

**BEST PRACTICES AND PROTESTS:
TOWARD EFFECTIVE USE OF PAST PERFORMANCE AS A
CRITERION IN SOURCE SELECTIONS**

Keith F. Snider and Mark F. Walkner*

ABSTRACT. Recent federal procurement policies require evaluations of offerors' past performance as a way to reduce risk in selecting sources of supply. As past performance has grown in importance in source selections, however, the number of past performance-related contract award protests has also increased, indicating that firms are uncomfortable with the discretion exercised by procurement officials in this area. Two resources that can aid in the development of officials' "competent discretion" are procurement agency's best practice guides, which reflect practical wisdom and lessons learned from the experience of practitioners, and General Accounting Office (GAO) cases of past performance-related bid protests. This article provides a coordinated discussion of these resources, which together with applicable Federal Acquisition Regulation provisions, illuminate more effective use of past performance as an evaluation criterion.

INTRODUCTION

The "Revolution in Business Affairs" (Cohen, 1997) in the Department of Defense (DoD) is based on the idea that government

** Keith F. Snider, Ph.D., is an Assistant Professor, Graduate School of Business and Public Policy, Naval Postgraduate School in Monterey, California. His teaching and research interests lie in the areas of pragmatic theory, public administration history, and defense acquisition management. Mark F. Walkner, M.S., is Deputy Contracting Officer, Regional Contracting Office (NW), Marine Air Ground Task Force Training Command, Twenty-nine Palms, California. His principal duties are to provide acquisition support to the command for supplies and non-personnel services that are determined to be unavailable from the Marine Corps Supply System.*

management operations, including procurement actions, should model those of leading private sector firms. Among the practices that the federal government seeks to emulate is the reliance of corporations, as they focus today on their core functions, upon preferred suppliers as a way to reduce procurement risk. However, because of competition requirements, socio-economic programs, and other concerns, government is often unable to follow the private sector's lead with respect to preferred suppliers.

One relatively new method federal procurement officials can use to reduce procurement risk is to request, via the solicitation, information regarding a supplier's past performance and then use this information for source selection. The Federal Acquisition Regulations (FAR) states the importance of past performance as follows:

Past performance information is relevant information, for future source selection purposes, regarding a contractor's actions under previously awarded contracts. It includes, for example, the contractor's record of conforming to contract requirements and to standards of good workmanship...of forecasting and controlling costs...[of] adherence to contract schedules, including the administrative aspects of performance...of reasonable and cooperative behavior and commitment to customer satisfaction; and generally, the contractor's business-like concern for the interest of the customer (Federal Acquisition Regulation, § 42.1501).

Past performance differs from experience, in that experience reflects whether contractors have performed similar work before, while past performance reflects how well contractors have done the work (U.S. Department of Defense, 1999, p. 7). It also differs from the idea of contractor responsibility, which relates to the capability to perform work. When lowest price is not the driving factor in procurement, the FAR allows officials to make best value determinations—trade-offs between cost or price, technical merit, and past performance to ensure the best value to the government.

While the FAR provides direction on the use of past performance as an evaluation criterion, it provides little guidance on how contracting officials are to evaluate past performance information (PPI). In the absence of standardized processes or norms, the possibility increases that errors or abuses may occur in evaluations and subsequent award

decisions. According to Beausoleil (2000), less than twenty percent of the contracts that were completed in 1998 and 1999 were evaluated in a way that met the FAR requirements for PPI. He argues that current processes for post-award collection and evaluation of contractor performance are too cumbersome in today's acquisition environment. Solomon and Pflieger (2000) identified 1,020 companies that were sued or prosecuted for fraud over the last five years. They found that 737 of these companies were still eligible for future contracts and that several of these companies have subsequently won contract awards. They conclude that the federal procurement process places little value on an offeror's past performance.

Such findings indicate the need among public procurement officials and scholars to understand how supplier PPI may be more effectively incorporated in acquisition processes. This article contributes to such understanding through a synthesis of three major sources of information on past performance: (1) the FAR which, as mentioned above, gives directions and specifies procedures to be followed when using PPI as an evaluation criterion; (2) agency "best practice" guides, which reflect practical wisdom such as "rules of thumb" and lessons learned derived from experience; and (3) General Accounting Office (GAO) cases of bid protests¹ involving past performance. These sources illuminate past performance as an evaluation criterion from three different aspects. Put simply, the FAR states the rules, the agency guides tell how the rules may be put into practice, and the GAO cases provide interpretations and judgments of practice. This article provides a coordinated discussion of these three "frames" and thereby integrates them in order to gain a more complete perspective of past performance, as well as new insights into its effective use.

While the article presents policies, practices, and cases involving federal government procurements, mostly involving DoD, the implications and general conclusions of the discussion should be applicable to public procurement officials at state and local levels as well. The article begins with a sketch of the evolution of past performance policies in the federal government. Next, it elaborates on the problems, mentioned above, in the implementation of those policies as indicated by recent trends in GAO contract award protests involving use of PPI. It then identifies the "top 10" past performance best practices based on a survey of selected agency guides and handbooks. The main

body of the article then elaborates on each of these best practices with discussions of applicable FAR provisions and relevant GAO cases. It concludes with some brief remarks on development of public procurement theory.

THE CHALLENGE – POLICIES AND THEIR IMPLEMENTATION

Office of Federal Procurement Policy (OFPP) Letter 92-5 (OFPP, 1992) provided the foundation for current past performance policies. It required that past performance be used as an evaluation factor in all competitively negotiated contracts exceeding \$100,000, and that newly established firms could compete for contracts even though they lacked a history of past performance. In 1995 past performance became a mandatory evaluation factor for all solicitations with an estimated value of \$1,000,000. The FAR now requires that PPI be evaluated in all source selections for negotiated competitive acquisitions expected to exceed \$100,000 (unless the contracting officer documents the reasons why past performance is not an appropriate evaluation factor). Clearly, past performance is an area of significant policy interest, as indicated by the FAR's Statement of Guiding Principles:

The Federal Acquisition System will satisfy the needs of its customers in terms of cost, quality and timeliness by...using contractors who have a track record of successful past performance or who demonstrate a current superior ability to perform (FAR § 1.102).

The intent of these policies notwithstanding, there is evidence of problems in their implementation. One problem concerns the collection of information during a contractor's period of performance so that it may be used in evaluating that contractor's subsequent proposals (Beausoleil, 2000). Another problem area—the focus of this paper—is the use of PPI in source selection. Evidence of difficulties here may be seen in trends involving GAO protests of recent contract awards. Table 1 depicts data² on protests, with emphasis on protests involving past performance as an

TABLE 1
GAO Protests

	FY1997	FY1998	FY1999	FY2000 (Oct-Jun)
Merit Protests	501	406	347	161
Protests Sustained	61	63	74	44
(Sustainment Rate as %)	(12%)	(16%)	(21%)	(27%)
Past Performance Protests	40	43	62	46
Protests Sustained	6	13	15	13
(Sustainment Rate as %)	(15%)	(30%)	(24%)	(28%)
Past Performance Protests as %				
Merit Protests	8%	11%	18%	29%
Sustained Past Performance Protests as % Sustained Protests	10%	21%	20%	30%

evaluation criterion, for fiscal years (FY) 1997-1999 and for the first three quarters of FY2000. This timeframe was chosen because it covers much of the implementation period for the policies mentioned above.

The data show that, while the number of merit protests³ has been declining over the last four years, the number of past performance-related protests has been increasing. In 1997 past performance protests constituted only 8% of all merit protests, and as of June 2000 that percentage has grown to 29%. An upward trend is also evident with the percentage of past performance protests as a percentage of sustained protest. In 1997 sustained past performance protests accounted for only 10% of the overall sustained protests, and by June of 2000 that percentage had risen to 30%.

It is ironic that, while the federal government has attempted to follow the private sector's lead in adopting past performance as a criterion in selecting suppliers, industry has responded with increasing protests. This points out difficulties that can arise when government attempts to emulate business. The idea that "government is different" is a familiar theme in the field of public administration. As Paul Appleby (1945, p.

101) put it over half a century ago, “government administration differs from all other administrative work...by virtue of its public nature, the way in which it is subject to public scrutiny and public outcry....No other institution is so publicly accountable.” These differences, and increasing numbers of protests, do not necessarily mean, of course, that the government is not receiving better quality products and services as a result of using PPI in source selections. The question of whether past performance policies are having their desired effects in terms of improved outcomes is open and requires further research. This question aside, increasing numbers of protests should concern government procurement officials. Even in protests that are sustained, the settlement process consumes scarce agency resources. In certain cases the agency may be required to withhold a contract award and suspend performance for up to ninety days while the GAO’s Comptroller General completes the inquiry. Clearly, reducing the numbers of protests is in the government’s best interest.

One plausible explanation for increasing numbers of protests is simply that there is now one more criterion for evaluation in source selection, which increases the complexity of the process. A contract award based solely on cost or price is straightforward, but as additional criteria—technical, management, and so on—are added, the potential for errors and misunderstandings increases.

Another explanation is that, since past performance policies are relatively new, procurement agencies are struggling to institutionalize procedures for their implementation. Thus, firms protest more award decisions because they are not yet comfortable with the ways federal procurement agencies are using PPI. Businesses that deal with the federal government feel that the FAR allows too much latitude to evaluators, resulting in widely differing weighting and selection of evaluation factors among federal agencies (Clipsham, 1998). One senior DoD procurement official agreed, stating that he was not surprised by these trends:

Businesses want to be treated fairly. They want a level playing field, and they can’t be guaranteed one with our current collection and tracking systems. With the increased emphasis on the collection and use of past performance information, it is understandable that businesses would challenge more of our evaluations and best value determinations. . . In the absence of a

good collection and tracking system, there is always the possibility of mistakes in the collection and evaluation of past performance. These mistakes translate into more past performance protests that have substance (S. Soloway, personal interview, August 31, 2000).

This problematic situation is exacerbated by additional factors. First, when past performance is weighted heavily as a source selection factor, companies may increase the level of risk that they are willing to accept in today's competitive business environment by adjusting their pricing strategies in order to win the contract. With this added risk, companies may be more likely to file protests whenever it appears that reasonableness and consistency are lacking in the source selection process. Second, because past performance policies are relatively new, the body of "case law" from protests and contract disputes is still relatively immature (Phillips, 2000).

Businesses apparently have reason to be wary of government evaluations involving past performance. Table 2 summarizes the principal reasons given by the GAO in sustaining forty-one past

TABLE 2
Sustained GAO Protests (October 1998-June 2000)

Reason for Sustainment	Cases
Evaluation not consistent with evaluation criteria	12
Unreasonable source evaluation	11
Source evaluation: inadequate documentation	8
Opportunity to respond to adverse information not provided	3
Past performance not similar in scope, magnitude, complexity	2
Offeror improperly penalized re: disputes clauses	2
Prior past performance ignored	1
Awardee's negative information not reasonably considered	1

performance protests from FY1998 through the third quarter of FY2000.² It reveals that in the majority of sustained protests, acquisition officials failed to apply consistently their own evaluation criteria. Specifically, the evaluation of past performance

information was found either to be unreasonable or not consistent with the evaluation criteria contained in the solicitation.

High numbers of protests indicate the private sector's belief that procurement officials are acting and deciding improperly in source selections, and firms are using protests as a check on officials' discretion. The scholarly debate between Carl Friedrich and Herman Finer during the 1940s helps frame this issue. Friedrich and Finer were concerned with the question of how best to ensure administrative responsibility, or in other words, the accountability of public officials who exercised discretion in their positions. Finer (1941, p. 335) argued that external constraints ("arrangement[s] of correction and punishment") were necessary, while Friedrich (1940, p. 19) maintained that responsibility "is not so much enforced as it is elicited" through internal checks such as an individual's sense of professionalism. Protests essentially act as an external check on the responsibility of public procurement officials. Fewer protests are likely to occur in the area of past performance if firms have confidence that source selection processes are carried out properly. This confidence will spring from a corresponding confidence in the internal checks on officials' responsibility, that is, in their competent discretion.

Considering the difficulty in implementing past performance policies and industry's corresponding distrust of the government's use of PPI, it is critical that public procurement officials seek to increase their proficiency in this area. An understanding of how best to use PPI should result in fewer errors in source evaluations and contract awards, and private sector confidence in the government's use of PPI should follow.

PAST PERFORMANCE – AGENCY BEST PRACTICES

Several agencies have recognized that the problems described above stem at least in part from the relative novelty of past performance as an evaluation criterion and the corresponding lack of experience in and guidance available for its use. As a remedy, these agencies have published best practice guides for using PPI. The term "best practice" usually refers to a method that has been shown by experience to work successfully. Thus, one should be able to gain insights into effective PPI usage through an examination of these guides.

None of the guides give detailed explanations as to how the best practices were obtained, nor have agencies made attempts to verify or validate them according to standards of positivist science. Rather, the identification and dissemination of best practices belie a more pragmatic

epistemology of learning from practical experience (Dewey, 1998). Best practices may also be viewed as efforts on the parts of agencies to enable and facilitate organizational learning (Argyris & Schön, 1978; Lipshitz, Popper & Oz, 1996).

Five agency guides⁴ were examined to identify the most important best practices. Numerous best practices appeared in more than one guide, which allowed a comprehensive “top 10” list of commonly cited best practices to be developed. Table 3 groups these according to whether they occur during pre-solicitation or post-solicitation activities.

Clearly, most of these best practices have more general applicability than to past performance alone. For the purposes of this paper, though, the discussions that follow emphasize past performance.

BEST PRACTICES ELABORATED: THE FAR AND GAO PROTEST CASES

These best practices represent starting points for more in-depth discussions of past performance. In this section, the best practices are elaborated upon with accompanying summaries of applicable FAR provisions, as well as illustrations from GAO protest cases.⁵ The GAO cases have an especially important role in these discussions. They are intended to have a function and benefit similar to cases used in law education. That is, the cases illustrate problematic aspects of practices involving past performance. They also provide interpretations and judgments for resolution, which contribute to insights into the effective use of PPI.

Pre-solicitation Activities

Best Practice 1. Invest in command or program resources needed for a competent and well documented best value source selection. Include the source selection authority as an active participant. Train all the evaluators in best practices.

TABLE 3
“Top 10” Best Practices – Past Performance in Source Selection

Pre-solicitation Activities

1. Invest in command or program resources needed for a competent and well documented best value source selection. Include the source selection authority as an active participant. Train all the evaluators in best practices.
2. Tailor use and evaluation of PPI to fit the needs of the acquisition. Weight past performance to ensure that it is a valid discriminator. Limit sub-factors to true discriminators (e.g., quality of performance, cost performance, schedule performance, and business relations).
3. Conduct pre-solicitation exchanges (e.g., draft solicitations and pre-solicitation conferences) with industry to explain approaches to be used to evaluate performance risk.
4. Structure the solicitation to communicate effectively to potential offerors. Evaluations may be properly made only on the basis of what is communicated via the solicitation.

Post-solicitation Activities

5. Use the most relevant, recent PPI available in making the source selection decision. PPI can come from federal, state and local government databases, commercial contractors, references provided by the offeror, and quality certificates and awards.
 6. Conduct reference checks and look for patterns or trends. Whenever possible request two points of contact for each reference. Use questionnaires, face to face interviews, and telephone interviews.
 7. Document strengths, weaknesses, and risks of each proposal to support the cost/past performance tradeoff.
 8. Justify price premiums with tradeoff documentation regardless of the selected proposal's cost or past performance superiority.
 9. Ensure that the source selection decision is consistent with the relative weights assigned to the evaluation factors in the solicitation.
 10. Conduct a proper and timely debriefing to provide unsuccessful offerors with the opportunity to learn about their strengths and weaknesses and how to improve future proposals submitted to the government.
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The FAR provides very limited direction that is related to this best practice, stating only that the source selection authority (SSA) will “...establish an evaluation team, tailored for the particular acquisition, which includes appropriate contracting, legal, logistics, technical, and other expertise to ensure a comprehensive evaluation of offers [and] approve the source selection strategy or acquisition plan, if applicable, before solicitation release” (FAR § 15.303 [b]). Such direction implies that the agency has the discretion to tailor the evaluation team, but that it also has the responsibility to ensure a comprehensive evaluation.

This duality of discretion and responsibility in source selection is illustrated in the protest of LB&B Associates (GAO, 1999d). Here the protestor argued, among other points, that the contracting agency miscalculated its proposal, that it had more relevant experience than the awardee, and hence should have received a higher score in the “demonstrated success” category of the evaluation. The GAO’s Comptroller General (1999d) ruled, however, that it was not its role to make independent determinations regarding merits of proposals. The protest was denied on the principle that “the evaluation of proposals is within the discretion of the procuring agency since it is responsible for defining its needs and the best method of accommodating them, and must bear the burden arising from a defective evaluation” (GAO, 1999d, p. 1).

A presumed appropriate level of individual competence underlies this duality. Technical knowledge, sound judgment, and skill contribute to (but obviously cannot guarantee) procurement officials’ abilities to exercise discretion in a responsible way. The FAR places the onus on the SSA to ensure an appropriate level of competence and, by implication, on the agency to provide for it. Best Practice 1 emphasizes the need for investment of resources to promote such competence.

Best Practice 2. Tailor the use and evaluation of PPI to fit the needs of the acquisition. Weight past performance to ensure that it is a valid discriminator. Limit sub-factors to true discriminators (e.g., quality of performance, cost performance, schedule performance, and business relations).

This best practice follows very closely FAR directions on evaluation factors:

Evaluation factors and significant subfactors must represent the key areas of importance and emphasis to be considered in the

source selection decision...and support meaningful comparison and discrimination between and among competing proposals. The evaluation factors and significant subfactors...and their relative importance, are within the broad discretion of agency acquisition officials...[P]rice or cost...shall be evaluated in every source selection, [and] quality shall be addressed through consideration of factors such as past performance, compliance with solicitation requirements, technical excellence, management capability, personnel qualifications, and prior experience (FAR § 15.304).

As discussed earlier, the FAR now requires, in general, past performance as a mandatory evaluation factor in competitively negotiated procurements.

Best Practice 2 and the FAR stress that appropriate evaluation factors and weights should be selected to satisfy the requirements of the procurement, or in other words, to enable a best value solution to agency needs. But agency officials have wide flexibility in selecting factors and weights to accomplish this goal, especially with regard to PPI subfactors since they are not specified in the FAR. The discretion of public procurement officials in this area was affirmed in the protest of Borders Consulting, Inc. (GAO, 1999b). In this case the protestor asserted, generally, that the past performance criteria used in proposal evaluation were designed to favor the incumbent contractor. The Comptroller General denied the protest, finding essentially no problem with evaluation criteria that may actually "steer" an award to a particular firm, if the criteria directly relate to the statement of work.

Agencies enjoy broad discretion in selecting evaluation criteria and [the Comptroller General] will not object to a solicitation's evaluation scheme so long as it reasonably relates to the agency's needs....The fact that a solicitation's technical requirements or evaluation criteria may favor one offeror over another is unobjectionable, so long as they reflect the agency's actual needs, and the advantage enjoyed by a particular firm is not the result of improper government action (GAO, 1999b, p. 1-2).

Best Practice 3. Conduct pre-solicitation exchanges (e.g., draft solicitations and pre-solicitation conferences) with industry to explain approaches to evaluate performance risk.

The best practice guides overwhelmingly recommended conducting pre-solicitation exchanges of information with industry to provide the procuring agency with the opportunity to explain to potential offerors the proposed approach for the evaluation of past performance. These exchanges also facilitate a mutual understanding of government requirements and industry capabilities, thereby allowing potential offerors to judge whether or not they can satisfy the government's requirements, and the government to judge its ability to obtain quality supplies and services at reasonable prices. Pre-solicitation exchanges thus contribute to efficiency in proposal preparation, proposal evaluation, and contract award. The FAR (§ 15.201 (c)) encourages early exchanges with industry and provides a listing of recommended techniques for promoting early exchanges with industry. These include industry or small business conferences, public hearings, market research, one-on-one meetings with potential offerors, pre-solicitation notices, draft solicitations, pre-solicitation or pre-proposal conferences, and site visits.

While pre-solicitation exchanges are encouraged, procurement officials must maintain the integrity of the process by not favoring one offeror over another (FAR § 15.306 (e) (1)). In J. A. Jones Grupo de Servicios, SA (GAO, 1999h), the protestor asserted, among other points, that the agency was indeed biased in favor of the awardee. A review of the source selection records found that the contracting officer had sent a message prior to the submission of initial offers, reminding the incumbent contractor to follow the solicitation's instructions for submitting information for evaluation, rather than rely upon the agency's familiarity with its capabilities. The Comptroller General (1999h, p. 5) saw nothing improper in the exchange, finding it simply a "conscientious effort to enhance competition by ensuring that a significant competitor, the incumbent contractor, avoided a mistake often made by incumbents, which is failing to provide information needed for the evaluation, in the belief that the agency already has that information." The Comptroller General (GAO, 1999h, p. 5) found no basis to object to the contracting officer's "gentle advice," apparently given for the purpose of enhancing competition, and it denied the protest, ruling that:

Where a protestor alleges bias on the part of government officials, the protestor must provide credible evidence clearly demonstrating a bias against the protestor or for the awardee and showing that the agency's bias translated into action that unfairly affected the protestor's competitive position.

This presumption of good faith absent contrary evidence grants procurement officials freedom to maximize use of pre-solicitation exchanges with industry. As long as exchanges are open and provide the same information to all potential offerors, officials may view them as valuable resources to enhance the quality of source selection.

Increasing the use of these exchanges could lead to varying outcomes regarding a firm's inclination to file a protest. If a firm's understanding of the evaluation scheme increases as a result of pre-solicitation exchanges, it may be either more or less inclined to protest, depending on its perception of how faithfully the scheme was executed.

Best Practice 4. Structure the solicitation to communicate effectively to potential offerors. Evaluations may be properly made only on the basis of what is communicated via the solicitation.

Solicitations communicate requirements to prospective offerors. The FAR describes the contents of the solicitation as it relates to past performance:

The solicitation shall describe the approach for evaluating past performance, including evaluating offerors with no relevant performance history, and shall provide offerors an opportunity to identify past or current contracts (including federal, State, and local government and private) for efforts similar to the government requirement. The solicitation shall also authorize offerors to provide information on problems encountered on the identified contracts and the offeror's corrective actions (FAR § 15.305.2).

Best Practice 4 focuses on the product of pre-solicitation activities. It indicates the central importance of the solicitation as the tangible basis for the entire source selection process. While procurement officials may have wide discretion in crafting the past performance terms of a solicitation, their discretion will be constrained by these terms after its release.

The critical importance of the solicitation in resolving protests was affirmed in Enmax Corporation (GAO, 1999f). In this case the protestor argued that the agency's evaluation of the awardee's proposal was improper in two areas—the conclusion that the awardee's proposal was technically acceptable, and the decision that the awardee's proposal presented low performance risk. The Comptroller General stated in the decision that, in considering a protest challenging an agency's evaluation

of proposals, the record will be examined to determine whether the agency's judgment was fair, reasonable, and consistent with stated evaluation criteria in the solicitation. In this case, the Comptroller General found that the agency's evaluators had failed to evaluate the awardee's proposal in accordance with the evaluation criteria contained in the solicitation. The protest was sustained, affirming the principle that the solicitation is "the touchstone for whether offerors have been treated fairly in an evaluation" (GAO, 1999f, p. 5).

To summarize the discussion to this point, both the FAR and the Comptroller General affirm the discretion of procurement officials in determining appropriate past performance schemes for particular procurements. This affirmation is grounded in the presumed competence of officials—in their presumed good faith actions, knowledge of agency needs, and expertise, which may be strengthened through investments in resources such as training. Officials are presumed to exercise competent discretion in the activities leading to preparation of the solicitation. The solicitation itself constrains officials' discretion once it is released, since they must evaluate proposals in strict accordance with its provisions.

Post-solicitation Activities

Best Practice 5. Use the most relevant, recent PPI available in making the source selection decision. PPI can come from federal, state and local government databases, commercial contractors, references provided by the offeror, and quality certificates and awards.

Best Practice 6. Conduct reference checks and look for patterns or trends. Whenever possible request two points of contact for each reference. Use questionnaires, face to face interviews, and telephone interviews.

These two best practices have to do mainly with sources of PPI to be used in evaluations. The FAR provides specific guidance in this area:

The currency and relevance of the information, source of the information, context of the data, and general trends in contractor's performance shall be considered... The evaluation should take into account past performance information regarding predecessor companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement... [FAR § 15.305 (a) (2)].

Three recent protest cases illustrate some issues in considering PPI sources. First, in OMV Medical, Inc.; Saratoga Medical Center, Inc. (GAO, 1999a), the protesters contended that the agency arbitrarily neutralized past performance as an evaluation discriminator by according all offerors "low risk" performance ratings regardless of experience, which was allegedly prejudicial to the incumbent. The main purpose of the past performance evaluation was for the agency to identify and review relevant present and past performance in order to make an overall risk assessment of the offeror's ability to perform the requirement. In order to do so, the agency sent questionnaires to a minimum of two references provided by each offeror. Based on the responses received, the agency concluded that all offerors were capable of performing and, thus, all received a low performance risk rating. The protestors challenged the relevance of the references submitted by some offerors, but their protest was denied. The Comptroller General (1999a, p. 4) found nothing unreasonable in the agency's approach to investigating the past performance history of the offerors and, based on that investigation, in concluding that all offerors presented a low risk of nonperformance.

Where a solicitation requires the evaluation of offerors' past performance, an agency has discretion to determine the scope of the offerors' performance histories to be considered provided all proposals are evaluated on the same basis and consistent with the solicitation requirements (GAO, 199a, p. 4).

The protest of Kellie W. Tipton Construction Company (GAO, 1999) concerned a termination for convenience of a contract for the installation and replacement of water and sewer lines and the agency's decision to award a contract for these services to another offeror. The solicitation called for offerors to submit at least ten references; however, not all offerors did so. The agency determined that five past performance records were sufficient to evaluate an offeror. It reviewed three government projects ratings and two customer performance surveys for both the awardee and the protestor, who were rated as being equal under past performance. The protestor alleged that the agency miscalculated proposals with respect to past performance. The Comptroller General ruled, however, that the agency evaluation was reasonable and did not conflict with the solicitation evaluation criteria. While the solicitation requested a minimum of ten references, it did not specify the number of references that the agency would contact for purposes of evaluation. The Comptroller General denied the protest, holding that there is no requirement that an agency contact all of an offeror's references, so long as offerors are evaluated consistently.

Finally, in Consolidated Engineering Services Inc. (GAO, 1998), the protestor argued that the agency improperly downgraded its proposal relative to the awardee based on the awardee's more detailed description of the proposed maintenance subcontractor's experience. Although both offerors proposed the incumbent subcontractor, points were deducted from the protestor's score—while the awardee received all points—for failure to adequately address the results achieved (e.g., quality of service, timeliness of performance and cost control), by the subcontractor under prior contracts. The protestor argued that, since the protestor and the awardee proposed using the same subcontractor, they should have received the same score for the subcontractor's experience, and in any case, since the proposed subcontractor was the incumbent, the evaluators should have been aware of its performance and capabilities. The Comptroller General sustained the protest, ruling that even if the agency was correct that the protestor's proposal did not provide as much information as the awardee's regarding the subcontractor's experience, since both proposals offered the same subcontractor, the evaluation unreasonably accorded the two proposals different scores in this area. Once the agency became aware of the subcontractor's experience—whether from the awardee's proposal, personal knowledge, or otherwise—it could not have reasonably assigned the awardee's proposal

a higher score than the protestor's based on that experience. Thus, an agency may not ignore prior performance information of which it is aware.

From this portion of the discussion emerge themes like reasonableness, fairness, and consistency with the solicitation. The FAR provisions cited above indicate these themes in the use of wording such as "shall be considered" and "should take into account" without direction as to how, specifically, PPI should be considered and taken into account. Absent such direction, procurement officials must judge their actions by standards of reasonableness and fairness to all offerors. They still exercise competent discretion, but only to the extent allowed by the terms of the solicitation.

Best Practice 7. Document strengths, weaknesses, and risks of each proposal to support the cost/past performance tradeoff.

Best Practice 8. Justify price premiums with tradeoff documentation regardless of the selected proposal's cost or past performance superiority.

Best Practice 9. Ensure that the source selection decision is consistent with the relative weights assigned to the evaluation factors in the solicitation.

These three best practices deal with proposal evaluation, with tradeoffs among various evaluation factors, and with the need for adequate documentation of the evaluation and award decision. The FAR provides general direction in these areas:

An agency shall evaluate competitive proposals and then assess their relative qualities solely on the factors and subfactors specified in the solicitation. Evaluations may be conducted using any rating method or combination of methods, including color or adjectival ratings, numerical weights, and ordinal rankings. The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation shall be documented in the contract file (FAR § 15.305).

In the final award determination—one of the last tasks before contract award—the offer or offers which represent the best value to the government is selected. In many cases, this is achieved through a tradeoff process that reflects a willingness to accept a higher priced offer because the perceived benefits of that offer are in the best interests of the

government. Though Best Practice 9 does not address documentation of the decision explicitly, the FAR provides clear direction:

The source selection authority's (SSA) decision shall be based on a comparative assessment of the proposals against all source selection criteria in the solicitation. While the SSA may use reports and analyses prepared by others, the source selection decision shall represent the SSA's independent judgment. The source selection decision shall be documented, and the documentation shall include the rationale for any business judgments and tradeoffs made or relied on by the SSA, including benefits associated with additional costs. Although the rationale for the selection decision must be documented, that documentation need not quantify the tradeoffs that led to the decision (FAR § 15.308).

The use of PPI and tradeoffs in best value source selections is illustrated in Marathon Watch Company Limited (GAO, 1999e). Here the protestor challenged the adequacy of a best value determination, which resulted in the agency's issuance of the purchase order to the another source. The Comptroller General found, however, that the agency's selection of the awardee, a higher-priced vendor with excellent performance history, instead of the protestor, a lower-priced vendor whose performance reflected delivery delinquencies, was reasonable and consistent with the solicitation. The solicitation advised that the best value determination would be based on a comparative assessment of prices and past performance, which were equally weighted. The past performance factor considered quality performance and delivery performance to be "of equal value." If the vendor with the best past performance history did not offer the lowest price, the agency would make the appropriate tradeoff of price for past performance, and listed several considerations such as delivery schedule, inventory status, historical delivery, and quality problems that could affect the tradeoff determination. The Comptroller General (1999e, p. 4, 8) denied the protest, finding that:

Since [awardee] had the best past performance history..., but had not offered the lowest price, the contracting officer, as provided for by the [solicitation], determined that the appropriate tradeoff of price for past performance would include delivery schedule/inventory status and historical delivery problems. The

contracting officer decided that, given these tradeoff considerations, Marathon's lower price was not worth the increased performance risk associated with its past delivery delinquencies, and that award to [awardee], with a slightly higher price but an excellent performance history, was justified to ensure timely delivery and represented the best value to the government. The contracting officer's conclusion was consistent with the [solicitation's] evaluation scheme and the discretion afforded the contracting officer in making the tradeoff decision.

Two other GAO protest cases illustrate issues in documenting source selection decisions involving past performance. In J&J Maintenance, Inc. (GAO, 2000), the protester contended that the decision for the awardee on the basis of its higher-priced proposal was flawed because the agency unreasonably downgraded the protester's proposal and evaluated proposals unequally. The GAO's review found that minimal documentation had been kept, in part because oral presentations had been used to streamline the source selection process. Oral presentations constituted the offerors' entire technical proposals, with the only written portions related to past performance. The record of the oral presentations and the evaluation was so sketchy that the Comptroller General had no means to determine the reasonableness of the agency's selection. While the Comptroller General agreed that (1) oral presentations are an effective means of streamlining the source selection process and enhancing an agency's understanding of an offeror's approach; (2) the FAR does not limit the flexibility afforded by their use; and (3) the FAR requires no particular method of establishing a record of what was said by offerors during oral presentations, the FAR does however establish an obligation to provide a reasonably adequate record of the presentations, the evaluation, and the cost/technical tradeoffs. Such a record permits a meaningful review of the agency's decision. This protest was sustained.

In Support Services, Inc. (GAO, 1999g), the protester challenged the evaluation of past performance and relevant experience and argued that the award was based on a defective tradeoff between price and past performance. The language in the source selection record suggested that one of the protestor's past performance references was improperly not considered, and the Comptroller General found that the written documentation provided by the agency lacked sufficient detail for a determination. Therefore, the Comptroller General had to request

clarifying statements from the contracting officer. In this case, the contracting officer's post-protest explanations were found to be generally consistent with the record and were sufficient to support the conclusion that all of the protester's submitted references were considered. The record as a whole indicated that all relevant references furnished by the protester were considered. The Comptroller General (1999g, p. 4) denied the protest, stating that while it "will accord more weight to contemporaneous documents in determining whether an evaluation was reasonable, post-protest explanations that are credible and consistent" with the documentation will be considered.

This portion of the discussion has a more constrained tone in that the theme of procurement officials' discretion is not evidenced as strongly as in previous portions. Rather, consistency of the source selection evaluation and decision with the solicitation emerges as an overriding concern. Further, while tests of reasonableness still apply, and while the SSA exercises "independent judgment" in the award decision, the requirement for documentary evidence casts a shadow over these considerations. While procurement officials are presumed to exercise competent discretion and to act reasonably and in good faith, a protest will in large part be decided on the basis of the content of an acquisition's documentation.

Best Practice 10. Conduct a proper and timely debriefing to provide unsuccessful offerors with the opportunity to learn about their strengths and weaknesses and how to improve future proposals submitted to the government.

The FAR addresses debriefings to unsuccessful offerors. Debriefing information includes:

The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal...The overall evaluated cost or price (including unit prices) and technical rating, if applicable, of the successful offeror and the debriefed offeror, and past performance information on the debriefed offeror...The overall ranking of all offerors, when any ranking was developed by the agency...A summary of the rationale for award...[and]... Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed (FAR § 15.505; 15.506).

As indicated by Best Practice 10, the purpose of these debriefings is to improve the quality of future proposals. However, as with pre-solicitation exchanges, these debriefings give unsuccessful offerors insights into the specifics of the agency's evaluation process. They may rely on information provided during debriefings to influence their decisions to file protests. Thus, they may be either more or less inclined to file a protest, depending on their perception of whether the process was fair, reasonable, and consistent with the solicitation. Certainly, in the absence of timely and productive briefings, unsuccessful offerors may be more likely to file protests as a way to determine if rationale for evaluations and tradeoffs have been properly documented.

SUMMARY

The GAO protest cases add substance and provide a "real-world" context to FAR provisions and agency best practices. They illustrate how some problematic past performance issues may be resolved as well as standards by which protests will be decided. Essentially, the Comptroller General will be looking for reasonableness of action by procurement officials throughout the acquisition process, as well as for fair and impartial treatment for all businesses that compete for government contracts. An agency has discretion in crafting solicitations and evaluation schemes involving past performance, since it is responsible for defining its needs and the best method of accommodating them; it also bears any burden arising from a defective evaluation. When protests arise over past performance evaluation criteria or the use of best value tradeoffs, the Comptroller General will review source selection files to determine if the evaluation and selection were fair, reasonable, and consistent with the solicitation. The record must contain sufficient detail to allow review of the merits of the protest and to show that the evaluation was neither arbitrary nor in contravention with the solicitation.

Past performance-related protests should decrease in number as firms gain confidence in the competent discretion of public procurement professionals. Competent discretion in the use of PPI clearly must begin with a sound understanding of FAR provisions, and it may be further developed through training and experience. Best practice guides facilitate training by capturing and promulgating the experiences of agency members so that others may learn from them. To maximize their benefits, these guides should be reviewed and updated periodically to

incorporate current experiences in an evolving procurement environment. Comptroller General decisions on protests and rulings on other cases also facilitate training by providing interpretations of and resolutions to problematical cases. These cases also serve to illustrate and operationalize standards, such as reasonableness, fairness, and consistency, to which public procurement officials are held.

CONCLUSION – PROCUREMENT THEORY

Scholars will have noted that this article does not call for development or improvement of a body of knowledge or overarching theory of public procurement. Rather, its corrective emphasizes procurement practice as revealed in agency best practice guides and protest cases. A detailed explication of the pragmatic approach to theory development is not possible here but has been presented ably elsewhere (e.g., Miller & King, 1998). Grand theories or definitive bodies of knowledge are poor fits in contemporary professional fields like procurement for at least two reasons. First, procurement is a highly complex enterprise that entails the overlap and interplay of a variety of contexts—management, business, politics, and technology, to name a few. Second, each of these contexts is continually evolving in important ways. Under these conditions, the development of stable theories and bodies of knowledge becomes problematical. They become either too general to be useful or too specific to be interesting.

Pragmatic theories are practice-based and thus have a local, situational, and tentative character. They are simply hypotheses about actions that might work to resolve problematic situations. Public procurement practice may always be marked by such situations. To the extent, then, that best practice guides and protest cases portray the constantly evolving state of public procurement practice, they provide resources for officials to reflect critically on practice (Miller & King, 1998, p. 58) and thus participate in the continual development of procurement theory.

NOTES

1. Part 33 of the FAR describes procedures for protest if an offeror thinks a federal government contract may be or has been awarded unfairly. Protests are usually filed either against the terms of a

solicitation or against a contract award, and they may be filed before or after submission of offers, as well as before or after contract award.

Offerors have several routes for protests. They may file protests directly with the agency contracting officer. Offerors may also file protests with the GAO. Unless the protest is dismissed due to procedural or substantive defect, the contracting agency must submit to the GAO a report that responds to the protest, and which is also provided to the protester. During the protest process, the GAO's Comptroller General may schedule meetings or conferences to resolve procedural matters and to obtain information pertaining to the disposition of the protest. Hearings may also be conducted to resolve factual and legal issues raised during the protest process.

Within 100 days after the hearing, the Comptroller General will issue a decision that either denies or sustains the protest. In the case of sustained protests, the Comptroller General will recommend that the contracting agency implement an appropriate remedy.

2. Data were obtained from the GAO's website at <http://www.gao.gov> and the "Where in Federal Contracting?" website at <http://www.wifcon.com>
3. Merit protests are those not dismissed due to procedural or substantive defects.
4. Office of Federal Procurement Policy (2000); U.S. Marine Corps (1997); U.S. Army (1998); U.S. Department of Defense (1999); U.S. Air Force (2000).
5. Cases were selected from the population of one hundred fifty-one past performance related protests from FY 1998 through June 2000.

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