# CONTRACT LAW DIVISION

**Office of the Assistant General Counsel for Finance & Litigation**

**A Lawyer's View of Past Performance Information**

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## OFPP Policy Letter 92-5—Boon or Burden?

**by Lynn Hawkins Patton**

### Introduction

The Office of Federal Procurement Policy recently issued OFPP Policy Letter 92-5 (58 *Federal Register* 3573), its final rule establishing uniform use of past performance information ("PPI").[1] Prior to Policy Letter 92-5 the use of past performance information was required only to determine whether a prospective contractor was responsible [FAR 9.104-1(c) and 9.104-3(c)] but use of such information was neither required nor consistently used as an evaluation factor by procurement officials. Policy Letter 92-5 maintains the requirements at FAR Part 9.1, but adds an additional requirement for negotiated procurements expected to exceed $100,000—PPI must be specified as an evaluation factor except where the contracting officer determines that such action is not appropriate.[2] Also, agencies must now prepare an evaluation of a contractor's performance on all new contracts over $100,000, both during and upon completion of performance. The effect of these new requirements will be examined in two ways. First, how should procurement officials use past performance information in conducting proposal evaluations? Secondly, what is the functional impact on the methods agencies use to obtain past performance information.[3]

### Using Past Performance Information in Evaluations

Past performance information is defined in Policy Letter 92-5 as "relevant information regarding a contractor's actions under previously awarded contracts," and includes "the contractor's record of conforming to specifications and to standards of good workmanship; 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." While this definition of past performance information may be consistent with its prior use by agencies, for those agencies that are unaccustomed to using PPI as an evaluation factor, some guidance is in order. Agencies that are accustomed to using past performance information as an evaluation factor should consider whether their practices are consistent with the guidance below.

Responsibility determinations and evaluations require a different use of PPI. Whereas responsibility determinations use PPI to determine whether a contractor can perform the task, evaluations use PPI to determine how well a contractor can perform the task. Responsibility determinations result in a "go-no-go" decision while evaluations result in a risk assessment of each contractor relative to the other competitors. Thus, in making a responsibility determination, contracting officers can rely on general information about a contractor's capability, such as financial resources, facilities, quality control measures, and business integrity. The definition of PPI in Policy Letter 92-5 includes similar *indicia* of responsibility, but it also includes specific elements of a contractor's capabilities. In conducting evaluations using past performance information, contracting officers should focus on specific evidence of capability, such as whether a contractor adhered to specifications, whether items were delivered on schedule, and whether services were provided correctly the first time. PPI used for evaluations should focus on work performance only.

A second guideline for contracting officers is that exaggerated weight should not be given to past performance information in conducting evaluations. This could happen if past perfor-

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mance was specified as a separate evaluation criterion but included as a subfactor in other evaluation criteria. Procurement officials should be careful that solicitations to which this policy letter applies specify past performance as a separate criterion and that during evaluations other criteria are considered separately from a contractor's past performance.

These suggestions are especially important because Policy Letter 92-5 now provides contractors with a right that did not exist before. Contractors are now entitled to review evaluations of their performance and have a minimum of 30 days to discuss any evaluation with the head of the contracting activity. A contractor may submit rebutting evidence which then must be included in the contract file. However, because agencies are now responsible for collecting and storing past performance information (a second new requirement discussed below), contractors are afforded both an opportunity to review and rebut an agency's evaluation.

It is unclear, both from the final rule and from OFPP's response to comments on the interim rule, what kind of evaluation triggers a contractor's rebuttal rights. The final rules states that contractor evaluations shall be provided to the contractor "at the time they are completed." If the evaluations referred to are evaluations made during the contract negotiations, the procurement process could take significantly longer. However, if the evaluations referred to are those evaluations of a contractor completed during or after contract performance, the new right to rebut past performance information may not be disruptive. The type of evaluation referred to in the rule is probably the latter. Presumably, there will have been discussions between offerors and agencies regarding past performance information during contract negotiations because the offeror would be advised of deficiencies in its proposal, with the opportunity to address them, at that time.

The final rule does make clear, however, that "the ultimate conclusion and content of an evaluation is a decision of the contracting agency." The rule forces an agency to be open with a contractor about its performance evaluation, but does so without weakening the deference afforded procurement officials. While contractors may be given greater review rights, OFPP remains committed to protecting the judgment of procurement officials.

### Obtaining Past Performance Information

Policy Letter 92-5 perhaps has its biggest impact on the way past performance information is collected by agencies. Agencies generally relied on offerors for this information. Most solicitations required that the contractor include in its proposal previous contracts and references, thus placing the burden and discretion of obtaining this information with the contractor. Agencies are now responsible for compiling, storing, and updating past performance information. PPI can be based on the history of both Government and private contract performance..

The interim rule published in December, 1991 (56 *Federal Register* 63988), contemplated requiring agencies to establish "formal systems" for compiling past performance information, preferably automated data systems and central data banks. Comments to the interim rule convinced OFPP that any such requirement would be too expensive for agencies to establish. The final rule requires "only that past performance information be used and that existing systems be reviewed to determine if they can be consolidated." However, some agencies may not have any PPI system now, and because agency procedures for obtaining PPI must "still comply with the fairness and openness provisions" of Policy Letter 92-5, some agencies may decide to divert some funds for this purpose.

No matter how an agency obtains PPI, it bears the additional burden of keeping both current and accurate files. Before this final rule was issued, agencies generally were not required either to show or discuss information received by the agency from sources listed in a contractor's proposal. *Schneider, Inc.*, B-21475, 84-2 CPD ¶448 (1984). Offerors who were required to list their past experience were presumed to be aware that any listed reference would be contacted and that statements by those references would be considered in the evaluation process.

Further, there was no requirement that an agency investigate the accuracy of statements from contractor listed references. *Kirk-Mayer, Inc.*, B-20852, 83-2 CPD ¶288 (1983).

Agencies must make sure that only relevant information, as required by the definition of PPI in the Policy Letter, is used in evaluations. Information that is outdated may not be considered relevant; indeed, OFPP recommends that PPI should be disposed if it is more than six years old. Though OFPP recommends updating PPI every six years also, it is more likely that agencies will be required to update their systems more frequently because the "age and relevancy of PPI must be determined each time it is used. Agencies must also make sure that PPI is accurate. If a contractor has taken steps to improve poor performance ratings or if PPI is erroneous, evaluations based on incomplete or erroneous data may be challenged. While contractors have attempted such challenges in the past, the burden of proof might shift to the agencies as the new record keepers. Every attempt to keep PPI systems updated and accurate should be made. This will certainly require additional work by procurement officials, but it may avoid protracted discussions with a contractor or even a protest.

Finally, the new requirement that agencies maintain a PPI system is accompanied by the responsibility of keeping that information confidential. The most frequent comment to the interim rule was that the final rule should require written consent by a contractor before any PPI was released to a private party and that PPI information was exempt from Freedom of Information Act (FOIA) inquiries. The final rule does state that PPI cannot be released to a private party without the prior written consent of the contractor. However, if an agency determines that information requested is subject to FOIA, no written consent of the contractor is necessary. In addition to implementing management controls to curb the inadvertent release of a contractor's past performance history, agencies that plan to establish automated PPI systems are advised to implement technical controls to reduce the chance that anyone other than authorized personnel could access contractor files.

## Conclusion

There are additional burdens on procurement officials as a result of Policy Letter 92-5. It may appear that contractors are favored by this new rule, considering that they now have the right to rebut negative evaluation results. However, procurement officials should consider this a rule to be used to their best advantage. With the additional responsibilities of collecting and maintaining PPI systems comes the opportunity for more accurate contractor risk assessment. Agencies should take advantage of the forced openness that is now required and use it to encourage contractor improvement, both during and after performance, based on candid discussions of their deficiencies. Further, agencies still have the flexibility to determine what information will be considered; some information may be relevant to one procurement but not to another. Determining that relevancy is still within the contracting officer's discretion. Finally, OFPP has indicated that agencies should continue to be afforded great deference in their evaluations. Agencies should strive to utilize the advantage of the increase in the amount, accessibility, and use of past performance information to conduct procurements that will result in consistent contract success.

1. Implementation in the Federal Acquisition Regulations (FAR) is expected by the first week of August, 1993.

2. Such a determination must be written and included in the contract file.

3. OFPP specifically states that a firm cannot be prohibited from competing for a Government contract because it lacks a past performance history; however, this article addresses the application of Policy Letter 92-5 to firms that have past performance histories.

For further reference. An in-depth article that could be consulted is Dominic Femino's Evaluating Past Performance, Dept. of the Army Pamphlet 27-50-196, 1989