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# FEDERAL CONTRACTING

## Use of Contractor Performance Information

Statement of William T. Woods, Director  
Acquisition and Sourcing Management





Highlights of [GAO-07-1111T](#), a testimony before the Subcommittee on Government Management, Organization, and Procurement, Committee on Oversight and Government Reform, House of Representatives

## Why GAO Did This Study

The federal government is the largest single buyer in the world, obligating over \$400 billion in fiscal year 2006 for a wide variety of goods and services. Because contracting is so important to how many agencies accomplish their missions, it is critical that agencies focus on buying the right things the right way. This includes ensuring that contracts are awarded only to responsible contractors, and that contractors are held accountable for their performance. Use of contractor performance information is a key factor in doing so.

This testimony covers three main areas concerning the use of contractor performance information: (1) the various ways in which a contractor's performance may be considered in the contracting process; (2) how information on past performance is to be used in selecting contractors, as well as the various mechanisms for how that occurs; and (3) some of the key issues that have arisen in considering past performance in source selection, as seen through the prism of GAO's bid protest decisions.

GAO has previously made recommendations for improving the use of contractor performance information, but is not making any new recommendations in this testimony.

[www.gao.gov/cgi-bin/getrpt?GAO-071111T](http://www.gao.gov/cgi-bin/getrpt?GAO-071111T).

To view the full product, including the scope and methodology, click on the link above. For more information, contact William T. Woods at (202) 512-4841 or [woodsw@gao.gov](mailto:woodsw@gao.gov).

## FEDERAL CONTRACTING

### Use of Contractor Performance Information

#### What GAO Found

The government contracting process provides for consideration of various aspects of contractor performance at multiple points:

- *Source selection:* Past performance is required to be an evaluation factor in selecting contractors, along with factors such as price, management capability, and technical approach to the work.
- *Responsibility determinations:* Once a contractor is selected for award, the contracting officer must make a responsibility determination that the prospective awardee is capable and ethical. This includes, for example, whether the prospective awardee has a satisfactory performance record on prior contracts.
- *Surveillance under the current contract:* Once a contract is awarded, the government monitors a contractor's performance throughout the performance period, which may serve as a basis for performance evaluations in future source selections.
- *Debarment:* To protect the government's interests, agencies can debar, that is preclude, contractors from receiving future contracts for various reasons, including serious failure to perform to the terms of a contract.

Agencies are required to consider past performance in all negotiated procurements above the simplified acquisition threshold of \$100,000 and in all procurements for commercial goods or services. Although past performance must be a significant evaluation factor in the award process, agencies have broad discretion to set the precise weight to be afforded to past performance relative to other factors in the evaluation scheme. Whatever they decide about weights, agencies must evaluate proposals in accordance with the evaluation factors set forth in the solicitation, and in a manner consistent with applicable statutes and regulations. In evaluating an offeror's past performance, the agency must consider the recency and relevance of the information to the current solicitation, the source and context of the information, and general trends in the offeror's past performance. The key consideration is whether the performance evaluated can reasonably be considered predictive of the offeror's performance under the contract being considered for award.

Although a seemingly simple concept, using past performance information in source selections can be complicated in practice. GAO bid protest decisions illustrate some of the complexities of using past performance information as a predictor of future contractor success. Some of the questions raised in these cases are:

- *Who:* Whose performance should the agencies consider?
- *What:* What information are agencies required or permitted to consider in conducting evaluations of past performance?
- *When:* What is the period of time for which agencies will evaluate the past performance of contractors?
- *Where:* Where do agencies obtain contractor performance information?

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Mr. Chairman and Members of the Subcommittee:

Thank you for inviting me here today to discuss the use of contractor performance information. The federal government is the largest single buyer in the world, obligating over \$400 billion in fiscal year 2006 for a wide variety of goods and services. Spending on contracts across the government has increased significantly in recent years and currently represents about a quarter of discretionary spending governmentwide. Because contracting is so important to how many agencies accomplish their missions, it is critical that agencies focus on buying the right things the right way. This includes ensuring that contracts are awarded only to responsible contractors, and that contractors are held accountable for their performance.

Today I would like to cover three main areas concerning the use of contractor performance information. First, I will discuss the various ways in which a contractor's performance may be considered in the contracting process. Second, I will discuss in more detail how information on past performance is to be used in selecting contractors, as well as the various mechanisms for how that occurs. And third, I will highlight some of the key issues that have arisen in considering past performance in source selection, as seen through the prism of GAO's bid protest decisions.

In preparing this statement, we analyzed federal statutes, regulations, and government-wide guidance, as well as more specific guidance from the Departments of Defense (DOD), Energy (DOE), and Homeland Security (DHS) concerning the use of contractor past performance information in awarding contracts. We selected these agencies because they were the three largest agencies in terms of federal contracting dollars obligated during fiscal year 2006. We also reviewed prior GAO reports on related topics, as well as relevant bid protest decisions. This statement is based primarily on prior GAO work that was conducted in accordance with generally accepted government auditing standards.

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## Contractor Performance Is to Be Considered at Multiple Points in the Contracting Process

The government contracting process provides for consideration of various aspects of contractor performance at multiple points:

- *Past performance as source selection factor:* Only relatively recently have federal agencies been required to consider past performance in selecting their contractors. In 1997, the Federal Acquisition Regulation (FAR) was modified to require that agencies consider past performance information as an evaluation factor in source selection.

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Past performance is now required to be an evaluation factor in selecting contractors, along with factors such as price, management capability, and technical approach to the work.

- *Responsibility determinations:* Once a contractor is selected for award, the contracting officer must make an affirmative determination that the prospective awardee is capable and ethical. This is known as a responsibility determination, and includes, for example, whether a prospective awardee has adequate financial resources and technical capabilities to perform the work, has a satisfactory record of integrity and business ethics, and is eligible to receive a contract under applicable laws and regulations.<sup>1</sup> As part of the responsibility determination, the contracting officer also must determine that the prospective awardee has a “satisfactory performance record” on prior contracts. This determination of the prospective awardee’s responsibility is separate from the comparison of the past performance of the competing offerors conducted for purposes of source selection.<sup>2</sup>
- *Surveillance of performance under the current contract:* Once a contract is awarded, the government should monitor a contractor’s performance throughout the performance period. Surveillance includes oversight of a contractor’s work to provide assurance that the contractor is providing timely and quality goods or services and to help mitigate any contractor performance problems. An agency’s monitoring of a contractor’s performance may serve as a basis for past performance evaluations in future source selections. GAO reported in March, 2005 on shortfalls at DOD in assigning and training contract surveillance personnel, and recommended improvements in this area.
- *Suspension and debarment:* Contractor performance also comes into play in suspensions and debarments. A suspension is a temporary exclusion of a contractor pending the completion of an investigation or legal proceedings, while a debarment is a fixed-term exclusion lasting no longer than 3 years. To protect the government’s interests, agencies can debar contractors from future contracts for various reasons, including serious failure to perform to the terms of a contract. Suspensions and debarments raise a whole set of procedural and policy issues beyond past performance, not the least of which is the question of whether these are useful tools in an environment in which recent

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<sup>1</sup>FAR § 9.104-1.

<sup>2</sup>FAR § 15.305(a)(2)(i).

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consolidations have resulted in dependence on fewer and larger government contractors. Questions have also been raised about whether delinquent taxes or an unresolved tax lien should result in suspension or debarment. A proposed revision to the FAR would list these tax issues as grounds for suspension or debarment.<sup>3</sup> In July 2005, GAO reported on the suspension and debarment process at several federal agencies and recommended ways to improve the process.

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## Past Performance Should Play a Key Role in Source Selection

In the Federal Acquisition Streamlining Act (FASA) of 1994, Congress stated that in the award of contracts, agencies should consider the past performance of contractors to assess the likelihood of successful performance of the contract. FASA required the adoption of regulations to reflect this principle, and the FAR now requires the consideration of past performance in award determinations. The Office of Federal Procurement Policy (OFPP) has issued guidance on best practices for using past performance information in source selection, and individual agencies have issued their own guidance on implementing the FAR requirements.

For agencies under the FAR, a solicitation for a contract must disclose to potential offerors all evaluation factors that will be used in selecting a contractor. Agencies are required to consider past performance in all negotiated procurements above the simplified acquisition threshold of \$100,000 and in all procurements for commercial goods or services. Although past performance must be a significant evaluation factor in the award process, agencies have broad discretion to set the precise weight to be afforded past performance relative to other factors in the evaluation scheme. Whatever they decide about weights, agencies must evaluate proposals in accordance with the evaluation factors set forth in the solicitation, and in a manner consistent with applicable statutes and regulations. Agencies must allow offerors to identify past performance references in their proposals, but also may consider information obtained from any other source. In evaluating an offeror's past performance, the agency must consider the recency and relevance of the information to the current solicitation, the source and context of the information, and the general trends in the offeror's past performance. Offerors who do not have any past performance may not be evaluated favorably or unfavorably. That is, they must receive a neutral rating.

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<sup>3</sup>For more information on contractor tax compliance, see *Tax Compliance: Thousands of Federal Contractors Abuse the Federal Tax System*, [GAO-07-742T](#) (Washington, D.C.: April 19, 2007).

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In addition, the OFPP has issued guidance on best practices for considering past performance data.<sup>4</sup> Consistent with the FAR, OFPP guidance states that agencies are required to assess contractor performance after a contract is completed and must maintain and share performance records with other agencies. The guidance encourages agencies to make contractor performance records an essential consideration in the award of negotiated acquisitions, and gives guidelines for evaluation. It also encourages agencies to establish automated mechanisms to record and disseminate performance information. If agencies use manual systems, the data should be readily available to source selection teams. Performance records should specifically address performance in the areas of: (1) cost, (2) schedule, (3) technical performance (quality of product or service), and (4) business relations, including customer satisfaction, using a five-point rating scale.<sup>5</sup>

Agencies may also issue their own supplemental regulations or guidance related to past performance information. All of the three largest departments in federal procurement spending - the Department of Defense, the Department of Energy, and the Department of Homeland Security - provide at least some additional guidance in the use of past performance data, addressing aspects such as the process to be followed for considering past performance during contract award and what systems will be used to store and retrieve past performance data. Below are some examples that illustrate the types of guidance available.

- DOD offers instruction on using past performance in source selection and contractor responsibility determinations through the Defense Federal Acquisition Regulation Supplement and related Procedures, Guidance, and Information. DOD's Office of Defense Procurement and Acquisition Policy also has made available a guide that provides more detailed standards for the collection and use of past performance information, including criteria applicable to various types of contracts.

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<sup>4</sup>Federal law gives the Office for Federal Procurement Policy the authority to prescribe guidance for executive agencies regarding standards for (1) evaluating past performance of contractors, and (2) collecting and maintaining information on past contract performance. In May of 2000, OFPP published discretionary guidance entitled "Best Practices for Collecting and Using Current and Past Performance Information."

<sup>5</sup>The guidance also addresses the evaluation of affiliates, the contractor comment process, and the retention of performance evaluation records.

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- DOE also provides additional guidance to contracting officers in the form of an acquisition guide that discusses current and past performance as a tool to predict future performance, including guidelines for assessing a contractor's past performance for the purpose of making contract award decisions as well as for making decisions regarding the exercise of contract options on existing contracts.
  - At DHS, the department's supplemental regulations outline which systems contracting officers must use to input and retrieve past performance data. Specifically, contracting officers and contracting officer representatives are required to input contractor performance data into the Contractor Performance System, managed by the National Institutes of Health, and use the Past Performance Information Retrieval System (PPIRS) - which contains contractor performance ratings from multiple government systems - to obtain information on contractor past performance to assist with source selection.

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## Issues in Using Past Performance in Source Selection

Although a seemingly simple concept, using past performance information in source selection can be complicated in practice. GAO has not evaluated the practices that agencies use regarding contractor past performance information in source selection or whether those practices promote better contract outcomes. Our bid protest decisions, however, illustrate some of the complexities of using past performance information as a predictor of future contractor success. Some of these issues are listed below. In all of these cases, the key consideration is whether the performance evaluated can reasonably be considered predictive of the offeror's performance under the contract being considered for award.

- *Who*: One issue is whose performance agencies should consider. Source selection officials are permitted to rate the past performance of the prime contractor that submits the offer, the key personnel the prime contractor plans to employ, the major teaming partners or subcontractors, or a combination of any or all of these. For example, in one case, GAO found that the agency could consider the past performance of a predecessor company because the offeror had assumed all of the predecessor's accounts and key personnel, technical staff, and other employees.<sup>6</sup> In another case, GAO held that an agency

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<sup>6</sup>Al Hamra Kuwait Co., B-288970, December 26, 2001.

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could provide in a solicitation for the evaluation of the past performance of a corporation rather than its key personnel.<sup>7</sup>

- *What:* Also at issue is what information agencies are required or permitted to consider in conducting evaluations of past performance. The issue is one of relevancy. Agencies must determine which of the contractor's past contracts are similar to the current contract in terms of size, scope, complexity, or contract type. For example, is past performance building single family homes relevant to a proposal to build a hospital? Agencies do not have to consider all available past performance information. However, they should consider all information that is so relevant that it cannot be overlooked, such as an incumbent contractor's past performance. In one case, GAO found that an agency reasonably determined that the protester's past performance on small projects was not relevant to a contract to build a berthing wharf for an aircraft carrier.<sup>8</sup>
- *When:* Agencies also have to determine the period of time for which they will evaluate the past performance of contractors. Agencies are required to maintain performance data for 3 years after the conclusion of a contract<sup>9</sup> although agencies have discretion as to the actual length of time they consider in their evaluation of past performance and could, for example, choose a period longer than 3 years. In one case, GAO held that although the solicitation required the company to list contracts within a 3-year time frame, the agency could consider contract performance beyond this timeframe because the solicitation provided that the government may "consider information concerning the offeror's past performance that was not contained in the proposal."<sup>10</sup>
- *Where:* Once agencies determine who they will evaluate, what information they will consider, and the relevant time frame, they still may have difficulties obtaining past performance information. Agencies can obtain past performance information from multiple sources, including databases such as PPIRS - a centralized, online database that contains federal contractor past performance information. However, in

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<sup>7</sup>Olympus Bldg. Svcs., B-282887, August 31, 1999.

<sup>8</sup>Marathon Constr. Co., B-284816, May 22, 2000.

<sup>9</sup>FAR §42.1503(e).

<sup>10</sup>BST Systems, Inc., B-298761, B-298761.2, December 1, 2006.



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2006, the General Services Administration noted that PPIRS contains incomplete information for some contractors. Agencies may also obtain information from references submitted with proposals and reference surveys. One case illustrates how an agency evaluated a company based on limited past performance information. The agency assigned the company a neutral rating because the agency did not receive completed questionnaires from the company's references listing relevant work and the solicitation provided that it was the company's obligation to ensure that the past performance questionnaires were completed and returned.<sup>11</sup>

These are just some of the many issues that have been the subject of protests involving the use of past performance. Our cases are not necessarily representative of what may be occurring throughout the procurement system, but they do provide a window that allows us to get a glimpse of how the issue is handled across a number of agencies. At a minimum, however, our cases suggest that the relatively straightforward concept of considering past performance in awarding new contracts has given rise to a number of questions that continue to surface as that concept is implemented.

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Mr. Chairman, this concludes my statement. I would be happy to respond to any questions you or other Members of the Subcommittee may have at this time.

For further information regarding this testimony, please contact William T. Woods at (202) 512-4841 or [woodsw@gao.gov](mailto:woodsw@gao.gov). Individuals making key contributions to this testimony included Carol Dawn Petersen, E. Brandon Booth, James Kim, Ann Marie Udale, Anne McDonough-Hughes, Kelly A. Richburg, Marcus Lloyd Oliver, Michael Golden, Jonathan L. Kang, Kenneth Patton, and Robert Swierczek.

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<sup>11</sup>American Floor Consultants, Inc., B-294530.7, June 15, 2006.

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