



# Evaluating the “Past Performance” of Federal Contractors: Legal Requirements and Issues

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## Summary

Poor performance under a federal contract can have immediate consequences for contractors, who could potentially be denied award or incentive fees, required to pay liquidated damages, or terminated for default. In addition, it can affect their ability to obtain future contracts because various provisions of federal law require agencies to evaluate contractors' "past performance" and consider past performance information when making source selection decisions in negotiated procurements and when determining whether prospective contractors are "responsible." "Past performance" refers to contractors' performance on "active and physically completed contracts." Recent reports alleging that some contractors received new contracts despite allegedly deficient performance under prior or current contracts has prompted interest in the role that evaluations of past performance play in federal contracting, as well as attempts by some members of Congress and the Obama Administration to strengthen existing requirements pertaining to the compilation and use of performance evaluations.

Currently, federal law requires agencies to evaluate and document contractor performance on all contracts whose value exceeds \$150,000. The evaluation must address the contractor's performance vis-à-vis any required subcontracting plan and may address its conformity to contract requirements, adherence to contract schedules, and related factors. The evaluation and any contractor response comprise the past performance information that is stored in government databases (e.g., Past Performance Information Retrieval System (PPIRS), Federal Awardee Performance and Integrity Information System (FAPIS)) and may be used in future source selection decisions. Agencies must also consider contractors' past performance when making source selection decisions in negotiated procurements whose value exceeds \$150,000. In a negotiated procurement, the contract is awarded to the offeror whose proposal represents the "best value" for the government based on various factors identified in the solicitation. These factors typically must include price and past performance. However, other factors may be considered, and the factors can carry various weights. Additionally, agencies must consider whether the contractor has a satisfactory performance record when determining whether the contractor is sufficiently "responsible" to be awarded a federal contract. Agencies cannot award a federal contract without determining that the contractor is "responsible." While agencies are generally prohibited from repeatedly finding a contractor nonresponsible based upon the same deficient past performance, they also have authority to debar or suspend contractors for willful failure to perform under a contract or a history of failure to perform.

The 111<sup>th</sup> Congress enacted or proposed legislation regarding agency evaluations of contractors' past performance and use of past performance information in source selection decisions (e.g., P.L. 111-23, P.L. 111-83, P.L. 111-212). The Obama Administration has also implemented initiatives that would reward contractors for good performance, including the Navy's "Preferred Supplier Program." Under this pilot program, which the Department of Defense (DOD) recently proposed expanding DOD-wide, contracting officers can grant favorable contract terms and conditions to contractors based on good past performance.

Contractors, however, have expressed concern about certain proposed reforms on the grounds that these reforms could result in *de facto* debarment or otherwise deprive contractors of due process. Contractors' ability to challenge allegedly erroneous or biased performance evaluations at the time of their issuance is limited, and courts and the Government Accountability Office generally give substantial deference to agency source selection decisions and responsibility determinations.

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## Introduction

Poor performance under a federal contract can have immediate consequences for contractors, who could potentially be denied award or incentive fees, required to pay liquidated damages, or terminated for default.<sup>1</sup> In addition, it can affect their ability to obtain future contracts because various provisions of federal law require agencies to evaluate contractor's "past performance" and consider past performance information when making source selection decisions in negotiated procurements and when determining whether prospective contractors are "responsible." "Past performance" refers to contractors' performance on "active and physically completed contracts."<sup>2</sup>

Recent reports alleging that some contractors received new contracts despite allegedly deficient performance under prior or current contracts has prompted interest in the role that evaluations of past performance play in federal contracting,<sup>3</sup> as well as attempts by some members of Congress and the Obama Administration to improve agencies' compilation and use of past performance evaluations. Contractors, however, have expressed concerns about certain proposed reforms on the grounds that these reforms could result in *de facto* debarment or otherwise deprive contractors of due process.<sup>4</sup>

This report provides an overview of existing legal requirements pertaining to past performance, including the issues raised by contractors' attempts to challenge (1) agency evaluations of their past performance, (2) source selection decisions based, in part, on consideration of past performance information, and (3) responsibility determinations. It also surveys recently enacted and proposed legislation and executive branch initiatives related to evaluations of past performance.

## Evaluating and Documenting Contractor Performance

While agencies have long informally evaluated contractors' performance and generally kept some records regarding this performance, at least during the term of the contract, they were not required to compile evaluations of past performance until 1993. Then, as part of reforms requiring agency consideration of past performance in certain source selection decisions, discussed below, the Office of Federal Procurement Policy (OFPP) directed federal agencies to "[p]repare evaluations of contractors' performance on all new contracts over \$100,000."<sup>5</sup> One year later,

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<sup>1</sup> See 48 C.F.R. §§ 11.500-11.503 (liquidated damages); 48 C.F.R. §§ 16.401-16.406 (award and incentive fees); 48 C.F.R. §§ 49.401-49.406 (termination for default).

<sup>2</sup> 48 C.F.R. § 2.101.

<sup>3</sup> See, e.g., Committee on Armed Services, *Inquiry into the Role and Oversight of Private Security Contractors in Afghanistan*, 111<sup>th</sup> Cong., 2d Sess., at 55 (2010) (noting that Department of Defense files on security contracts in Afghanistan contained "little or no information" about the past performance of security providers); Kimberly Hefling, KBR Gets \$35 Million Contract Despite Electrocutions, *Army Times*, Sept. 7, 2009, available at [http://www.armytimes.com/news/2009/02/ap\\_kbr\\_contract\\_020709](http://www.armytimes.com/news/2009/02/ap_kbr_contract_020709) (quoting commentators who questioned this award to KBR in light of its allegedly poor performance under a prior contract).

<sup>4</sup> See *infra* note 151 and accompanying text.

<sup>5</sup> Exec. Office of the Pres., Office of Mgmt. & Budget, Office of Fed. Procurement Policy, Final Issuance of Policy Letter 92-5, 58 Fed. Reg. 3573, 3575 (Jan. 11, 1993). OFPP Policy Letter 92-5 further added that "[e]valuations shall (continued...)

Congress enacted the Federal Acquisition Streamlining Act (FASA) of 1994, which established a statutory basis for agency evaluation of past performance.<sup>6</sup> Among other things, FASA required OFPP to prescribe "policies for the collection and maintenance of information on past contract performance that, to the maximum extent practicable, facilitate automated collection, maintenance, and dissemination of information and provide for ease of collection, maintenance, and dissemination of information by other methods, as necessary."<sup>7</sup> OFPP met this requirement by promulgating regulations regarding "contractor performance information" in Subpart 42.15 of the Federal Acquisition Regulation (FAR).<sup>8</sup> These regulations, as amended, currently prescribe the content of contractor performance evaluations, as well as procedures for the compilation, posting, and use of such evaluations.

The requirement that agencies evaluate contractor performance was imposed, in part, because "performance assessment is a basic 'best practice' for good contract administration, and is one of the most important tools available for ensuring good contract performance."<sup>9</sup> Additionally, Congress and the executive branch hoped that written evaluations of contractor performance would "improve[] the amount and quality of performance information available to source selection teams," which would, in turn, "enable[] agencies to better predict the quality of, and customer satisfaction with, future work."<sup>10</sup> However, although OFPP, in particular, anticipated that agencies would ultimately be able to rely almost exclusively on agency performance evaluations in their source selection decisions,<sup>11</sup> this does not seem to have occurred, as discussed below.<sup>12</sup>

## Contents of Evaluations

Under Subpart 42.15 of the FAR, agencies are generally required to evaluate contractors' performance on all contracts valued in excess of \$150,000 (\$30,000 for architect-engineer contracts, \$650,000 for construction contracts) when the contract is completed or on an interim basis, in the case of multi-year contracts.<sup>13</sup> However, Subpart 42.15 leaves the content of this

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(...continued)

be made during contract performance, as required for contract administration purposes and at the time the work under the contract is completed." *Id.* The Federal Acquisition Regulation (FAR), in contrast, currently requires evaluations of contractor performance only "at the time the work under the contract or order is completed," or an interim basis, in the case of multiyear contracts. 48 C.F.R. § 42.1502(a).

<sup>6</sup> P.L. 108-355, § 1091(b), 108 Stat. 3272 (Oct. 13, 1994) (codified at 41 U.S.C. § 405 note).

<sup>7</sup> *Id.*

<sup>8</sup> Gen. Servs. Admin., Nat'l Aeronautics & Space Admin., & Dep't of Defense, Federal Acquisition Regulation; Past Performance Information, 60 Fed. Reg. 16718, 16719-20 (Mar. 31, 1995).

<sup>9</sup> Exec. Office of the Pres., Office of Mgmt. & Budget, Office of Fed. Procurement Policy, Best Practices for Collecting and Using Current and Past Performance Information, May 2000, at Foreword, *available at* [http://www.whitehouse.gov/omb/best\\_practice\\_re\\_past\\_perf](http://www.whitehouse.gov/omb/best_practice_re_past_perf).

<sup>10</sup> *Id.*

<sup>11</sup> Office of Fed. Procurement Policy, A Guide to Best Practices for Past Performance, at 19 & 36 (1995) (copy on file with the author) (encouraging agencies to rely on evaluations completed pursuant to Subpart 42.15 of the FAR in the source selection process "to the maximum extent practicable").

<sup>12</sup> *See infra* notes 81 to 83 and accompanying text.

<sup>13</sup> 48 C.F.R. § 42.1502(b) (general requirement); 48 C.F.R. § 42.1502(e) (construction contracts); 48 C.F.R. § 42.1502(f) (architect-engineer contracts); 48 C.F.R. § 42.1502(b) (multi-year contracts). Agencies must also evaluate performance on any construction or architect-engineer contract that is terminated for default, regardless of its value, as well as on orders valued in excess of \$150,000 placed under the Federal Supply Schedules or an interagency contract. (continued...)

evaluation largely to the agency’s discretion. When evaluating past performance, agencies are *required* to evaluate only the contractor’s performance on and efforts to achieve any small business subcontracting goals,<sup>14</sup> although they are *encouraged* to consider other factors, such as

the contractor’s record of conforming to contract requirements and to standards of good workmanship; the contractor’s record of forecasting and controlling costs; the contractor’s adherence to contract schedules, including the administrative aspects of performance; the contractor’s history of reasonable and cooperative behavior and commitment to customer satisfaction; the contractor’s reporting into databases . . . ; the contractor’s record of integrity and business ethics, and generally, the contractor’s business-like concern for the interest of the customer.<sup>15</sup>

The contracting agency determines the relevant evaluation factors and typically incorporates them into a “performance assessment clause” or similar clause in the contract.<sup>16</sup> This clause generally also establishes the categories to be used in rating performance, which can be quite broad, and the metrics used in applying particular ratings to specific conduct.<sup>17</sup> Because the evaluation factors and ratings categories are terms of the contract, they arguably cannot be changed during the course of contract performance without the consent of both contracting parties.<sup>18</sup>

## Procedures for Compiling, Posting, and Using Evaluations

Subpart 42.15 of the FAR also requires agencies to follow certain procedures when compiling, posting, and using performance evaluations. The contracting officer, or someone who has been delegated this authority by the contracting officer, is to prepare the evaluation.<sup>19</sup> However, the evaluation should be based on the experiences of the technical office and end users, where appropriate, as well as those of the contracting office.<sup>20</sup> A copy of the evaluation should be

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(...continued)

48 C.F.R. § 42.1502(c). They are, however, prohibited from evaluating performance on contracts awarded to nonprofit agencies employing persons who are blind or have severe disabilities. 48 C.F.R. § 42.1502(h).

<sup>14</sup> 48 C.F.R. § 42.1502(g). Section 8(d) of the Small Business Act requires that all contracts whose expected value exceeds \$650,000 (\$1.5 million for construction contracts) incorporate a “subcontracting plan” that provides the “maximum practicable opportunity” for various types of small businesses to participate in performing the contract. *See* 15 U.S.C. § 637(d)(4)(C) (negotiated procurements); 15 U.S.C. § 637(d)(5)(B) (sealed-bid procurements).

<sup>15</sup> 48 C.F.R. § 42.1501. When the FAR was revised to require evaluation of contractor performance, some contractors and commentators objected to certain of these criteria, most notably the contractor’s “commitment to customer satisfaction” and “business-like concern for the customer’s interest,” on the grounds that the criteria are inherently subjective. *See, e.g.,* George M. Coburn, *Unfavorable Past Performance Determinations as De facto Debarment*, 31 *Proc. Law.* 26, 27 (1996). Despite such concerns, however, their implementation does not appear to have generated particular controversy, beyond the controversy generally associated with the issuance of allegedly biased or erroneous performance evaluations. *See infra* note 31 and accompanying text.

<sup>16</sup> *See, e.g.,* Colonna’s Shipyard, Inc., ASBCA No. 56940, 2010-2 B.C.A. ¶ 34,494 (2010) (contractor’s performance to be evaluated based on “technical (quality of product),” “schedule (timeliness of performance)” and “management”).

<sup>17</sup> *See, e.g., id.* (performance to be rated as exceptional, very good, satisfactory, or marginal, with the marginal rating used for performance that “does not meet some contractual requirements. The contractual performance of the element or sub-element being assessed reflects a serious problem for which the contractor has not yet identified corrective actions. The contractor’s proposed actions appear only marginally effective or were not fully implemented.”).

<sup>18</sup> Evaluation criteria are often broad enough to encompass any conduct or omission of the contractor that the agency might wish to address. However, if the contract defined the evaluation criteria narrowly, an agency might not be able to address unanticipated conduct or omissions within the existing categories without violating the terms of the contract.

<sup>19</sup> 48 C.F.R. § 42.1503(a).

<sup>20</sup> *Id.*

provided to the contractor “as soon as practicable after [its] completion,”<sup>21</sup> with the contractor then having “a minimum of 30 days” to submit comments or additional information.<sup>22</sup>

Disagreements between the contractor and the contracting officer are reviewed “at a level above the contracting officer,” although “[t]he ultimate conclusion on the performance evaluation is a decision of the contracting agency.”<sup>23</sup>

The evaluation and any response from the contractor are to be marked “source selection information” and submitted to the Past Performance Information Retrieval System (PPIRS).<sup>24</sup> Marking them as source selection information ensures that they cannot be released to anyone other than eligible government personnel, or the contractor whose performance was evaluated, for at least three years.<sup>25</sup> Because of this limitation on access to performance evaluations, access to the PPIRS database is similarly limited, and information about a contractor in PPIRS can only be viewed by authorized government personnel or the contractor in question. Access to the Federal Awardee Performance Integrity Information System (FAPIIS), which includes PPIRS information along with contractor-submitted information and information from other federal databases, was originally similarly limited.<sup>26</sup> However, although Congress subsequently required that most FAPIIS information be made publicly available on the Web,<sup>27</sup> past performance information was explicitly exempted from such disclosure because of its protected status as source selection information.<sup>28</sup>

Subpart 42.15 of the FAR further requires that agencies “use” recent evaluations of past performance stored in PPIRS,<sup>29</sup> but it does not specify for what they are to be used. This

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<sup>21</sup> 48 C.F.R. § 42.1503(b).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* Some contracts contain language to the effect that the final performance rating is “the unilateral determination of the reviewing official” and not subject to dispute or appeal beyond the agency. *See, e.g.,* Colonna’s Shipyard, Inc., ASBCA No. 56940, 2010-2 B.C.A. ¶ 34,494 (2010). Such language is generally not enforceable. *See, e.g.,* Burnside-Ott Aviation Training Center v. Dalton, 107 F.3d 854 (Fed. Cir. 1997) (finding that certain award fee determinations are reviewable notwithstanding contract language like that quoted above), *aff’g* Burnside-Ott Aviation Training Center, ASBCA No. 43184, 96-1 B.C.A. ¶ 28,102 (1996); Puyallup Tribe of Indians, ASBCA No. 29802, 88-2 B.C.A. ¶ 20,640 (contract’s sovereign immunity provision cannot nullify the disputes clause), *aff’d* F.2d 1096 (Fed. Cir. 1989). *See also infra* notes 35 to 47 and accompanying text.

<sup>24</sup> 48 C.F.R. § 42.1503(c).

<sup>25</sup> 41 U.S.C. § 423(a)(1) (prohibiting disclosure of source selection information); *id.*, at § (f)(2) (defining “source selection information”). *See also* 48 C.F.R. § 42.1503(b) (“Disclosure of such information could cause harm both to the commercial interest of the Government and to the competitive position of the contractor being evaluated as well as impede the efficiency of Government operations.”)

<sup>26</sup> *See* Duncan Hunter National Defense Authorization Act for FY2009, P.L. 110-417, §§ 871-873, 122 Stat. 4555-58 (Oct. 14, 2008). Among other things, FAPIIS also includes brief descriptions of all civil, criminal, and administrative proceedings involving federal contracts that resulted in a conviction or finding of fault, as well as all terminations for default, administrative agreements, and nonresponsibility determinations relating to federal contracts, within the past five years for all persons holding a federal contract or grant worth \$500,000 or more.

<sup>27</sup> *See* Consolidated Appropriations Act, 2010, P.L. 111-212, § 3010, 124 Stat. 2340 (July 29, 2010) (“Section 872(e)(1) of the Clean Contracting Act of 2008 (subtitle G of title VIII of Public Law 110-417; 41 U.S.C. 417b(e)(1)) is amended by adding at the end the following: ‘In addition, the Administrator shall post all such information, *excluding past performance reviews*, on a publicly available Internet website.’”) (emphasis added).

<sup>28</sup> *Id.* *See also* Dep’t of Defense, Gen. Servs. Admin., & Nat’l Aeronautics & Space Admin., Federal Awardee Performance and Integrity Information System: Final Rule, 75 Fed. Reg. 14059, 14063 (Mar. 23, 2010).

<sup>29</sup> 48 C.F.R. § 42.1503(e) (“Agencies *shall* use the past performance information in PPIRS that is within three years (six years for construction and architect-engineer contracts) of completion of performance of the evaluated contract or order.”) (emphasis added). However, Subpart 42.15 elsewhere states that “[t]hese evaluations *may* be used to support future award decisions.” 48 C.F.R. § 42.1503(b).

provision presumably refers to consideration of agency past performance evaluations in source selection decisions, as discussed in the following section. However, nothing in Subpart 15.3 of FAR, which generally governs use of past performance as an evaluation factor, expressly requires consideration in source selection decisions of the past performance evaluations that agencies are required to complete under Subpart 42.15.<sup>30</sup>

## Contractor Challenges to Performance Evaluations

Because of the potential use of agency performance evaluations in source selection decisions, contractors are generally concerned about the contents of their evaluations and want to ensure that these evaluations are accurate and unbiased.<sup>31</sup> However, their ability to challenge their evaluations outside the agency was historically limited, and they could generally only allege improprieties in their evaluations in the course of bid protests challenging agency source selection decisions based, in part, on the contents of these evaluations.<sup>32</sup> This arguably afforded contractors little relief from erroneous or biased evaluations because (1) the focus of the protest is upon the reasonableness of the contracting officer's source selection decision, not the reasonableness of the evaluation of the contractor's past performance,<sup>33</sup> and (2) the judicial and administrative tribunals hearing bid protests give substantial deference to the contracting officer's determinations in the source selection process.<sup>34</sup>

More recently, however, disputes over performance evaluations have come to be seen as potential claims under the Contract Disputes Act (CDA) of 1978. This trend began in 2004, when the U.S. Court of Federal Claims issued its decision in *Record Steel & Construction, Inc. v. United States*.<sup>35</sup> The contractor in *Record Steel* had sued seeking, among other things, a declaratory judgment that its evaluation be "corrected to reflect accurately" its performance under the contract.<sup>36</sup> The government countered by asserting that the court lacked jurisdiction because, while the Tucker Act waives the government's sovereign immunity as to "claims" arising under the CDA, *Record Steel's* letter to the contracting officer requesting that its performance rating be

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<sup>30</sup> Policy guidance from OFPP does, however, encourage agencies to use performance evaluations completed under Subpart 42.15 of the FAR for source selection purposes. *See supra* note 11 and accompanying text.

<sup>31</sup> *See, e.g., Todd Constr., L.P. v. United States*, 85 Fed. Cl. 34, 36 (2008) ("Given the increasing importance of performance reviews and prejudice to contractors from erroneous ratings, there should be some judicial forum available to consider challenges to the fairness and accuracy of evaluations.").

<sup>32</sup> A bid protest is a formal, written objection to an agency's solicitation for bids or offers, cancellation of a solicitation, or award or proposed award of a contract. 31 U.S.C. § 3551(1)(A)-(D). For more on bid protests, see CRS Report R40228, *GAO Bid Protests: An Overview of Timeframes and Procedures*, by Kate M. Manuel and Moshe Schwartz. More recently, GAO has suggested that bid protests are not the proper forum to dispute the substance of performance evaluations required under Subpart 42.15 of the FAR. *See Ocean Tech. Servs., Inc.*, B-288659 (Nov. 27, 2001).

<sup>33</sup> *See, e.g., BLR Group of Am. v. United States*, 84 Fed. Cl. 634, 647 (2008) ("It is conceivable that by the time the contractor is able to challenge the evaluation, ... fading memories could hinder the contractor's chances of success."). In addition, the contracting officer making the source selection decision is not necessarily the same person, or even with the same agency, that produced the allegedly biased or erroneous evaluation of the contractor's performance.

<sup>34</sup> *See infra* notes 91 to 96 and accompanying text. Some commentators also suggest that challenges to past performance evaluations raised during bid protests make the procurement process less efficient by disrupting agency operations. *See BLR Group*, 84 Fed. Cl. at 647 ("The efficiency of the procurement process would be compromised by forcing a contractor to protest an issue that could have been resolved at an earlier time under the [Contract Disputes Act].").

<sup>35</sup> 62 Fed. Cl. 508 (2004).

<sup>36</sup> *Id.* at 509.



reevaluated and changed did not constitute a claim since it did not seek relief "as a matter of right" or arising from or related to the contract.<sup>37</sup> The court disagreed.<sup>38</sup> It found that it had jurisdiction, assuming the other requirements of the CDA were met,<sup>39</sup> because Record Steel's letter to the contracting officer constituted a "claim" as that term is defined in the FAR.<sup>40</sup> In reaching this conclusion, the court found that a request for reevaluation and/or change of performance ratings was a "claim of right" because the FAR requires agencies to prepare such evaluations for contracts of the size and type held by Record Steel.<sup>41</sup> The court also rejected the government's assertion that the precedent of the boards of contract appeals, which had long declined to exercise jurisdiction over challenges to performance evaluations, meant that the court lacked jurisdiction.<sup>42</sup>

Then, on May 6, 2010, the Armed Services Board of Contract Appeals (ASBCA) also found that it has jurisdiction over contractor challenges to performance evaluations.<sup>43</sup> Previously, in a series of decisions issued between 1991 and 2006, the ASBCA and other boards of contract appeals had found that they lacked jurisdiction in such cases because a "performance evaluation under a contract is an administrative matter not a Government claim, and a contractor's request that a contracting officer change an evaluation is not a contractor's claim."<sup>44</sup> Like the decision in *Record Steel*, the May decision of the ASBCA relied on the FAR's definition of "claim" to find that the contractor's request that the board "rescind" the contractor's evaluation constituted a

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<sup>37</sup> *Id.* 518-19. As sovereign, the United States is immune to suit without its consent. *See, e.g.,* United States v. Sherwood, 312 U.S. 584, 586 (1941). The Tucker Act waives this immunity as to claims against the United States founded in the U.S. Constitution, federal statutes or regulations, or express or implied contracts with the United States. 28 U.S.C. § 1491(a)(1). It also provides the court with "jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978, including . . . nonmonetary disputes in which a decision of the contracting officer has been issued under section 6 of that Act." 28 U.S.C. § 1491(a)(2).

<sup>38</sup> *Record Steel*, 62 Fed. Cl. at 518.

<sup>39</sup> For example, for the Court of Federal Claims to have jurisdiction over a CDA "claim," the claim must have been made in writing and submitted to the contracting officer for a decision. *See* 41 U.S.C. § 605(a).

<sup>40</sup> *Record Steel*, 62 Fed. Cl. at 518. The CDA itself does not define "claim," nor did the contract in question. The FAR, however, defines a claim as "a written demand or written assertion by one of the contracting parties 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 this contract." 48 C.F.R. § 2.101 (definitions). *See also* 48 C.F.R. § 52.233-1(c) (standard contract clause).

<sup>41</sup> *Record Steel*, 62 Fed. Cl. at 519 (noting that FAR Subpart 36.201(a)(1) required the agency to prepare a performance evaluation).

<sup>42</sup> *Id.* at 521. A subsequent decision of the Court of Federal Claims has, however, distinguished between performance evaluations and PPIRS entries, finding that, while contractors are entitled by the FAR to a "fair and accurate" performance evaluation, they are not similarly entitled to a "properly formatted PPIRS entry" since the relevant regulations and policy guidelines "do not address the manner in which a PPIRS entry is displayed or formatted." *BLR Group*, 84 Fed. Cl. at 639. This decision also suggested that final Contractor Performance Assessment Reports (CPARs) are not final decisions of the contracting officer for purposes of the CDA because they are issued by a reviewing official, who is above the contracting officer, not the contracting officer. However, while only final decisions of the contracting officer are generally disputable, the plaintiff's claim survived because, assuming the reviewing official is seen as issuing the performance evaluation, the contracting officer issues no decision, and s/he is otherwise required by the CDA to issue a decision "within a reasonable time," or the claim is deemed denied. *BLR Group*, 84 Fed. Cl. at 648.

<sup>43</sup> *Versar, Inc.*, ASBCA No. 56857, 2010-1 B.C.A. ¶ 34,437 (2010).

<sup>44</sup> *TLT Constr. Corp.*, ASBCA No. 53769, 02-2 B.C.A. ¶ 31,969 (2002). *See also* *Aim Constr.*, ASBCA No. 52540, 07-1 BCA ¶ 33,466 (2006); *Franklin's Cleaning & Supply Co.*, GSBCA No. 16527, 06-1 BCA ¶ 33,139 (2005); *G. Bliudzius Contractors*, ASBCA No. 42365, 92-1 BCA ¶ 24,605 (1991); *Konoike Constr. Co.*, ASBCA No. 40910, 91-3 BCA ¶ 24,170 (1991).

claim, although the board grounded the contractor's entitlement to a "fair and accurate" performance evaluation in the terms of the contract and the "implied . . . duty of good faith and fair dealing inherent in every contract," not the FAR.<sup>45</sup> A subsequent decision by the ASBCA expanded upon the May decision by suggesting that earlier board decisions had been misconstrued as holding that the boards *always* lacked jurisdiction over contractor challenges to performance evaluations,<sup>46</sup> and that the government's duty to provide an "accurate and fair" performance evaluation arises from *both* the FAR and the contract.<sup>47</sup>

Nonetheless, despite these recent decisions finding that the federal courts and boards of contract appeals have jurisdiction to hear contractor challenges to allegedly erroneous or biased performance evaluations, it is presently unclear what, if any, relief they might be able to grant. This question was first directly addressed in the Court of Federal Claims' decision on July 22, 2009, in *Todd Construction, L.P. v. United States*.<sup>48</sup> Todd Construction had asked the court to (1) determine that the Air Force's final evaluation of its performance was unlawful and should be set aside and (2) direct the Air Force to remove the final performance evaluation from the Construction Contractor Appraisal Support System (CCASS).<sup>49</sup> The court, however, found that neither form of relief was within its authority.<sup>50</sup> It found that, while it has inherent authority to grant declaratory relief,<sup>51</sup> a declaration of rights would not resolve the case at hand because it would not cause the performance evaluation to be changed or removed from CCASS.<sup>52</sup> It similarly found that its statutory authority to remand the case to the agency with directions that the agency take "proper and just" steps could only be used to direct the agency's attention to

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<sup>45</sup> *Versar, Inc.*, ASBCA No. 56857, 2010-1 B.C.A. ¶ 34,437 (2010) ("[T]he Air Force was contractually obligated to complete a performance assessment in good faith that was fair and accurate."). This reliance on the "implied . . . duty of good faith and fair dealing inherent in every contract" is potentially significant because it could encompass aspects of the performance evaluation process that are not explicitly addressed in the contract or regulations (e.g., the formatting of PPIRS entries). See *supra* note 42.

<sup>46</sup> *Colonna's Shipyard, Inc.*, ASBCA No. 56940, 2010-2 B.C.A. ¶ 34,494 (2010). According to the board, the initial case involving a past performance evaluation found only that the issuance of a performance evaluation, *per se*, did not constitute a claim. It also noted that a subsequent case found that the board *had* jurisdiction when a performance rating claim is based upon a contract's disputed terms. See *Sundt Construction, Inc.*, ASBCA No. 56293, 09-1 BCA ¶ 34,084 (2009).

<sup>47</sup> *Colonna's Shipyard, Inc.*, ASBCA No. 56940, 2010-2 B.C.A. ¶ 34,494 (2010). The contractor here also noted that the government had an implied duty to produce a unbiased and accurate performance evaluation, but the board did not address this issue.

<sup>48</sup> 88 Fed. Cl. 235 (2009). A December 9, 2008, decision in this case had found that the court had jurisdiction over the contractor's challenge to its performance evaluation on the same grounds discussed in *Record Steel*. See 85 Fed. Cl. 34 (2008).

<sup>49</sup> *Todd Constr.*, 88 Fed. Cl. at 248. Prior to July 1, 2009, agencies were not required to submit their performance evaluations to PPIRS, and some, such as DOD, maintained their own databases (e.g., CCASS).

<sup>50</sup> *Id.* at 243-44.

<sup>51</sup> *Id.* (quoting *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) ("Jurisdiction is power to declare the law.")).

<sup>52</sup> *Id.* at 244 ("If the Court possess only the power to say 'no, the performance evaluation is not fair and accurate,' but no authority to order any other action, the plaintiff would be essentially no better off than it is today. Even if the Court could say 'the performance evaluation should be set aside,' but had no power to require any entity to take any action on that conclusion, the declaratory relief would be meaningless."). In so finding, the court distinguished prior cases, where it had granted declaratory relief, from the present case by characterizing the prior cases as involving "live disputes" of the "yes" or "no" sort, where "the consequences flowing from [the court's] answer did not require further intervention from a court or board." *Id.* (citing *CW Gov't Travel, Inc. v. United States*, 63 Fed. Cl. 369, 387-90 (2004) (declaring whether the contract entitled the contractor to be the exclusive service provider); *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1271 (Fed. Cir. 1999) (declaring whether the exercise of an option was valid); *Malone v. United States*, 849 F.2d 1441, 1445 (Fed. Cir. 1988) (declaring whether a termination for default was valid)).

matters that the court believes require further action to create an adequate record of the agency's decision, not to mandate particular factual determinations.<sup>53</sup> Subsequent board of contract appeals decisions also found that the boards lack authority to order an agency to rescind a poor performance evaluation or revise the agency's evaluation.<sup>54</sup>

## Consideration of Past Performance in Source Selection in Negotiated Procurements

Although not expressly required to do so, agencies appear to have considered past performance when selecting vendors in "negotiated procurements" since at least the 1960s.<sup>55</sup> A negotiated procurement is one in which the contract is awarded to the vendor whose proposal represents the "best value" for the government.<sup>56</sup> This is not necessarily the vendor whose proposal has the lowest price, but rather the vendor whose proposal represents the "greatest overall benefit" to the government given its price, technical merit, and relationship to other evaluation criteria specified in the request for proposals (RFP).<sup>57</sup> Such consideration of past performance in source selection decisions was not, however, standardized or required until the mid-1990s.<sup>58</sup> Then, in 1993, OFPP issued guidelines that required agencies to consider past performance information in all negotiated procurements valued in excess of \$100,000.<sup>59</sup> This requirement was given a statutory basis one year later, when Congress enacted FASA.<sup>60</sup> FASA directed OFPP to promulgate

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<sup>53</sup> *Todd Constr.*, 88 Fed. Cl. at 244-46. See 28 U.S.C. § 1491(a)(2) ("In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just."). In its 2009 decision, the court granted Todd Construction the right to amend its complaint, which the court had characterized as "not contain[ing] sufficient factual allegations to suggest entitlement to remand," in light of the recent decisions by the Supreme Court in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*. 88 Fed. Cl. at 249. In 2010, the court found that revised complaint failed to state a basis on which relief could be granted. See *Todd Constr., L.P. v. United States*, 94 Fed. Cl. 100, 116 (2010).

<sup>54</sup> *Colonna's Shipyard, Inc.*, ASBCA No. 56940, 2010-2 B.C.A. ¶ 34,494 (2010) (contractor seeking a declaration that its performance scores are erroneous and a violation of the contract, as well as remand to the contracting officer with instructions or advice on correcting the evaluation); *Versar, Inc.*, ASBCA No. 56857, 2010-1 B.C.A. ¶ 34,437 (2010) (contractor seeking rescission of the performance evaluation).

<sup>55</sup> See, e.g., *Educ. Servs.*, B-156860 (July 26, 1965) (request for proposals (RFP) stating that NASA would solicit information about prospective contractors' past performance from all available government sources and consider this information in its evaluation).

<sup>56</sup> See 48 C.F.R. § 15.101 (best value as the goal of negotiated procurements); 48 C.F.R. § 2.101 (defining "best value").

<sup>57</sup> Defense agencies were first authorized to conduct negotiated procurements in certain circumstances in 1948. Armed Services Procurement Act, P.L. 80-413, 62 Stat. 21 (Feb. 19, 1948) (codified at 10 U.S.C. § 2302 *et seq.*). Civilian agencies received similar authorization in 1949. Federal Property and Administrative Services Act, P.L. 81-152, 63 Stat. 377 (June 30, 1949) (codified at 40 U.S.C. § 471 *et seq.* and 41 U.S.C. § 251 *et seq.*). This authority was subsequently expanded when Congress enacted the Competition in Contracting Act of 1984. See P.L. 98-369, §§ 2701-2753, 98 Stat. 1175 (July 18, 1984).

<sup>58</sup> Previously, in 1986, Congress enacted legislation requiring defense agencies to consider "quality" in every source selection decision in which cost/price is not the only factor considered. See Joint Resolution Making Continuing Appropriations for the Fiscal Year 1987, and for Other Purposes, P.L. 99-591, § 101 [Title X, § 924(a)-(b)], 100 Stat. 3341-153 (Oct. 30, 1986) (codified at 10 U.S.C. § 2305). "Quality" was defined as including the "prior experience of the offeror." *Id.* However, prior experience is not the same as past performance, and this provision was repealed by FASA. See *infra* note 97; P.L. 103-355, § 1013(a), 108 Stat. 3255 (Oct. 13, 1994).

<sup>59</sup> 58 Fed. Reg. 3573.

<sup>60</sup> P.L. 108-355, § 1091(b), 108 Stat. 3272 (Oct. 13, 1994) (codified at 41 U.S.C. § 405 note).

“standards for evaluating past performance with respect to cost (when appropriate), schedule, compliance with technical or functional specifications, and other relevant performance factors that facilitate consistent and fair evaluation by all executive agencies.”<sup>61</sup> OFPP did so by promulgating regulations in 1995-1997 regarding consideration of past performance information in negotiated procurements.<sup>62</sup> These regulations were codified in FAR Subpart 15.3 and fully took effect in 1999.<sup>63</sup> Subpart 15.3, as amended, currently governs use of past performance as an evaluation factor in negotiated procurements.

Congress and the executive branch required agencies to consider past performance in source selection decisions in the hope that the government would obtain better performance under its contracts—and better value for its procurement dollars—by shifting the basis of its source selection decisions. Previously, agencies conducting negotiated procurements had relied heavily on what some commentators described as “complex technical and cost proposals,” which commentators asserted had “no correlation to the contractor’s ability to perform the job.”<sup>64</sup> Consideration of past performance in source selection decisions was seen as an alternative to reliance on such proposals, especially by those who characterized past performance information as “the best indicator of a contractor’s ability to provide quality goods and services at a reasonable cost.”<sup>65</sup> Such consideration was not intended to exclude contractors with poor performance histories from future contracts. Rather, it was anticipated that certain contractors with poor performance histories would be able to compensate for this in other aspects of their proposals (e.g., offering lower prices, partnering with companies with better records),<sup>66</sup> while others would be found nonresponsible for purposes of particular contracts or excluded from government contracting generally through the operation of other legal authorities.<sup>67</sup>

## Past Performance as an Evaluation Factor

Subpart 15.3 of the FAR currently requires agencies to consider past performance or some other non-cost evaluation factor in all procurements, although the requirements differ somewhat depending upon the value of the procurement:

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<sup>61</sup> *Id.*

<sup>62</sup> Dep’t of Defense, Gen. Servs. Admin., & Nat’l Aeronautics & Space Admin., Part 15 Rewrite: Contracting by Negotiation and Competitive Range Determination, 62 Fed. Reg. 51224 (Sept. 30, 1997); 60 Fed. Reg. at 16718-19.

<sup>63</sup> The requirement was phased in, with procurements with higher values being subject to the requirement sooner than those with lower values. *See, e.g.*, 60 Fed. Reg. at 16719 (procurements valued in excess of \$1 million subject to the requirement July 1, 1995; those valued in excess of \$500,000, by July 1, 1997; and those valued in excess of \$100,000 by January 1, 1999).

<sup>64</sup> Nathanael Causey, Past Performance Information, *De facto* Debarments, and Due Process: Debunking the Myth of Pandora’s Box, 29 *Pub. Cont. L.J.* 637, 640 (1999/2000). *See also* Steven Kelman, *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance* 40 (1990) (quoting a government employee as saying “We deal with written lies,” when describing his agency’s reliance on contractors’ technical proposals when making source selection decisions).

<sup>65</sup> 48 C.F.R. § 15.305(a)(2)(i).

<sup>66</sup> *See, e.g.*, Steven Kelman & Mathew Blum, Past Performance as an Evaluation Factor—Strengthening the Government’s Best Value Decisions, 38 *Gov’t Cont.* 37 (Oct. 2, 1996) (“[The offerors] always have the opportunity to offset a marginal performance record with an aggressive price proposal or a strong showing in other factors that are being considered.”); Alliant Techsystems, Inc., B-260215.4, B-260215.5 (Aug. 4, 1995) (suggesting that a contractor that is aware of potentially adverse past performance information can explain that information or otherwise revise its proposal). Dr. Kelman was the administrator of OFPP during the mid-1990s.

<sup>67</sup> *See infra* notes 100 to 139 and accompanying text.

- *With procurements valued at or below the simplified acquisition threshold (\$150,000), agencies must consider past performance or some other non-cost evaluation factor (e.g., technical excellence, management capability).*<sup>68</sup>
- *With procurements whose value exceeds the simplified acquisition threshold, agencies must consider past performance unless the contracting officer documents why past performance is not appropriate evaluation factor for the acquisition.*<sup>69</sup>

Subpart 15.3 further requires (1) that agencies’ evaluation of past performance be in accordance with the terms of the solicitation,<sup>70</sup> and (2) that contractors’ performance in subcontracting with small disadvantaged businesses be considered when evaluating their past performance.<sup>71</sup>

Beyond these requirements, however, Subpart 15.3 generally gives agencies broad discretion in their use of the past performance evaluation factor.<sup>72</sup> Agencies may define what constitutes “past performance” for purposes of the procurement, including any subfactors that comprise the past performance evaluation factor.<sup>73</sup> They may also determine what performances qualify as “recent” and “relevant” for purposes of the procurement,<sup>74</sup> as well as whose performances are considered when past performance is evaluated (e.g., prime contractors, subcontractors, key employees).<sup>75</sup> Additionally, agencies may determine what role the “past performance” factor plays in relation to other evaluation factors. Agencies are required to consider cost/price and the quality of the

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<sup>68</sup> 48 C.F.R. § 15.304(c)(2).

<sup>69</sup> 48 C.F.R. § 15.304(c)(3)(i).

<sup>70</sup> 48 C.F.R. § 15.304(d). Additionally, Subpart 15.3 requires that agency solicitations (1) provide offerors with the opportunity to identify past or current contracts for similar efforts with any entity; (2) authorize offerors to provide information on problems encountered with identified contracts and the offeror’s corrective actions; and (3) make clear that an offeror without relevant past performance, or for whom information on past performance is not available, may not be evaluated favorably or unfavorably. 48 C.F.R. § 15.305(a)(2)(ii) & (v).

<sup>71</sup> 48 C.F.R. § 15.305(a)(2)(v). Additionally, when the solicitation involves “bundling,” agencies’ evaluation of past performance must assess the offeror’s performance in meeting goals in any subcontracting plans incorporated in prior contracts. 48 C.F.R. § 15.304(c)(3)(ii). “Bundling” refers to the consolidation of two or more requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation for a single contract that is likely to be unsuitable for award to a small business because of its size or scope. *See* 15 U.S.C. § 632(o)(2).

<sup>72</sup> Although the factors and subfactors considered must relate to the procurement, contractors’ ability to challenge agencies’ use of allegedly improper factors is limited by the deference that judicial and administrative tribunals give to agencies’ selection of evaluation criteria. *See, e.g.,* SML Innovations, Inc., B-402667.2 (Oct. 28, 2010) (“[W]e will not object to the use of particular evaluation criteria so long as they reasonably relate to the agency’s needs in choosing a contractor that will best serve the government’s interests.”).

<sup>73</sup> *See, e.g.,* Brican Inc., B-402602 (June 17, 2010) (evaluation of past performance based on experience and past performance); CapRock Government Solutions, Inc.; ARTEL, Inc.; Segovia, Inc., B-402490, B-402490.2, B-402490.3, B-402490.4, B-402490.5 (May 11, 2010) (evaluation of past performance based on (1) conformance to contract requirements; (2) standards of workmanship; (3) schedule; (4) business relations; (5) management of key personnel; (6) management of subcontractors; and (7) record of complying with subcontracting goals).

<sup>74</sup> *See, e.g.,* Dorado Services, B-401930.3 (June 7, 2010) (defining relevant performance as that under contracts requiring the offeror to perform refuse and recycling services of the same or similar complexity and recent performance as that within the past five years).

<sup>75</sup> *See, e.g.,* Brican Inc., B-402602 (June 17, 2010) (past performance of subcontractors considered); CapRock Government Solutions, Inc.; ARTEL, Inc.; Segovia, Inc., B-402490, B-402490.2, B-402490.3, B-402490.4, B-402490.5 (May 11, 2010) (noting that nothing in the RFP indicated that the past performance of the prime contractor was more important than that of the subcontractors); JSW Maintenance, Inc., B-400581.5 (Sept. 8, 2009) (past performance of key employees considered).

product or service, along with past performance, in all negotiated procurements.<sup>76</sup> However, depending upon their requirements, they may consider a range of other factors, such as corporate experience, management, key personnel and staffing plan, organizational capacity, "proven plan to achieve efficiency and cost-effectiveness," "continuous enhancement of processes and systems(s)," and the offeror's small business status.<sup>77</sup> Moreover, agencies have broad discretion in assigning various weights to the evaluation factors.<sup>78</sup> Past performance need not be the most heavily weighted factor,<sup>79</sup> and poor scoring on the past performance factor could be offset by higher scores on other factors, particularly if little weight is given to past performance.<sup>80</sup>

Agencies also generally have broad discretion in their consideration of various sources of information about contractors' past performance. Much of the information used in evaluating contractors' past performance comes from questionnaires or customer surveys submitted by the contractor,<sup>81</sup> although agencies have,<sup>82</sup> and often explicitly reserve,<sup>83</sup> the right to consider other information. This includes any evaluations of contractor performance that agencies were required to prepare under Subpart 42.15 of the FAR. It should be noted, however, that Subpart 15.3 does not require agencies to consider evaluations prepared pursuant to Subpart 42.15 in source

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<sup>76</sup> 48 C.F.R. § 15.304(c)(1) (price/cost); 48 C.F.R. § 15.304(c)(2) (quality of the product or service). Certain other evaluation factors must be used in specific circumstances. For example, the extent of participation by small disadvantaged businesses in performing the contract must be evaluated for all non-set-aside contracts valued in excess of \$650,000 (\$1.5 million for construction contracts). 48 C.F.R. § 15.304(c)(4). Similarly, the extent of proposed subcontracting with small businesses must be an evaluation factor for contracts that involve bundling and offer a significant opportunity for subcontracting. 48 C.F.R. § 15.304(c)(5).

<sup>77</sup> See, e.g., Source Diversified, Inc., B-403437.2 (Dec. 16, 2010) (corporate experience); Industrial Constr. & Trading Co., B-403849 (Dec. 13, 2010); Int'l Medical Corps, B-403688 (Dec. 6, 2010) (key personnel and staffing plan, organizational capacity); Delta-21 Resources, Inc., B-403586 (Nov. 10, 2010) ("proven plan to achieve efficiency and cost-effectiveness," "continuous enhancement of processes and systems(s)"); Washington-Harris Group, B-401794, B-401794.2 (Nov. 16, 2009) (offeror's small business status).

<sup>78</sup> See 48 C.F.R. § 15.304(e)(1)-(3) (requiring the solicitation to indicate whether all non-cost/non-price evaluation factors are (1) significantly more important than cost/price; (2) approximately equal to cost/price; or (3) significantly less important than cost/price).

<sup>79</sup> See, e.g., Source Diversified, Inc., B-403437.2 (Dec. 16, 2010) (product description and corporate experience weighted more heavily than past performance); ITW Military GSE, B-403866.3 (Dec. 7, 2010) (technical merit weighted more heavily than past performance); L&N/MKB, Joint Venture, B-403032.3 (Dec. 16, 2010) (price as important as technical merit and past performance combined). Guidance issued by OFPP in 1995 recommended that past performance be at least 25% of the non-cost factors, or at least equal to or more important than any other non-cost factor. See Guide to Best Practices, *supra* at 16-18. Agencies were not required to abide by this guidance, however.

<sup>80</sup> It should also be noted that agencies evaluating past performance often rate it using broad descriptors (e.g., substantial, satisfactory, limited, and unknown). See, e.g., Dorado Services, B-401930.3 (June 7, 2010). Additionally, vendors' past performance is considered only in relation to that of the other vendors who submitted offers, not in the abstract. Thus, a company whose past performance has been less than stellar, but does not result in a nonresponsibility determination or exclusion, could be selected for award if the past performance of the other offerors was equally or more problematic.

<sup>81</sup> MFM Lamey Group, LLC, B-402377 (Mar. 25, 2010) (solicitation requesting offerors to submit up to five past performance questionnaires completed by former customers); SDV Solutions, Inc., B-402309 (Feb. 1, 2010) (RFP requiring offeror to ensure that at least three past performance questionnaires are submitted by former customers).

<sup>82</sup> See, e.g., Seattle Sec. Servs., Inc. v. United States, 45 Fed. Cl. 560, 568 (1999) (agency has right to consider information derived from the personal knowledge of the evaluators).

<sup>83</sup> See, e.g., Dorado Services, B-401930.3 (June 7, 2010) (RFP granting the procuring agency the right to consider data obtained from the government and other sources); Shaw-Parsons Infrastructure Recovery Consultants, LLC; Vanguard Recovery Assistance, JV, B-401679.4, B-401679.5, B-401679.6, B-401679.7 (Mar. 10, 2010) (agency reserving the right to use "outside knowledge," including agency knowledge of the firm's performance); CMI Management, Inc., B-402172, B-402172.2 (Jan. 26, 2010) (RFP reserving the agency's right to use PPIRS information).

selection decisions,<sup>84</sup> although Subpart 42.15 does require “use” of such evaluations, and failure to consider them could be found unreasonable under the “close at hand” doctrine.<sup>85</sup> While the federal courts and the Government Accountability Office (GAO) have held that contracting officers need not consider all possible information about a contractor’s past performance when evaluating such performance for source selection purposes,<sup>86</sup> GAO, in particular, has noted that some information may be so “close at hand” that agencies cannot reasonably ignore it. For example, in *Shaw-Parsons Infrastructure Recovery Consultants, LLC*, GAO found that the Federal Emergency Management Agency (FEMA) acted unreasonably when it relied solely on information regarding past performance submitted by the contractor, and failed to consider information contained in customer questionnaires that FEMA had required the offerors to submit.<sup>87</sup> GAO noted that, while the solicitation may have given FEMA discretion to seek out additional information, FEMA “could not simply ignore” the questionnaires once it had them because they were “close at hand.”<sup>88</sup>

Agencies generally need not seek out information that would mitigate potentially adverse past performance information contained in the sources they consult,<sup>89</sup> although there are a few circumstances in which they must do so, as **Table 1** illustrates. They are also generally free to draw their own inferences regarding contractors’ past performance from the sources they consult so long as these inferences are reasonable. However, Subpart 15.3 does require contracting officers to take into account “[t]he currency and relevance of the information, source of the information, context of the data, and general trends in contractor’s performance” when considering past performance information.<sup>90</sup>

**Table 1. Various Exchanges Potentially Involving Past Performance Information**

Type of Exchange	Authorized or Required?	Past Performance Information Addressed
Clarifications <i>Limited exchanges between the government and offerors that may occur when award without discussions is contemplated</i>	Authorized	Relevance of past performance information  Adverse <sup>a</sup> past performance information to which the offeror has not previously had the opportunity to respond

<sup>84</sup> The situation is different with responsibility determinations, where agencies are explicitly required to consider agency performance evaluations in PPIRS. See *infra* notes 108 to 114 and accompanying text.

<sup>85</sup> See, e.g., *Contract Int’l, Inc.*, B-401871.5, B-401871.6, B-401871.7 (May 24, 2010) (finding that the Army Corps of Engineers unreasonably failed to consider negative information contained in three Contractor Performance Assessment Reports about the awardee). The allegedly poor performance by the awardee in *Contract* had also been the subject of news coverage and a report by the Department of Defense Office of the Inspector General. Absent such coverage or reports, however, it is unclear how a protester would know of potentially adverse performance evaluations contained in PPIRS or other agency sources given the restrictions on access to source selection information. See *supra* notes 25 to 28 and accompanying text.

<sup>86</sup> See, e.g., *SDA, Inc.*, B-256075, B-25606 (May 2, 1994) (“[W]e 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.”); *IGIT, Inc.*, B-275299.2 (June 23, 1997) (agency need not contact all sources listed by the offeror).

<sup>87</sup> B-401679.4; B-401679.5; B-401679.6; B-401679.7 (Mar. 10, 2010).

<sup>88</sup> *Id.*

<sup>89</sup> See, e.g., *Cessna Aircraft Co.*, B-261953.5 (Feb. 5, 1996); *SDA, Inc.*, B-256075, B-25606 (May 2, 1994).

<sup>90</sup> 48 C.F.R. § 15.305(a)(2)(i).

Type of Exchange	Authorized or Required?	Past Performance Information Addressed
<p>Communications</p> <p><i>Exchanges between the government and offerors after receipt of proposals leading to the establishment of the competitive range<sup>b</sup></i></p>	Required	Adverse <sup>a</sup> past performance information to which the offeror has not previously had the opportunity to respond
<p>Discussions</p> <p><i>Exchanges between the government and offerors after the establishment of the competitive range that are undertaken with the intent of allowing the offeror to revise its proposal</i></p>	Required	Adverse <sup>a</sup> past performance information to which the offeror has not previously had the opportunity to respond <sup>c</sup>

**Source:** Congressional Research Service, based on FAR Part 15.306.

- a. The fact that another vendor is rated higher for past performance does not necessarily mean that the information on any lower rated vendors is "adverse." See, e.g. Value CAD, B-272936 (Nov. 7, 1996).
- b. The "competitive range" consists of the most highly rated offerors, to one or more of whom an award is likely to be made. 48 C.F.R. § 15.306(c)(1).
- c. It is possible that poor past performance information could be corrected for, as well as explained, during discussions. This is not the case during clarifications and communications, when any information shared must be "historical" and is not subject to change or improvement. See, e.g., Alliant Techsystems, Inc., B-260215.4, 260215.5 (Aug. 4, 1994).

## Protesting Agency Evaluations of Past Performance

Contractors that object to the procuring activity's evaluation of their own past performance, or that of the winning offeror, in making its source selection decision could potentially file a bid protest challenging the decision, although protesters must overcome significant hurdles to disturb a challenged award.<sup>91</sup> The protester first has to demonstrate standing to bring the protest, which generally requires that the protester be next in line for the award if the protest is sustained.<sup>92</sup> Then, assuming that the protester has standing, it has to allege defects in the evaluation process sufficient to overcome the substantial deference that GAO and the federal courts accord to contracting officers' evaluations of past performance.<sup>93</sup> This generally means that the protester must allege that the evaluation was unreasonable, not adequately documented, or not in accordance with the law or the terms of the solicitation.<sup>94</sup> Protests that fail to allege one of these

<sup>91</sup> One study of bid protests conducted in the 1990s found that GAO had sustained only 13 out of 300 protests challenging agencies' use of past performance information in the period between December 1992 and May 1997. *See Only Four Percent of GAO Protests Involving 'PPI' Evaluations Are Sustained, GAO Defends Results, 67 Fed. Cont. Rep.* 590-91 (May 19, 1997). This study does not appear to have been updated or replicated.

<sup>92</sup> *But see* Arora Group, B-288127 (Sept. 14, 2001) (recognizing a bidder whose proposal was ranked fifth as an interested party only because its protest challenged the agency's application of the evaluation criteria in general and, if successful, could have placed the contractor in line for the award).

<sup>93</sup> *See, e.g.,* Dorado Services, B-401930.3 (June 7, 2010) ("As a general matter, the evaluation of an offeror's past performance is within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based past performance ratings.").

<sup>94</sup> *See, e.g.,* JSW Maintenance, Inc., B-400581.5 (Sept. 8, 2009) ("Our Office examines an agency's evaluation of past performance to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations; however, the necessary determinations regarding the relative merits of the offerors' proposals are primarily matters within the contracting agency's discretion. ... [O]ur office will not question an agency's determinations absent evidence that those determinations are unreasonable or contrary to the stated evaluation (continued...)")



three things are generally seen as "mere disagreements ... as to the relative merit of competing proposals" and are denied.<sup>95</sup> Moreover, beyond having broad discretion in determining whether particular past performance merits a particular rating, contracting officers also have broad discretion in determining which proposal represents the "best value" for the government. GAO and the federal courts have expressly approved of agencies' selection of contractors with lower past performance ratings over contractors with higher, or even "perfect," ratings, notwithstanding the fact that the solicitation calls for past performance to be given more weight than price in the source selection decision.<sup>96</sup>

## Other Consideration of Past Performance in Source Selection

Agencies sometimes also consider contractors' past performance in source selection decisions in ways that do not entail use of the past performance evaluation factor. For example, agencies may consider past performance as a component of other evaluation factors (e.g., experience, mission capability), as well as its own factor.<sup>97</sup> Additionally, under FASA, agencies may use past performance as a factor in determining with whom to place certain orders under multiple-award contracts.<sup>98</sup> Subpart 16.5 of the FAR, which implements the relevant provisions of FASA, requires that contracting officers take into account "past performance on earlier orders under the contract, including quality, timeliness and cost control" when developing procedures for ensuring that all contractors holding a multiple-award contract have a "fair opportunity" to be considered for orders exceeding \$5.5 million.<sup>99</sup> Such consideration does not involve a source selection

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(...continued)

criteria."). It should also be noted that the focus of the protest is upon the determinations of the contracting officer who made the source selection decision, not that of any contracting officer who previously gave an offeror a poor performance evaluation. *See supra* note 33 and accompanying text.

<sup>95</sup> *Compare* Dorado Services, B-401930.3 (June 7, 2010) (finding that the contracting officer's assignment of a "substantial confidence" rating to the awardee was not unreasonable despite the fact that the awardee had received lower ratings and more unfavorable comments from its references and experienced more performance problems under its contracts) *with* Brican Inc., B-402602 (June 17, 2010) (sustaining the protest because nothing in the record indicated that the contracting officer had credited the protester with the performance of its subcontractor, while it had so credited the awardee).

<sup>96</sup> *See also* Truetech, Inc., B-402536.2 (June 2, 2010) ("[S]ource selection officials in a negotiated procurement have broad discretion in determining the manner and extent to which they will make use of the technical and price evaluation results; price/technical tradeoffs may be made, and the extent to which one may be sacrificed for the other is governed only by the test of rationality and consistency with the established evaluation factors."); FN Manufacturing, LLC, B-403059.4, B-402059.5 (Mar. 22, 2010) ("It is well-settled that an agency properly may select a lower-rated, lower-priced proposal" even if the RFP states that price is less important than technical merit).

<sup>97</sup> *Software Eng'g Servs. Corp. v. United States*, 85 Fed. Cl. 547, 550 (2009) (using "mission capability" as an evaluation factor and defining "mission capability" to include "directly-related current or past performance"). Offerors' experience, which is akin to past performance, is sometime also considered as a separate evaluation factor, although agencies are generally not required to give offerors an opportunity to address adverse information regarding their prior experience through clarifications, communications, or discussions. *See, e.g.*, CMI Management, Inc., B-402172, B-402172.2 (Jan. 26, 2010) (relevant experience as an evaluation factor); Moore Medical Corp., B-261758 (Oct. 26, 1995) (upholding agency's determination not to conduct discussions regarding prior experience, in part, because prior experience differs from past performance).

<sup>98</sup> *See* P.L. 103-355, § 1004, 108 Stat. 3249-54 (Oct. 13, 1994) (codified at 10 U.S.C. § 2304a(d)(3)) (procurements of defense agencies); *id.* at § 1054, 108 Stat. 3261-65 (codified at 41 U.S.C. § 253h(d)(3)) (procurements of civilian agencies). Under a multiple-award contract, the government enters agreements with several vendors to supply goods or services. It can then generally award work to any of these vendors by issuing task or delivery orders.

<sup>99</sup> 48 C.F.R. § 16.505(b)(1)(iv)(A)(1). This requirement would not necessarily ensure that a particular order is placed with the contractor who has the best past performance record, however, in part because agencies are legally obligated to (continued...)

decision, *per se*, because the sources were selected at the time when the contract was awarded, and only those sources holding a multiple-award contract are eligible for orders placed under it. However, it is akin to a source selection decision in that it effectively determines who supplies particular goods to, or performs particular work for, the procuring activity.

## Past Performance as a Criterion in Responsibility Determinations

Ever since the FAR was promulgated in 1984,<sup>100</sup> agencies have considered whether contractors have a “satisfactory performance record,” among other things, in determining whether they are sufficiently “responsible” to be awarded a government contract.<sup>101</sup> Agencies are prohibited from awarding a contract to a contractor who has not been determined to be affirmatively responsible.<sup>102</sup> Then, in 1995, after the issuance of OFPP Policy Letter 92-5 and the enactment of FASA, OFPP amended Subpart 9.1 of the FAR to further require that agencies consider “relevant past performance information,” as defined in Subpart 42.15, when making responsibility determinations.<sup>103</sup> Guidance issued by OFPP shortly thereafter clarified that agencies are to use consideration of past performance in the responsibility determination process—not the source selection process—as a means of avoiding contractors with poor performance histories:

A contractor with a record of unsatisfactory past performance should be screened out of the selection process as part of the responsibility determination. If a contractor’s past performance record passes the responsibility determination, then the record should be compared to the other responsible offerors to determine the offeror that provides the best value to the Government.<sup>104</sup>

However, it should be noted that while OFPP characterizes the responsibility determination process as the means for “screening out” contractors with poor past performance, agencies may

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(...continued)

order certain minimum quantities of goods or services from each contractor holding a multiple-award contract. *See, e.g.*, 48 C.F.R. § 16.504(a)(1); Peter J. Brandon, AGBCA No. 91-186-1, 92-1 B.C.A. ¶ 24,648 (1991).

<sup>100</sup> Dep’t of Defense, Gen. Servs. Admin., & Nat’l Aeronautics & Space Admin., Establishing the Federal Acquisition Regulation (Part 2 of 12), 48 Fed. Reg. 42102 (Sept. 19, 1983). Agencies were required to determine that prospective contractors were responsible before the FAR was promulgated, and consideration of contractor’s performance record was generally a component of this responsibility determination process. *See* John Cibinic, Jr. & Ralph C. Nash, Jr., *Formation of Government Contracts* 403-04 (3d ed. 1998).

<sup>101</sup> 48 C.F.R. § 9.104-1(c). Other factors include (1) whether the contractor has adequate financial resources to perform the contract, or the ability to obtain them; (2) whether the contractor is able to comply with the required or proposed delivery schedule; (3) whether the contractor has a satisfactory record of integrity and business ethics; (4) whether the contractor has the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them; (5) whether the contractor has the necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and (6) whether the contractor is otherwise qualified and eligible to receive an award under applicable laws and regulations. 48 C.F.R. § 9.104-1(a)-(b), (d)-(g).

<sup>102</sup> 48 C.F.R. § 9.103(b). *See also* 48 C.F.R. § 9.103(a) (“Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only.”).

<sup>103</sup> 60 Fed. Reg. at 16718. Subpart 9.1 was also amended to preclude prospective contractors being found nonresponsible because they lack a relevant performance history. *Id.* They could, however, still be found nonresponsible because they lack the necessary experience. *See, e.g.*, CEA Indus., Inc., B-169160 (May 4, 1970).

<sup>104</sup> Guide to Best Practices for Past Performance, *supra* note 11, at 11.

not use nonresponsibility determinations to punish contractors for poor performance, and poor performance or even default on one or several prior contracts does not necessarily constitute adequate grounds for a nonresponsibility determination.<sup>105</sup> Additionally, as discussed below, any use of the responsibility determination process to avoid a contractor with poor past performance must be short-term and procurement-specific so as to avoid *de facto* debarment of the contractor.<sup>106</sup> For dealings with a contractor to be avoided long-term and/or government-wide, the contractor would need to be formally excluded from government contracting (i.e., debarred or suspended).<sup>107</sup>

## "Satisfactory Performance Record" As Condition for Contract

Because of the amendments made to Subpart 9.1 of the FAR in 1995, past performance has traditionally played a unique role in the responsibility determination process. Until recently, "relevant past performance" information was the *only* information that contracting officers were required by law to consider when making responsibility determinations.<sup>108</sup> They otherwise had broad discretion as to what and how much information to consider,<sup>109</sup> although they were encouraged to consider certain information (e.g., commercial sources of supplier information, preaward survey reports, business and trade associations).<sup>110</sup> This changed in 2008, when Congress enacted legislation requiring contracting officers to consider the information contained in FAPIIS when making responsibility determinations.<sup>111</sup> Among other things, FAPIIS contains brief descriptions of all civil, criminal, and administrative proceedings involving federal contracts that resulted in a conviction or finding of fault, as well as all terminations for default, administrative agreements, and nonresponsibility determinations relating to federal contracts, within the past five years for all persons holding a federal contract or grant worth \$500,000 or more.<sup>112</sup> Consideration of this information would arguably be most helpful in assessing responsibility criteria other than whether the contractor possesses a satisfactory performance record (e.g., whether the contractor has a satisfactory record of integrity and business ethics). However, because FAPIIS includes information from PPIRS,<sup>113</sup> the requirement to consider the

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<sup>105</sup> See, e.g., *Marine Eng'rs Beneficial Ass'n*, B-181265 (Nov. 27, 1974).

<sup>106</sup> See *infra* notes 127 to 134 and accompanying text.

<sup>107</sup> See 48 C.F.R. § 9.400-9.409.

<sup>108</sup> See, e.g., 48 C.F.R. § 9.105-1(c) (2008).

<sup>109</sup> See, e.g., *John C. Grimberg Co. v. United States*, 185 F.3d 1297, 1303 (Fed. Cir. 1999) ("[T]he contracting officer is the arbiter of what, and how much, information he needs."). Contracting officers must obtain "information sufficient to be satisfied" that the prospective contractor is responsible. 48 C.F.R. § 9.105-1(a). However, the contractor bears the responsibility of ensuring that the contracting officer has sufficient information. 48 C.F.R. § 9.103(b); *Sec. Assistance Forces & Equip. Int'l, Inc.*, B-194876 (Nov. 19, 1980). An affirmative determination is improper if not based on sufficient information. 48 C.F.R. § 9.105-1(a). However, the amount of information needed depends upon the conclusions that can be drawn from it. See, e.g., *John F. Small & Co., Inc.*, B-207681.2 (Dec. 6, 1982). Determinations must also be supported by the record and based on the most current information available. See, e.g., 48 C.F.R. § 9.105-1(b)(1); *Gary Aircraft Corp.*, B-174455 (July 6, 1972).

<sup>110</sup> 48 C.F.R. § 9.105-1(c)(1)-(7) ("In addition, the contracting officer *should* use the following sources of information ...") (emphasis added).

<sup>111</sup> P.L. 110-417, § 872(b)(1) & (c), 122 Stat. 4356 (Oct. 14, 2008).

<sup>112</sup> *Id.*

<sup>113</sup> Because FAPIIS contains past performance information, access to FAPIIS was initially restricted to authorized government personnel. Although Congress subsequently required the information contained in FAPIIS to be made publicly available on the Web, it expressly excluded evaluations of past performance. See *supra* notes 24 to 28 and accompanying text.

information in FAPIIS arguably could increase agency consideration of past performance evaluations. While consideration of "relevant past performance" information would not necessarily entail consideration of *all* contractor performance evaluations in PPIRS, consideration of the information contained in FAPIIS could potentially entail this.<sup>114</sup>

Additionally, Subpart 9.1 of the FAR, which governs responsibility determinations, establishes a rebuttable presumption that contractors who are, or recently have been, "seriously deficient" in contract performance are nonresponsible unless the contracting officer determines that the circumstances were beyond the contractor's control, or the contractor has taken appropriate corrective action.<sup>115</sup> Subpart 9.1 does not define what constitutes a "serious deficiency" in performance, but GAO and the courts have found that it could potentially include delinquent performance, delivery of nonconforming items, failure to adhere to contract specifications, late deliveries, poor management or technical judgment, failure to correct production problems, failure to perform safely, and inadequate supervision of subcontractors.<sup>116</sup>

## Protests of Responsibility/Nonresponsibility Determinations

Contractors' ability to challenge agency determinations that they are nonresponsible, or that another contractor is responsible, is limited. Judicial and administrative tribunals that hear protests of contract awards do not routinely review contracting officers' responsibility determinations because such determinations are "practical, ... not legal determination[s]"<sup>117</sup> and "are not readily susceptible to judicial review."<sup>118</sup> The GAO hears protests regarding responsibility determinations only when the protester alleges that "definitive responsibility criteria"<sup>119</sup> were not met or "identif[ies] evidence raising serious concerns that ... the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation."<sup>120</sup> The federal courts similarly consider the merits of protested responsibility

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<sup>114</sup> It should be noted, however, that even when contracting officers are required to consider particular information when making responsibility determinations, they are not bound by any recommendations contained in the information that they consider. *See, e.g.,* Carl Weissman & Sons, Inc., B-190304 (Feb. 17, 1978).

<sup>115</sup> 48 C.F.R. § 9.104-3(b).

<sup>116</sup> *See, e.g.,* Campbell Indus., B-238871 (July 3, 1990) (poor management and technical judgment); Ford Motor Co., B-207179 (Jan. 20, 1983) (late deliveries); United Power & Control Sys., Inc., B-184662 (Dec. 27, 1978) (nonconforming items); Bill Ward Painting & Decorating, B-184612 (Jan. 28, 1976) (unsafe performance; inadequate supervision of subcontractors); Marine Eng'rs Beneficial Ass'n, B-181265 (Nov. 27, 1974) (failure to take corrective action); Kennedy Van & Storage Co., Inc., B-180973 (June 19, 1974) (failure to adhere to specifications); Land-Air, Inc., B-166969 (Sept. 2, 1969) (delinquent performance).

<sup>117</sup> *Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'r*, 714 F.2d 163, 167 n.18 (D.C. Cir. 1983).

<sup>118</sup> *YRT Servs. Corp. v. United States*, 28 Fed. Cl. 366, 394 (1993). These tribunals also take the view that federal agencies "bear the burden of difficulties experienced in obtaining the required performance." *See, e.g.,* *News Printing Co. v. United States*, 46 Fed. Cl. 740, 746 (2000).

<sup>119</sup> Definitive responsibility criteria are special standards that contractors must meet in order to be determined responsible for specific acquisitions. 48 C.F.R. § 9.104-2(a). Contracting officers may incorporate such standards into solicitations when unusual expertise, special facilities, or specific experience or equipment are necessary to ensure that the government's needs are satisfied. *See, e.g.,* Breland Co., B-217552 (Feb. 21, 1985) (unusual expertise); Aero Corp., B-201581 (June 23, 1981) (special facilities).

<sup>120</sup> *See, e.g.,* Gov't Accountability Office, Office of General Counsel, *Bid Protests at GAO: A Descriptive Guide* 51 (8<sup>th</sup> ed. 2006), available at <http://www.gao.gov/decisions/bidpro/bid/d06797sp.pdf>. Prior to 2003, the GAO exercised even more limited jurisdiction over protested responsibility determinations, hearing only protests alleging "bad faith" by agency officials or failure to meet definitive criteria. However, the GAO changed its policy in response to the decision by the U.S. Court of Appeals for the Federal Circuit in *Impresa Construzioni Geom. Domenico Garufi v. United States*, (continued...)

determinations only when the protester's allegations that the agency's determination was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law can survive a preliminary motion to dismiss.<sup>121</sup> Moreover, judicial and administrative tribunals decline to overturn contracting officers' responsibility determinations in many of the protests that they do hear. They generally overturn a determination only when the protester can show that the determination was clearly unreasonable given the record before the contracting officer.<sup>122</sup> The GAO and the courts have also held that a contracting officer's determination is not unreasonable merely because another contracting officer made a different determination after considering the same information.<sup>123</sup>

## De Facto Debarment

Because the focus of a responsibility determination is upon the contractor's ability to satisfy the needs of the government under a particular proposed contract, the responsibility determination process is not designed to exclude contractors with allegedly deficient past performance, or other problems, from future dealings with the government. Any use of it to this effect could potentially be found to constitute *de facto* debarment. The federal courts developed the concept of *de facto* debarment as a way of ensuring that agencies do not deprive contractors of the due process to which they are entitled in formal exclusion proceedings (i.e., debarment and suspension) by effectively excluding contractors by other means.<sup>124</sup> Repeated determinations of nonresponsibility based on the same alleged conduct by the contractor have been found to constitute *de facto* debarment,<sup>125</sup> as have statements or other conduct evidencing an intent to exclude a contractor

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238 F.3d 1324 (Fed. Cir. 2001).

<sup>121</sup> *Watts-Healy Tibbitts v. United States*, 84 Fed. Cl. 253 (2008). Claims that agency actions are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law derive from the Administrative Procedure Act (APA). The APA allows persons "suffering legal wrong because of agency action" to seek judicial review of that action. *See* 5 U.S.C. § 702 (right of review); 5 U.S.C. § 706 (2)(A) (arbitrary and capricious standard).

<sup>122</sup> *See, e.g., Impresa Construzioni*, 238 F.3d at 1334-35. Because the record upon which contracting officers make their determinations is not part of the files when they find contractors responsible, courts may permit limited depositions of contracting officers in order "to plac[e] on the record the basis for [their] responsibility determination." *Id.* at 1339. There is usually no parallel need to depose contracting officers when they determine a contractor is nonresponsible because their files must contain documents stating the basis for the nonresponsibility determination, among other things. *See* 48 C.F.R. § 9.105-2(a)(1).

<sup>123</sup> *See, e.g., MCI Constructors*, B-240655 (Nov. 27, 1990); *S.A.F.E. Exp. Corp.*, B-151834 (April 22, 1983).

<sup>124</sup> Contractors who are suspended or proposed for debarment must be given notice of their exclusion or proposed exclusion and an opportunity for a hearing, although the timing of the notice, in particular, differs for debarment and suspension. The concept of *de facto* debarment appears to have been introduced by the U.S. Court of Appeals for the District of Columbia Circuit's decision in *Gonzalez v. Freeman*. 334 F.2d 570 (D.C. Cir. 1964). Although the *Gonzalez* decision concerned the process due to contractors in *de jure* debarment, the court noted that the possibility of *de facto* debarment. *Id.* at 573.

<sup>125</sup> *Shermco Indus. v. Secretary of the Air Force*, 584 F. Supp. 76, 93-94 (N.D. Tex. 1984) ("[A] procuring agency cannot make successive determinations of nonresponsibility on the same basis; rather it must initiate suspension or debarment procedures at the earliest practicable moment following the first determination of nonresponsibility."); 43 Comp. Gen. 140 (Aug. 8, 1963) (finding that multiple determinations of nonresponsibility can be tantamount to debarment). However, multiple contemporaneous nonresponsibility determinations made on the same basis do not necessarily constitute *de facto* debarment, especially when the determinations are based on the most current information available. *See, e.g., Mexican Intermodal Equip., S.A. de C.V.*, B-270144 (Jan. 31, 1996) (two responsibility determinations were not "part of a long-term disqualification," but were "merely a reflection of the fact that the determinations were based on the same current information.").

from future government contracts.<sup>126</sup> For example, in *Old Dominion Dairy Products, Inc. v. Secretary of Defense*, the Air Force was found to have *de facto* debarred a contractor when the contracting officer determined that the contractor lacked integrity and was nonresponsible after another contracting officer had determined that the contractor was nonresponsible due to billing irregularities.<sup>127</sup> Similarly, in *Art-Metal-USA, Inc. v. Solomon*, the General Services Administration was found to have *de facto* debarred a contractor when it determined that the contractor was nonresponsible for a new contract and suspended its existing contracts in response to concerns that it had supplied "inferior products."<sup>128</sup> In both cases, the courts noted that the challenged agency conduct effectively excluded the contractor without providing the contractor with the notice or opportunity for a hearing that the contractor would have received had they been formally debarred or suspended. The courts thus enjoined the agency conduct that resulted in *de facto* debarment or granted other relief to the contractor.

Cases that involve *de facto* debarment sometimes also involve unconstitutional deprivation of contractors' liberty interests.<sup>129</sup> This generally occurs when contractors are excluded from government contracts without notice or a hearing because of concerns about their integrity, as contractors have a cognizable liberty interest in being "free from 'stigmatizing' governmental defamation having an immediate and tangible effect on [their] ability to do business."<sup>130</sup> However, depending upon the circumstances, concerns about past performance could be implicated in concerns about integrity.<sup>131</sup>

## Debarment and Suspension Under the FAR

Agencies also have legal authority under Subpart 9.4 of the FAR to debar or suspend contractors for willful failure to perform under a contract or a history of failure to perform.<sup>132</sup> Debarment and

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<sup>126</sup> Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs, 534 F. Supp. 1139 (D.D.C. 1982), *rev'd on other grounds*, 714 F.2d 163 (D.C. Cir. 1983) (internal government directive to hold awards to the contractor "in abeyance" for an indefinite period); Conset Corp. v. Cmty. Servs. Admin., 655 F.2d 1291 (D.C. Cir. 1981) (circulation of a memorandum alleging that a grant recipient had a conflict of interest, coupled with a subsequent refusal to approve the firm for a grant); Related Indus., Inc. v. United States, 2 Cl. Ct. 517 (1983) (contracting officer stated that "under no circumstances will he award any contract" to the contractor); Leslie & Elliott Co. v. Garrett, 732 F. Supp. 191 (D.D.C. 1990) (statement that the contractor was an "administrative burden").

<sup>127</sup> 631 F.2d 953, 955-56 (D.C. Cir. 1980).

<sup>128</sup> 473 F. Supp. 1, 5-6 (D.D.C. 1978).

<sup>129</sup> See, e.g., Peter Kiewit, 534 F. Supp. 1139 (finding that a government directive to hold all awards to contractor "in abeyance" due to concerns about the contractor's integrity, without providing notice or an opportunity to be heard, constituted *de facto* debarment and deprived the contractor of a protected liberty interest). A court could, however, find an improper *de facto* debarment without finding a denial of due process. See, e.g., Shermco Indus., 584 F. Supp. at 93-94. Contractors do not have property interests in prospective government contracts, only liberty interests in certain circumstances. See, e.g., Transco Security, Inc. of Ohio v. Freeman, 639 F.3d 318, 321 (6<sup>th</sup> Cir. 1981) ("[D]eprivation of the right to bid on government contracts is not a property interest.").

<sup>130</sup> *Old Dominion Dairy Prods.*, 631 F.2 at 955-56.

<sup>131</sup> See, e.g., Reeve Aleutian Airways, Inc. v. United States, 982 F.2d 594 (D.C. Cir. 1993) (suspension by the Commercial Airlift Review Board for safety reasons imposed a stigma on the contractor that "implicates the carrier's integrity"). *But see* Southeast Kansas Community Action Program, Inc. v. Lyng, 758 F. Supp. 1430 (D. Kan. 1991) (allegation of incompetence on part of contractor is not stigmatizing); Smith & Wesson v. United States, 782 F.2d 1074 (1<sup>st</sup> Cir. 1986) (same).

<sup>132</sup> 48 C.F.R. § 9.406-2(b)(1)(i)(A)-(B) (debarment); 48 C.F.R. § 9.407-2(c) (suspension upon "adequate evidence" of "any other cause of so serious or compelling a nature that it affects the present responsibility" of the contractor).

suspension are government-wide and last for a fixed period of time.<sup>133</sup> Such exclusions may, however, only be implemented to protect the government, not to punish the contractor,<sup>134</sup> and the agency could be found to have violated the Administrative Procedure Act (APA) if it subsequently excludes the contractor for conduct that it was aware of when it determined that the contractor was responsible. For example, in *Lion Raisins, Inc. v. United States*, the U.S. Court of Federal Claims found that the U.S. Department of Agriculture’s (USDA’s) suspension of a contractor for falsifying raisin certifications violated the APA, given that the USDA knew of the contractor’s conduct when making five prior determinations that the contractor was “responsible.”<sup>135</sup> While the decision in *Lion Raisins* has been criticized by some commentators<sup>136</sup> and distinguished by some courts,<sup>137</sup> it has been followed or cited approvingly by others<sup>138</sup> and could potentially be read to preclude agencies from debarring or suspending contractors under the FAR based on “stale” allegations of wrongdoing.<sup>139</sup> “Stale” allegations of wrongdoing could potentially include allegations of poor performance under contracts completed some time ago.

## Legislation and Other Initiatives

Concerns that certain contractors who allegedly performed poorly under prior or current contracts received additional federal contracts have prompted some Members of Congress and the executive branch to propose reforms. The 111<sup>th</sup> Congress enacted or considered legislation that would (1) increase the reliability and transparency of past performance information;<sup>140</sup> (2)

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<sup>133</sup> Debarred contractors are generally ineligible for government contracts for a fixed period of time, which can vary depending upon the authority under which the contractor is debarred and the seriousness of the conduct underlying the debarment, while suspended contractors are generally ineligible for the duration of any investigation into or litigation involving their conduct. See 48 C.F.R. § 9.406-4(a)(1) (debarment); 48 C.F.R. § 9.407-4(a) (suspension).

<sup>134</sup> 48 C.F.R. § 9.402(b) (“The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government’s protection and not for purposes of punishment.”).

<sup>135</sup> 51 Fed. Cl. 238, 247-48 (2001) (“The USDA awarded plaintiff five contracts between the completion of its investigation in May 1999 and its decision to suspend plaintiff in January 2001. The USDA statutorily was obligated to make an affirmative finding of plaintiff’s responsibility before awarding each of those contracts. In other words, five times between May 26, 1999, and February 1, 2001, the USDA itself affirmed that plaintiff’s business practices met the standards for present responsibility. Significantly, by the USDA’s own representations, it did so despite the possession of all the evidence that it would later use to suspend plaintiff. The court finds these facts dispositive of the issue of plaintiff’s present responsibility.”) (internal citations omitted).

<sup>136</sup> See, e.g., Michael J. Davidson, *Protest Challenges to Integrity-based Responsibility Determinations*, 14 *Fed. Cir. Bar J.* 473, 499-500 (2004/2005) (“Contrary to the court’s opinion, the contracting officer’s affirmative responsibility determination is a decision by a single contracting officer, not that of the entire agency. The responsibility determination is limited to that specific contract and does not bind the agency on any responsibility determination beyond it. Moreover, while the lack of present responsibility determination by [a Suspension or Debarment Official] binds the contracting officer and preempts the normal contracting officer responsibility determination, the converse is not true. To the extent the court decided otherwise, the case was wrongly decided.”).

<sup>137</sup> See *Kirkpatrick v. White*, 351 F. Supp. 2d 1261 (N.D. Ala. 2004) (noting that the investigation underlying the suspension in the instant case was not completed until eight months after the suspension was imposed, unlike in *Lion Raisins*); *Gulf Group, Inc. v. United States*, 61 Fed. Cl. 338 (2004) (noting that the testimony of the decision maker in the instant case was not inconsistent with the documentation of his decision, unlike in *Lion Raisins*).

<sup>138</sup> See, e.g., *Todd Constr.*, 88 Fed. Cl. 235; *Arch Chems., Inc. v. United States*, 64 Fed. Cl. 380 (2005); *S.K.J. & Assocs. v. United States*, 67 Fed. Cl. 218 (2005).

<sup>139</sup> See *Protest Challenges*, 14 *Fed. Cir. Bar J.* at 503 (suggesting that *Lion Raisins* gave agencies “greater incentive to act quicker” when determining whether to exclude a contractor).

<sup>140</sup> See, e.g., Transparency in Government Act of 2010, H.R. 4983, § 503 (requiring unique identifiers for contractors and the linkage of those identifiers with FAPIIS records); Federal Contracting Oversight and Reform Act of 2010, H.R. 5726, § 5 (requiring the creation of a single database that would consolidate the information contained in PPIRS, (continued...))

augment the factors considered when past performance is evaluated in certain source selection decisions;<sup>141</sup> (3) increase oversight of certain contracts based upon past performance issues on similar contracts or involving the same contractors;<sup>142</sup> and (4) give "preference" to certain contractors based on successful past performance.<sup>143</sup> Similar legislation could be introduced in the 112<sup>th</sup> Congress if concerns persist about poorly performing contractors receiving additional government contracts. The 112<sup>th</sup> Congress could also continue oversight of agencies' compliance with existing requirements regarding evaluations of past performance.<sup>144</sup>

The Obama Administration has also implemented or proposed initiatives designed to reward contractors for good performance. Key among these is the Department of the Navy's "Preferred Supplier Program," which would grant "special terms and conditions," such as favorable progress payments and special award fee pools, and "other potential post-award advantages" to contractors with good past performance.<sup>145</sup> The Department of Defense (DOD) has recently proposed expanding this pilot program DOD-wide.<sup>146</sup> OFPP has also issued guidance calling for agencies to identify who is responsible for preparing interim and final performance evaluations and "consider the achievement of small business goals in performance evaluations when the contract includes a Small Business Subcontracting Plan."<sup>147</sup> OFPP also proposes to conduct periodic reviews to ensure that agencies are submitting their evaluations to PPIRS in a timely fashion and that these evaluations "provide clear, comprehensive, and constructive information that is useful for making future contract award decisions."<sup>148</sup> The executive branch's ability to craft incentives for good performance is, however, arguably narrower than that of Congress because agencies cannot deny any responsible source the opportunity to submit a bid or proposal without express statutory

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FAPIS, and other databases).

<sup>141</sup> Weapon Systems Acquisition Reform Act of 2009, P.L. 111-23, § 202 (requiring agencies to consider in past performance evaluations certain contractors' make-or-buy decisions, or the "extent to which a contractor has given full and fair consideration to qualified sources other than the contractor in sourcing decisions"); Department of Defense Authorization Act for FY2011, S. 3454, § 843 (authorizing the Secretary of Defense to make determinations of fault in cases where there is reason to believe that a contractor may have caused serious bodily injury or death to DOD civilian or military personnel while performing a contract and consider such determinations in certain past performance evaluations); Department of Defense Authorization Act for FY2011, S. 3455, § 842 (failure to comply with new requirements regarding oversight and accountability of private security contractors to be included in databases of past performance information and considered in responsibility and source selection determinations). *See also* National Defense Authorization Act for FY2011, H.R. 5136, § 323 (pilot program on best value for contracts for private security functions).

<sup>142</sup> Department of Homeland Security Appropriations Act, 2010, P.L. 111-83, § 521 (agency inspector general to review certain contracts when there have been past performance problems on similar contracts or involving the same vendor).

<sup>143</sup> Oregon Eastside Forests Restoration, Old Growth Protection, and Jobs Act of 2009, S. 2895, § 13 (preference for local vendors based, in part, on consideration of their past performance relating to the purposes and goals of the act).

<sup>144</sup> *See, e.g., Role and Oversight of Private Security Contractors, supra* note 3, at 55 (reporting congressional findings regarding agencies' consideration of past performance when contracting for security services in Afghanistan).

<sup>145</sup> Office of the Under Secretary of Defense, Acquisition, Technology & Logistics, Better Buying Power: Guidance for Obtaining Greater Efficiency and Productivity in Defense Spending, Sept. 14, 2010, at 8, *available at* [http://www.acq.osd.mil/docs/USD\\_ATL\\_Guidance\\_Memo\\_September\\_14\\_2010\\_FINAL.PDF](http://www.acq.osd.mil/docs/USD_ATL_Guidance_Memo_September_14_2010_FINAL.PDF).

<sup>146</sup> *Id.*

<sup>147</sup> Exec. Office of the Pres., Office of Mgmt. & Budget, Office of Fed. Procurement Policy, Improving the Use of Contractor Performance Information, July 29, 2009, *available at* [http://www.whitehouse.gov/sites/default/files/omb/assets/procurement/improving\\_use\\_of\\_contractor\\_perf\\_info.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/procurement/improving_use_of_contractor_perf_info.pdf).

<sup>148</sup> *Id.* Findings from these reviews were supposed to be publicly released "starting in FY2010," but no findings appear to have been released to date.



authorization.<sup>149</sup> This means that the executive branch cannot ensure awards to contractors with good past performance by preventing other contractors from competing with them.<sup>150</sup>

Some proposed reforms have generated strong opposition from government contractors, who are concerned that increased emphasis on past performance information could lead to *de facto* debarment or "blacklisting."<sup>151</sup> Such contractors worry that, as the weight given to past performance information increases, contractors will be effectively excluded from future contract opportunities based upon information about them that they may not be aware of,<sup>152</sup> or whose accuracy and objectivity they cannot meaningfully challenge. Commentators have also noted that increased consideration of past performance interjects additional subjectivity into the procurement process,<sup>153</sup> potentially giving rise to more bid protests, and that not every allegedly poor performance by a contractor is the contractor's fault.<sup>154</sup> These concerns could prompt renewed calls for the development of judicial or quasi-judicial mechanisms allowing contractors to challenge agency evaluations of their past performance.<sup>155</sup>

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<sup>149</sup> See, e.g., 41 U.S.C. § 253(a)(1)(A) (generally requiring full and open competition); 41 U.S.C. § 403(6) (defining "full and open competition" as that in which "all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement").

<sup>150</sup> See, e.g., Navy Announces Reward Program for Top Performers, 18 *Set-Aside Alert* 4 (May 28, 2010) (emphasizing that contractors with better past performance "will not receive preference in source selection" under the Preferred Supplier Program).

<sup>151</sup> See, e.g., Tom Spoth, Contractor Performance Data to Become Public, *Federal Times*, Aug. 6, 2010, available at <http://www.federaltimes.com/article/20100806/ACQUISITION03/8060301>; Matthew Weigelt, New Law Puts Contractor Performance in Public Spotlight, *Wash. Tech.*, Aug. 5, 2010, available at <http://washingtontechnology.com/articles/2010/08/05/obama-opens-fapiis-to-the-public.aspx> Other proposals not related to past performance have also elicited concerns regarding *de facto* debarment. See, e.g., National Defense Authorization Act for FY2011, S. 3454, § 843(c) (allowing defense agencies to exclude certain sources to reduce supply chain risk and providing that determinations to exclude may not be disclosed or subjected to judicial or administrative review); Alice Lipowicz, Contractors Fear Being Blacklisted Under New Defense Bill, *Wash. Tech.*, July, 29, 2010, available at <http://washingtontechnology.com/articles/2010/07/29/2012-defense-bill-debarments.aspx>.

<sup>152</sup> For example, information communicated between agency personnel but not incorporated into a formal evaluation of contractor performance.

<sup>153</sup> See, e.g., Kimberly R. Heifetz, Striking a Balance Between Government Efficiency and Fairness to Contractors: Past Performance Evaluations in Government Contracts, 51 *Admin. L. Rev.* 235, 254 (1998).

<sup>154</sup> See, e.g., Protest Challenges, 14 *Fed. Cir. B. J.* at 502 ("Contractors are frequently under investigation for alleged [misconduct], and in a large percentage of those cases the allegations are either unfounded or unproven."); Unfavorable Past Performance, 31 *Proc. Law.* at 27 ("Experience shows that a contractor's apparent 'seriously deficient' performance, in the glare of discovery and cross-examination, is sometimes found by the boards and courts to be a performance failure that is beyond the contractor's control and without fault or negligence, and on occasion, one for which the Government is contractually liable.").

<sup>155</sup> Contractors have long sought the opportunity to challenge their performance evaluations and other information about their past performance outside the agency. See, e.g., More Guidance Needed on Implementing Past Performance Evaluation, 66 *Fed. Cont. Rep.* 490 (Nov. 18, 1996). The government, however, has resisted creating judicial or quasi-judicial mechanisms for contractors to challenge performance evaluations due to concerns that such mechanisms could "make the system collapse under its own weight." See, e.g., Kelman Outlines Priorities, Pledges Not to Duck Tough Decisions, 60 *Fed. Cont. Rep.* 565 (Dec. 6, 1993). Dr. Kelman was the Administrator of OFPP in the mid-1990s.

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