



# Legal Trends and Caveats on the Evaluation of Past Performance Information

## An Additional Help for ADS Chapter 302

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### **\*Ignoring Offeror's Past Performance on Incumbent Contract**

- **\*Axiom Resource Management, Inc., B-298870.3 et al., July 12, 2007, 2007 CPD ¶117.** GAO held that it was unreasonable for agency to ignore protestor's good past performance on the incumbent contract.
- **\*Johnson Controls Security Systems, Inc., B-296490.3, Mar. 23, 2007, 2007 CPD ¶100.** GAO held that it was unreasonable for agency to fail to consider the awardee's performance problems on incumbent contract.

### **\*\*"Stale" Past Performance**

- **\*Glasslock, Inc., B-299931, B-299931.2, Oct. 10, 2007, 2007 CPD ¶ TBD, 2007 WL 4200104.** GAO held that, under a solicitation that only provided for vendors to submit prior past performance references for the past 5 years, an agency improperly considered and awarded strengths for projects that were completed more than 5 years ago.

### **\*Lack of Relevant Past Performance/Neutral Rating**

- **\*Greater Pacific Aquatics, B-297654, Feb. 2, 2006, 2006 CPD ¶37.** GAO held that under solicitation for lifeguard services, agency reasonably rated protestor's past performance as neutral where protestor's proposal showed that protestor had managed a swim team, but had not performed lifeguard services.
- **\*MIL Corp., B-294836, Dec. 30, 2004, 2005 CPD ¶29.** Protest sustained where agency downgraded protestor's proposal under the past performance evaluation factor based upon agency's determination that protestor lacked relevant past performance information.

### **Relevance of Offeror's Past Performance Information**

- **\*United Paradyne Corp., B-297758, Mar. 10, 2006, 2006 CPD ¶47.** GAO sustained a protest of the agency's past performance evaluation based on its mechanical application of an irrational mathematical formula. The agency's method, which independently rated the relevance and quality of each offeror's past performance references, improperly: (1) penalized offerors for identifying less relevant past performance information even when additional, relevant

references had been submitted, and (2) assigned equal weight to both highly relevant and non-relevant past performance.

- ***Si Nor, Inc., B-292748.2, Jan. 7, 2004, 2004 CPD ¶10.*** The GAO held that the awarding agency erred in considering relevant one of the awardee's prior contracts. The RFP stated that only information on contracts "similar in size, scope, and complexity" to the work to be awarded would be evaluated. GAO found that the contract at issue was "substantially less than the dollar value of the requirements of the RFP" and relevant only to a limited portion of the solicited work.
- ***Continental RPVs, B-292768.2, Dec. 11, 2003, 2004 CPD ¶56.*** The GAO found unreasonable the agency's past performance evaluation of the awardee because it was based upon prior contracts which were not similar to several of the essential RFP work requirements and the dollar value of the largest contract was less than three percent of the contract value contemplated under the RFP, when the solicitation required the submission of information on contracts that were "same or similar" to the effort required by the RFP.
- ***KMR, LLC, B-292860, Dec. 22, 2003, 2003 CPD ¶233.*** The GAO held that where the RFP called for "same or similar" contracts, "a firm's success in performing complex IT tasks does not necessarily indicate that it can successfully perform the contract here involving significantly different tasks and skills, even if they involve less sophisticated skills."

#### **\*Unequal Effort in Contacting References**

- ***\*Family Entertainment Services, Inc., B-298047.3, Sept. 20, 2006, 2007 CPD ¶59.*** GAO sustains protest claiming that agency's evaluation of protestor's past performance was unreasonable where the record showed that the protestor and the awardee were not treated equally with regard to the agency's efforts to contact past performance references, and the record did not provide a reasonable explanation for the agency's conclusions regarding the protestor's past performance, including what if any impact the agency's receipt of contractor performance assessment reports had on its evaluation.

#### **\*Subcontractor Past Performance**

- ***\*Singleton Enterprises, B-298576, Oct. 30, 2006, 2006 CPD ¶157.*** GAO held that a latent ambiguity regarding the evaluation of subcontractor past performance was created where the RFP stated that the past performance of the "offeror" would be considered. The protestor's interpretation that the agency would also evaluate subcontractor past performance was reasonable in light of FAR 15.305(a)(2)(iii), which provides that subcontractor past performance

“should” be evaluated. Therefore, the agency’s refusal to consider subcontractor past performance was improper without further guidance from the RFP.

- **\*Daylight Tree Service & Equipment, LLC, B-310808, 2008 WL 239824 (Jan. 29, 2008).** Confirming that the FAR §15.305(a)(2)(iii) directs agencies to take into account past performance information of predecessor companies, key personnel who have relevant experience or subcontractors when such information is relevant to an acquisition. *See also, United Coatings, B-291978.2, July 7, 2003, 2003 CPD ¶146* (past performance of a new company based on the experience key individuals gained through prior employment with another, affiliated company is relevant).

#### **\*Evaluator’s Personal knowledge**

- **\*Omega World Travel, Inc., B-271262.2, July 25, 1996, 96-2 CPD ¶44.** Protest against downgrading of protester's past performance based on evaluators' personal knowledge of complaints about protester's performance under incumbent contract is denied, where the evaluation judgments were documented in sufficient detail by internal agency memorandum and surveys of agency travelers to show reasonableness of evaluation. “In an evaluation which takes into account the agency's own knowledge of offerors, the fundamental requirement that evaluation judgments be documented in sufficient detail to show that they are reasonable and not arbitrary still must be met.”

#### **\*Documentation of Past Performance Evaluation**

- **\*Tiger Truck, LLC, B-310759, B-310759.2, 2008 WL 399441 (Feb. 7, 2008).** The evaluation of past performance, including the agency's determination of the relevance and scope of a vendor's performance history to be considered, is a matter of agency discretion that we will not find improper unless it is unreasonable, inconsistent with the solicitation criteria or procurement statute or regulation, **or undocumented.**

#### **\*Evaluating Past Performance and Experience Separately**

- **\*Executive Court Reporters, Inc., B-272983.2, Dec. 5, 1996, 96-2 CPD ¶227.** GAO stated that past performance and experience should be separate evaluation factors and should be evaluated separately.
- **\*PW Constr., Inc., B-272248, Sept. 13, 1996, 96-2 CPD ¶130.** GAO concluded that the evaluation of both experience and past performance was properly performed.

**\*Further Detail on Cited Decisions**

The full text of most of the GAO Comptroller General Decisions cited above may be accessed by copying the decision number into the search window at: <http://www.gao.gov/cghome.html>, hitting the Search button, and then clicking on the resulting link.

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