procedure Act is quite limited.<sup>668</sup> The sole victory for a plaintiff in the courts certainly is not enough to suggest that protesters will fare better there than in GAO.

In making source selection decisions for new contract awards, the information contained in past performance databases will be used repetitively, for up to three years. While contractors theoretically have the opportunity to comment on or rebut these past performance evaluations and have them reviewed one level above the contracting officer, the review procedures are not well established

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668. See 5 U.S.C. § 706(2) (1994) (setting forth grounds for reversing agency action, including actions which are "arbitrary and capricious" or "not in accordance with law").

and may be somewhat *ad hoc* at present. Unless agencies are extremely fair and diligent in compiling accurate and timely past performance information in these databases, contractors may unfairly experience ongoing problems repeatedly dealing with the same adverse information in subsequent competitions.

Moreover, unlike the situation for compiling routine contractor performance data under FAR Subpart 42.15,<sup>669</sup> reference check replies and past performance questionnaire responses returned to procuring agencies during a new competition most likely will not be reviewed within the respondent agency above the level of the individual providing the response. The regulations provide no guidance on who has authority to respond to reference check inquiries or to complete and return past performance questionnaires. Whatever the reference reply or questionnaire response says about the contractor, regardless of the source, may well be the final word with no review and no appeal. These responses may effectively determine the offeror's success or failure in winning new business.

Given the sharply limited opportunity for review in GAO and in the courts, and given the state of the law as it exists today, the only sensible approach is for contractors to be extremely vigilant in monitoring the government's compilation of information concerning their performance of contract work. Contractors must become activists in seeking to influence the development of their own end-of-contract reviews as an original matter, and certainly should not wait to be handed a poor "report card." As a priority matter, contract managers should request permission to submit self-evaluation memoranda to the agency well in advance of the time the agency prepares the final report. The opportunity to comment on reviews while they are still drafts should be aggressively pursued. Moreover, contractors should treat the creation of past performance reports as a process to be managed to the maximum extent possible. Active management is essential, in view of the surprisingly low success rate that contractors have experienced to date in challenging these evaluations after the fact, when a contract has been lost and the only avenue of relief is through GAO or the courts.

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669. See 48 C.F.R. §§ 42.1500-1503 (1997).

