

NAVAL POSTGRADUATE SCHOOL
Monterey, California



THESIS

PAST PERFORMANCE INFORMATION: ANALYSIS OF
OPINIONS FROM THE COURT OF FEDERAL CLAIMS
AND THE GENERAL ACCOUNTING OFFICE

by

Eric S. Stump

December 2001

Thesis Advisor: Jeffrey R. Cuskey
Associate Advisor: Ron B. Tudor

Approved for public release; distribution is unlimited.

Report Documentation Page

Report Date 19 Dec 2001	Report Type N/A	Dates Covered (from... to) -
Title and Subtitle Past Performance Information: Analysis of Opinions from the Court of Federal Claims and the General Accounting Office	Contract Number	
	Grant Number	
	Program Element Number	
Author(s) Stump, Eric	Project Number	
	Task Number	
	Work Unit Number	
Performing Organization Name(s) and Address(es) Naval Postgraduate School Monterey, California	Performing Organization Report Number	
Sponsoring/Monitoring Agency Name(s) and Address(es)	Sponsor/Monitor's Acronym(s)	
	Sponsor/Monitor's Report Number(s)	
Distribution/Availability Statement Approved for public release, distribution unlimited		
Supplementary Notes The original document contains color images.		
Abstract		
Subject Terms		
Report Classification unclassified	Classification of this page unclassified	
Classification of Abstract unclassified	Limitation of Abstract UU	
Number of Pages 125		

THIS PAGE INTENTIONALLY LEFT BLANK

REPORT DOCUMENTATION PAGE

Form Approved OMB No.
0704-0188

Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instruction, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0188) Washington DC 20503.

1. AGENCY USE ONLY (Leave blank)		2. REPORT DATE December 2001	3. REPORT TYPE AND DATES COVERED Master's Thesis	
4. TITLE AND SUBTITLE: Past Performance Information: Analysis of Opinions from the Court of Federal Claims and the General Accounting Office			5. FUNDING NUMBERS	
6. AUTHOR (S) Eric S. Stump				
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Naval Postgraduate School Monterey, CA 93943-5000			8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING / MONITORING AGENCY NAME(S) AND ADDRESS(ES) N/A			10. SPONSORING/MONITORING AGENCY REPORT NUMBER	
11. SUPPLEMENTARY NOTES The views expressed in this thesis are those of the author and do not reflect the official policy or position of the U.S. Department of Defense or the U.S. Government.				
12a. DISTRIBUTION / AVAILABILITY STATEMENT Approved for public release; distribution is unlimited.			12b. DISTRIBUTION CODE	
13. ABSTRACT (maximum 200 words) This thesis identifies the case principles and trends involving past performance issues brought before the Court of Federal Claims and the General Accounting Office. It reviews the background, history, issues and current methods of using past performance information in the Department of Defense acquisition process. It then categorizes and analyzes the past performance protest decisions handed down from the Comptroller General from July 1, 2000 to September 30, 2001 as well as the rulings handed down by the Court of Federal Claims from February 1, 1997 to September 30, 2001. Following the review and analysis, the interpretations of the statutory requirements by the Comptroller General and the Courts are examined to determine if they allow acquisition professionals more or less discretion in carrying out the tasks required to conduct fair and reasonable procurements. It also examines protest decision trends to determine what changes are needed to mitigate the risk of past performance information claims and protests.				
14. SUBJECT TERMS Past Performance Information, Federal Acquisition Process, GAO Comptroller General Decisions, U.S. Court of Federal Claims Decisions			15. NUMBER OF PAGES 125	
17. SECURITY CLASSIFICATION OF REPORT Unclassified		18. SECURITY CLASSIFICATION OF THIS PAGE Unclassified	16. PRICE CODE	
		19. SECURITY CLASSIFICATION OF ABSTRACT Unclassified	20. LIMITATION OF ABSTRACT UL	

NSN 7540-01-280-5500

Standard Form 298 (Rev. 2-89)
Prescribed by ANSI Std. Z39-18

THIS PAGE INTENTIONALLY LEFT BLANK

Approved for public release; distribution is unlimited

PAST PERFORMANCE INFORMATION: ANALYSIS OF OPINIONS
FROM THE COURT OF FEDERAL CLAIMS AND THE GENERAL
ACCOUNTING OFFICE

Eric S. Stump
Lieutenant Commander, United States Navy
B.A., Texas Tech University, 1991

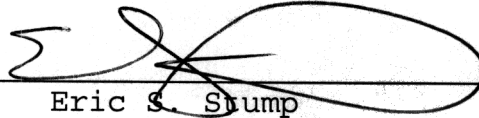
Submitted in partial fulfillment of the
requirements for the degree of

MASTER OF SCIENCE IN MANAGEMENT


from the

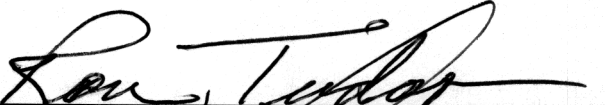
NAVAL POSTGRADUATE SCHOOL
December 2001

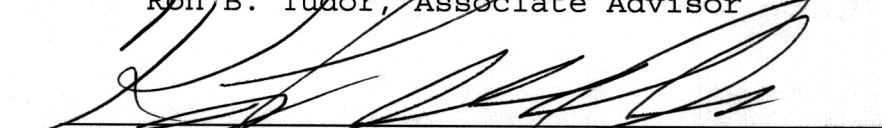
Author:


Eric S. Stump

Approved by:


Jeffrey R. Cuskey, Thesis Advisor


Ron B. Tudor, Associate Advisor


Kenneth J. Euske, Dean
Graduate School of Business and Public Policy

THIS PAGE INTENTIONALLY LEFT BLANK

ABSTRACT

This thesis identifies the case principles and trends involving past performance issues brought before the Court of Federal Claims and the General Accounting Office. It reviews the background, history, issues and current methods of using past performance information in the Department of Defense acquisition process. It then categorizes and analyzes the past performance protest decisions handed down from the Comptroller General from July 1, 2000 to September 30, 2001 as well as the rulings handed down by the Court of Federal Claims from February 1, 1997 to September 30, 2001. Following the review and analysis, the interpretations of the statutory requirements by the Comptroller General and the Courts are examined to determine if they allow acquisition professionals more or less discretion in carrying out the tasks required to conduct fair and reasonable procurements. It also examines protest decision trends to determine what changes are needed to mitigate the risk of past performance information claims and protests.

THIS PAGE INTENTIONALLY LEFT BLANK

TABLE OF CONTENTS

I. INTRODUCTION1

A. PREFACE1

 1. Purpose1

 2. Benefits of Research1

B. RESEARCH OBJECTIVE2

C. RESEARCH QUESTIONS2

 1. Primary Research Question2

 2. Secondary Research Questions2

D. SCOPE3

E. METHODOLOGY3

F. ASSUMPTIONS AND LIMITATIONS4

G. DEFINITIONS4

 1. Best Value4

 2. Claim5

 3. Claim for Relief5

 4. Interested Party5

 5. De Facto Debarment5

 6. Neutral Past Performance Information6

 7. Past Performance6

 8. Protest6

 8. Responsible Contractor7

H. ORGANIZATION OF THE THESIS7

II. BACKGROUND9

A. PURPOSE9

B. EVOLUTION OF PAST PERFORMANCE REQUIREMENTS10

C. CURRENT APPLICATION OF PPI IN DOD PROCUREMENT13

D. PAST PERFORMANCE INFORMATION ISSUES17

E. SUMMARY22

III. PAST PERFORMANCE PROTESTS25

A. INTRODUCTION25

B. THE PROTEST PROCESS25

C. SUSTAINED PROTEST BREAKOUT30

D. CASE PRINCIPLES34

 1. Reasonableness of Source Evaluations and Consistency with Evaluation Factors34

 a. *Matter of: Beneco Enterprises, Inc., B-283512.3, July 10, 2000*34

 b. *Matter of: Green Valley Transportation, Inc., B-285283, August 9, 2000*36

 c. *Matter of: Gray Personnel Services, Inc., B-285002, June 26, 2000*37

	d.	Matter of: Birdwell Brothers Painting & Refinishing, B-285035, July 5, 2000	38
	e.	Matter of: Symtech Corporation, B-285358, August 21, 2000	39
	f.	Matter of: Menendez-Donnell & Associates (MDA), B-286599, January 16, 2001	40
	2.	Adverse Information	41
	a.	Matter of: TLT Construction Corporation, B-286226, November 7, 2000	41
	b.	Matter of: NMS Management, Inc., B-286335, November 24, 2000	42
	3.	Inadequate Documentation	43
	4.	FAR Application	43
	E.	SUMMARY	44
IV.		PAST PERFORMANCE CLAIMS	47
	A.	INTRODUCTION	47
	B.	THE CLAIMS PROCESS	47
	1.	Background and Jurisdiction	47
	2.	Process	49
	C.	CLAIMS BREAKOUT	50
	D.	CASE PRINCIPLES	52
	1.	Reasonableness of Source Evaluation and Consistency with Evaluation Factors	53
	a.	Matter of: Unified Architecture & Engineering, Inc., 99-514C, February 25, 2000	53
	b.	Matter of: Seattle Security Services, Inc., 99-139C, January 28, 2000	54
	c.	Matter of: Miller-Holzwarth, Inc., 98-576C, January 6, 1999	56
	2.	Past Performance Evaluation was Unlawful or Improper	57
	a.	Matter of: Forestry Surveys and Data (FSD), 98-844C, August 12, 1999	57
	b.	Matter of: Advanced Data Concepts, Inc., 98-495C, April 14, 1999	58
	c.	Matter of: Stratos Mobile Networks USA, LLC., 99-402C, September 29, 1999	60
	3.	Failure to Conduct Meaningful Discussions	61
	4.	Overly Restrictive Solicitation	62
	E.	SUMMARY	64
V.		ANALYSIS	65
	A.	INTRODUCTION	65
	B.	TREND ANALYSIS OF GAO DECISIONS AND COURT RULINGS	65

C.	CASE PRINCIPLES AND STATUTORY REQUIREMENTS	70
D.	CIRCUMSTANCES LIKELY TO DRAW A PROTEST OR CLAIM ...	77
E.	SUMMARY	77
VI.	CONCLUSIONS AND RECOMMENDATIONS	79
A.	INTRODUCTION	79
B.	CONCLUSIONS	79
C.	RECOMMENDATIONS	82
D.	ANSWERS TO RESEARCH QUESTIONS	83
E.	SUGGESTED AREAS FOR FURTHER RESEARCH	89
APPENDIX A.	PAST PERFORMANCE PROTESTS	91
CASES WITH SUSTAINED PAST PERFORMANCE PROTESTS	91	
CASES WITH DENIED PAST PERFORMANCE PROTESTS	91	
APPENDIX B.	PAST PERFORMANCE CLAIMS	93
CASES WITH SUSTAINED PAST PERFORMANCE CLAIMS	93	
CASES WITH DENIED PAST PERFORMANCE CLAIMS	93	
APPENDIX C.	COMPTROLLER GENERAL'S PRINCIPLES	95
1.	REASONABLENESS OF SOURCE EVALUATIONS AND CONSISTENCY WITH EVALUATION FACTORS	95
2.	ADVERSE INFORMATION	96
3.	INADEQUATE DOCUMENTATION	97
4.	FAR APPLICATION	97
APPENDIX D.	COURT OF FEDERAL CLAIMS PRINCIPLES	99
1.	REASONABLENESS OF SOURCE EVALUATION AND CONSISTENCY WITH EVALUATION FACTORS	99
2.	PAST PERFORMANCE EVALUATION WAS UNLAWFUL OR IMPROPER	99
3.	FAILURE TO CONDUCT MEANINGFUL DISCUSSIONS	100
4.	OVERLY RESTRICTIVE SOLICITATION	101
LIST OF REFERENCES		103
INITIAL DISTRIBUTION LIST		107

THIS PAGE INTENTIONALLY LEFT BLANK

LIST OF FIGURES

Figure 3.1	Past Performance Sustained Protests	33
------------	---	----

THIS PAGE INTENTIONALLY LEFT BLANK

LIST OF TABLES

Table 2.1 Automated Past Performance Information Systems	16
Table 3.1 Past Performance Protests	31
Table 4.1 Past Performance Claims	51
Table 5.1 Summary of GAO Protest Statistics	65
Table 5.2 Summary of Claims Statistics	69

THIS PAGE INTENTIONALLY LEFT BLANK

ACKNOWLEDGEMENTS

I'd like to thank my wife for her patience and encouragement. I'd like to especially thank Professors Cuskey and Tudor for their time and guidance.

THIS PAGE INTENTIONALLY LEFT BLANK

I. INTRODUCTION

A. PREFACE

1. Purpose

This thesis identifies the case principles and trends involving past performance issues brought before the Court of Federal Claims and the General Accounting Office. It reviews the background, history, issues and current methods of using past performance information in the Department of Defense acquisition process. It then categorizes and analyzes the past performance protest decisions handed down from the Comptroller General from July 1, 2000 to September 30, 2001 as well as the rulings handed down by the Court of Federal Claims from February 1, 1997 to September 30, 2001. Following the review and analysis, the interpretations of the statutory requirements by the Comptroller General and the Courts are examined to determine if they allow acquisition professionals more or less discretion in carrying out the tasks required to conduct fair and reasonable procurements. It also examines protest decision trends to determine what changes are needed to mitigate the risk of past performance information claims and protests.

2. Benefits of Research

This thesis is intended to primarily benefit the Department of Defense contracting activities, in regards to using past performance information in best value selections. The critical review of the Comptroller General's decisions and the Court of Federal Claims' rulings will provide acquisition personnel with lessons learned to assist them in effectively incorporating past

performance into their acquisition and contracting processes.

B. RESEARCH OBJECTIVE

The primary objective of this research is to determine if there are any key case principles that will assist Department of Defense acquisition professionals to more effectively incorporate the use of past performance information into the source selection process.

C. RESEARCH QUESTIONS

1. Primary Research Question

What are the key case principles and trends involving past performance issues brought before the Court of Federal Claims and the General Accounting Office (GAO), and how might this information be used to improve the Department of Defense's Acquisition Process?

2. Secondary Research Questions

- What is the background and history of using past performance in DoD procurement?
- What are the current methods of using past performance information in DoD procurement?
- Have the interpretations of the statutory requirements by the Comptroller General and the Court of Federal Claims allowed acquisition professionals more or less discretion in making responsibility determinations and best value decisions?
- Under what circumstances is an offeror likely to file suit over the use of past performance information in the Court of Federal Claims?

- What changes are needed to mitigate the risk of past performance information claims and protests?

D. SCOPE

- The scope of this thesis will include:
- A review of the history and regulations regarding the evolution of Past Performance Information (PPI) in DoD Procurement.
- An examination of the current methods of using PPI in DoD Procurement.
- An in-depth analysis of the decisions made by the Comptroller General and the Court of Federal Claims with regard to protests and claims involving PPI issues.
- An examination of how a neutral past performance rating affects an offeror in a best-value procurement.
- An analysis of the circumstances in which an offeror is likely to file suit in the Court of Federal Claims.
- An analysis of changes that are needed to mitigate the risk of past performance claims and protests.

E. METHODOLOGY

- The research for this thesis will consist of the following steps:
- Complete a comprehensive literature search of books, magazines, articles, CD-ROM systems,

Government reports and Internet based materials and other library information resources.

- Conduct a search of the General Accounting Office database for protest cases that involved past performance as an element of the protest filed since July 1, 2000.
- Conduct a search of the United States Court of Federal Claims database for cases that involved past performance as an element of the claim.
- Identify trends or key elements that will allow the cases to be categorized and analyzed.

F. ASSUMPTIONS AND LIMITATIONS

This thesis will be limited to protests that involve past performance as an element of the protest that have occurred from July 1, 2000 to September 30, 2001. It will be limited to claims that involve past performance as an element of the protest that have occurred from February 1, 1997 to September 31, 2001. The primary assumption in this study is that the reader is familiar with the basic Federal acquisition contracting process.

G. DEFINITIONS

1. Best Value

The term "best value" procurement does not have an agreed definition, and is often used interchangeably with the term "greatest value". For the purposes of this thesis the term "best value" will refer to competitive, negotiated procurements in which DoD reserves the right to select the most advantageous offer by evaluating and comparing factors in addition to cost or price. A best value procurement enables the Department of Defense to purchase technical superiority even if it means paying a premium

price. A "premium" price is the difference between the price of the lowest priced proposal and the one, which DoD believes, offers the best value. [Ref. 10:2.101]

2. Claim

A "claim" means 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 the contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. [Ref. 10:33.201]

3. Claim for Relief

A "claim for relief" within the context of the Court of Federal Claims is a pleading which sets forth a claim for relief, whether an original claim, counter claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which the pleader is entitled. [Ref.39:Rule 8]

4. Interested Party

An "interested party" for the purposes of filing a protest means an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. [Ref. 10:33.101]

5. De Facto Debarment

A "de facto debarment" occurs during source selection if past performance information is used

to automatically exclude a company from the source selection process.

6. Neutral Past Performance Information

Offerors with no relevant past performance information are given a neutral rating in the area of past performance during source selection evaluations. The offeror is treated as an unknown performance risk, having no positive or negative evaluation significance. [Ref. 1:p.11]

7. Past Performance

Past performance information is relevant information regarding a contractor's actions under previously awarded contracts. It includes the contractor's record of conforming to specifications and to standards of good workmanship; the contractor's record of containing and forecasting costs on any previously performed cost reimbursable contracts; the contractor's adherence to contract schedules, including the administrative aspects of performance; the contractor's history for reasonable and cooperative behavior and commitment to customer satisfaction; and generally, the contractor's business-like concern for the interest of the customer. [Ref. 32]

8. Protest

A "protest" means a written objection by an interested party to any of the following: (1) a solicitation or other request by an agency for offers for a contract for the procurement of property or services, (2) the cancellation of the solicitation or other request, (3) an award or proposed award of the contract, and (4) a termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract. [Ref 10: 33.101]

8. Responsible Contractor

To be determined responsible, a prospective contractor must (a) have adequate financial resources to perform the contract, or the ability to obtain them; (b) be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and Governmental business commitments; (c) have a satisfactory performance record. A prospective contractor shall not be determined responsible or non-responsible solely on the basis of a lack of relevant performance history; (d) have a satisfactory record of integrity and business ethics including satisfactory compliance with the law including tax laws, labor and employment laws, environmental laws, antitrust laws, and consumer protection laws; (e) have a satisfactory record of integrity and business ethics; (f) have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them; (g) have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and (h) be otherwise qualified and eligible to receive an award under applicable laws and regulations. [Ref. 10:9.104-1]

H. ORGANIZATION OF THE THESIS

Following this introductory chapter, Chapter II provides a brief background on the evolution of statutory requirements and procurement policies with respect to the use of past performance information. It discusses the application of past performance information in Department of Defense procurements, including current processes and procedures. Finally, it provides a review of past performance issues that have been addressed throughout the policy evolution.

Chapter III provides a brief description of the protest process and addresses protests where past performance was an element of the protest. The protests are broken down into sustained and denied categories and case principles are identified.

Chapter IV provides a brief description of the claims' process and reviews those claims where past performance was an element of the claim. The claims are broken down into upheld and dismissed categories and case principles are identified.

Chapter V documents common elements between the Comptroller General's decisions and the rulings handed down by the Court of Federal Claims. Next, the GAO's protest decisions and the Courts' interpretations of the statutory requirements are analyzed in terms of current procurement policies to determine if acquisition professionals are allowed more or less discretion in making responsibility determinations and best value decisions. This chapter also examines circumstances likely to draw a protest or claim.

Chapter VI provides conclusions, recommendations, answers to the research questions and includes suggested areas of further research.

II. BACKGROUND

A. PURPOSE

The purpose of collecting past performance information (PPI) is to evaluate a contractor's history of performance to determine the degree of risk associated with contract performance. The collection and use of past performance information motivates contractors to improve their performance because of the potential use of that information in future source selections. PPI is useful as a means of communication, providing feedback and additional performance incentives for ongoing contracts. Acquisition reform efforts have led the Department of Defense (DoD) to implement initiatives and policies that have placed a greater emphasis on the use of contractor past performance information in source selection evaluations. As DoD budgets have continued to shrink, it has become increasingly important for acquisition personnel to select those sources that represent the best value for the DoD.

To accomplish this, the Federal Acquisition Regulation (FAR) allows acquisition professionals to make trade-offs between cost or price, past performance and technical ratings. Contracting officials are given a significant amount of flexibility in how they evaluate past performance information, and thus it is one of the most subjective decisions in the source selection process. The relative importance of past performance varies depending on the type of acquisition and the amount of performance risk that is involved. When two or more offerors are rated the same in the source selection process, based on an evaluation of

both cost and technical merits, past performance information becomes the discriminating factor in the selection. DoD acquisition professionals will always choose the offeror whom they believe will be successful in performing the requirement and past performance may be a good indicator of future success.

B. EVOLUTION OF PAST PERFORMANCE REQUIREMENTS

The Competition in Contracting Act (CICA) of 1984 was the first law to advocate the use of past performance information in the source selection process. The law did not specifically identify past performance information in the text of the Act but it did state:

An executive agency in conducting a procurement for property or services shall obtain full and open competition through the use of competitive procedures in accordance with the requirements of this title and the Federal Acquisition Regulation. [Ref. 6]

The competitive procedures referred to in the Act included promoting competition to the maximum extent possible by using factors other than just cost. One of the other factors to be considered was past performance information.

In 1986, President Reagan's Blue Ribbon Commission, the Packard Commission, on Defense Management recommended that the defense industry take action to eliminate inefficiencies and improper practices in the acquisition process. It included a recommendation that law and regulations include increased use of commercial style competition, emphasizing quality and past performance as well as price. The actual use of PPI in the source selection process took several years to develop within DoD.

This delay caused DoD to spend money on contractors with poor performance records. A 1993 General Accounting Office (GAO) report noted:

The General Services Administration's failure to consider past performance on 285 contracts it awarded between 1988 and 1991 caused it to unnecessarily spend more than \$1 billion on contractors with poor performance records. [Ref. 7:p. 6-9]

The use of past performance information was written into policy that same year. The Office of Federal Procurement Policy (OFPP) issued policy Letter 92-5, which for the first time specifically addressed past performance information in the source selection process. In this letter, OFPP recognized the importance of past performance information and acknowledged that several agencies had already successfully established policies and procedures for collecting, recording and using past performance information as a tool to aid in the source selection process and to improve contractor performance. The letter set specific policy mandating the following requirements:

- All new contracts exceeding \$100,000 would have past performance evaluations completed on them. Evaluations would be made during contract performance and at the completion of the contract.
- In accordance with FAR Part 9.1, past performance would be used in making responsibility determinations in both sealed bid and competitive negotiations.
- In competitive negotiations that were expected to exceed \$100,000, past performance would be used as an evaluation factor.

- Newly established firms would be allowed to compete for contracts even though they lack a history of past performance.

The OFPP Policy Letter 92-5 was incorporated into the FAR within 210 days and made the use of past performance information a standard policy. Before the FAR Council incorporated the changes, the Federal Acquisition Streamlining Act (FASA) was passed making the OFPP policy requirements into law. The FAR Council released Federal Acquisition Circular (FAC) 90-26 that became effective on May 30, 1995, mandating the use of past performance as an evaluation factor for all solicitations with an estimated value of:

- \$1,000,000 issued on or after July 1, 1995
- \$500,000 issued on or after July, 1997
- \$100,000 issued on or after January 1, 1999

The Federal Acquisition Reform Act of 1996 (Citation) incorporated past performance requirements into its many pages as well. After the issuance of OFPP 92-5 and the statutes that followed, past performance information was incorporated into the policies, programs and acquisition procedural manuals throughout the Department of Defense. In February of 1997 both the DoD and the Department of the Navy (DoN) established their own Past Performance Integrated Product Teams (IPTs) to develop a uniform methodology for the collection and use of past performance information.

In November of 1997, The Honorable Jacques S. Gansler, Under Secretary of Defense for Acquisition,

Technology and Logistics wrote a Memorandum concerning the collection of past performance information in the Department of Defense. The memorandum mandated that all Services begin collecting past performance report cards and to use this performance information in source selection for future contracts effective February 1, 1998. It outlined how the DoD IPT, chartered earlier in the year, had developed a solid plan to reach the objectives of developing a uniform management approach for the collection of past performance information. The policy contained in the attachment to the memorandum was a refinement of the current policies in the FAR Parts 15, 19 and 42.

In July 2000, the Department of Defense launched the Past Performance Automated Information System (PPAIS). The primary purpose of PPAIS was to take each of the Contractor Performance Assessment Rating databases that were created by each of the Services within DoD and put them in one location. This single database was designed to give source selection officials the ability to enter one site to retrieve report card information on the performance of DoD contractors.

C. CURRENT APPLICATION OF PPI IN DOD PROCUREMENT

In May 2001, The Office of the Under Secretary of Defense For Acquisition Reform released A Guide to Collection and Use of Past Performance Information. [Ref. 1] The guide was designed for use by the both the acquisition workforce in the Department of Defense and industry. It explained best practices for the use of past performance information during the periods of source selection, ongoing performance, and collection of

information. The following is a list of the guide's 10 most important tips on working with past performance information.

- FAR rules apply to all past performance information, however and whenever collected. This includes ensuring that contractors have the opportunity to comment on adverse PPI on report cards as well as other PPI gathered under less formal collection methods.
- PPI is "For Official Use Only" and "Source Selection Sensitive Information" and should be so marked.
- The performance assessment process continues through contract performance assessments of award fee and past performance.
- The narrative is the most critical aspect of PPI assessment.
- Performance assessments are the responsibility of the program/project/contracting team, considering the customer's input; no single office or organization should independently determine a performance assessment.
- Performance assessments should be developed throughout the period of contract performance, and not held to the end of the performance period.
- Use and evaluation of PPI for a specific acquisition should be tailored to fit the needs of each acquisition and clearly articulated in the solicitation.
- Source selection officials should use the most relevant, recent PPI available in making the source selection decisions. They must consider updated information provided by the contractor

regarding relevant PPI.

- Personnel collecting PPI for use in a particular source selection should consider whether the data received comes from reputable and reliable sources.
- The Government should share all relevant PPI with contractors as part of the past performance evaluation during the source selection process, and must share adverse PPI on which contractors have not had the opportunity to comment.

The PPI guide goes into great detail breaking down the tips and explaining the different components of past performance information that should be considered within the context of each tip. It also provides answers to common questions, key definitions, and references, and offers examples of how to obtain, weigh and rate past performance data. Past performance should be of equal weight with other non-cost criteria in a trade-off evaluation process. Rating areas for past performance are quality, timeliness, cost control, business relations, customer satisfaction, and key personnel. While each of the Services has developed its own automated solution, the only mandatory requirement is the assignment of one of five ratings of contract performance: exceptional (5)-significantly exceeds requirements; very good (4)-meets all and exceeds some requirements; satisfactory (3)-meets all requirements; marginal (2)-does not meet some requirements; and unsatisfactory (1)-does not meet requirements and recovery in terms of cost and schedule is unlikely. Table 2.1 is a list of DoD PPAIS developed by the researcher from information at PPAIS website that is administered by the

Naval Sea Logistics Center Detachment Portsmouth. [Ref. 38]
 The PPI guide also contains pertinent GAO rulings, specific business sector information, reporting thresholds, reviewing official requirements, performance assessment elements and a discussion of PPI collection techniques.

Agency	System Nomenclature	Points of Contact	Phone Number
National Institute of Health	Contractor Performance System	Ms. Jo Ann Wingard	301-496-1783
Army	Past Performance Information Management System (PPIMS)	Barbara Mather	703-681-9158
	Architect-Engineer Contract Administration Support System(ACASS)	Donna Smigel	202-761-0336
	Construction Contractor Appraisal Support System(CCASS)	Marilyn Nedell	503-808-4590
Navy	Product Data Reporting and Evaluation Program (PDREP)	John Deforge	603-431-9460
	Contractor Performance Assessment Reporting System (CPARS)	Wendell Smith	603-431-9460
Air Force	CPARS	Ms. Lois Todd	937-257-4657
Defense Logistics Agency	Automated Best Value System (ABVS)	Melody Readdon	703-767-1362
Defense Information Systems Agency	Contractor Past Performance Evaluation Toolkit	Mary Jenkins	703-681-1673

Table 2.1 Automated Past Performance Information Systems

D. PAST PERFORMANCE INFORMATION ISSUES

Many of the issues debated prior to the passage of the FASA in 1994 are still debated today. The use of past performance was criticized by the defense industry as being too subjective of a criterion for determining the award of contracts. Industry pushed for FASA to include an administrative process to challenge derogatory past performance information and to establish mandatory and uniform criteria. They also wanted a fixed period of time that past performance information could be retained and used in source selections. Despite such recommendations, Congress did not provide agencies with specific guidance for considering past performance information. Instead, FASA simply designated past performance information as a factor in source selection process by stating:

Past contract performance of an offeror is one of the relevant factors that a contracting official of an executive agency should consider in awarding a contract. It is appropriate for a contracting official to consider past performance of an offeror as an indicator of the likelihood that the offeror will successfully perform a contract to be awarded by that official. [Ref. 11:Sec 1091]

The Office of Federal Procurement Policy established policies for evaluating past performance information, automating the collection of the information, and limiting the period that past performance information would be maintained. OFPP instituted the changes by publishing Federal Acquisition Circular 90-26. The proposed changes were published in the Federal Register to allow public comment prior to finalization. A public meeting was advertised and held in the White House Conference Center on

May 6, 1994. Persons and organizations were invited to present ideas or suggestions on how past performance information could be used in the source selection process. Representatives from both Government agencies and industry attended the public meeting to voice their support or concerns about the use of past performance information. The following paragraph summarize some of the key arguments, both for and against the use of past performance information, that were discussed in the minutes of the public hearing. [Ref. 36]

Proponents of using past performance information as a source selection evaluation criterion claimed the benefits included an improved evaluation process, risk mitigation, emulation of best commercial practices, and stronger working relationships with the industrial base. They believed the first benefit of using past performance information in source selection was its potential for improving the evaluation process. This was based on the premise that historical behavior was an effective predictor of future behavior and that it allowed source selection panels to favor quality suppliers, which leads to a greater probability of satisfying customer requirements. They also argued the process could be improved by eliminating some of the subjectivity that is inherent in the evaluation process, such as tendencies to favor attractive proposals. Assessing past performance is one means of awarding contracts to good performers vice good proposal writers.

A second proposed benefit was that the use past performance information evaluations could be an effective risk-mitigating tool. While it would require additional

costs to manage PPI, favoring contractors with a higher probability of good performance would help mitigate the risks associated with performance. They argued that this mitigation of risk would reduce life cycle costs through improved reliability and supportability.

Finally, the use of past performance in source selection is common in the commercial sector and consistent with the trend toward long-term supplier relationships. Corporations customarily award follow-on business to proven performers. The investment community uses past performance as an indicator of future results and returns, and rates businesses accordingly. Using past performance is an example of a best commercial practice, which DoD seeks to emulate.

There were many concerns within the defense industry about the application of past performance information in the selection process. Those attending the public meeting submitted more than 35 comments, and the following list summarizes most of their specific concerns:

- No standard method for maintaining past performance data.
- New contractors would not be able to compete.
- One bad performance assessment may have the same effect as debarment.
- Criteria used in performance assessments are too subjective.

- Contracting officers could use performance assessments as a way to censure contractors who file disputes or protests.

First, industry argued that past performance might not be indicative of future accomplishments or effective measures of future performance. Although a company might perform well by delivering exactly what a contract requires, it may nonetheless receive poor marks on a customer satisfaction survey. Contractors expressed concern that one negative report could limit a company's competitive standing and could effectively become a de facto debarment. There was the concern that a poor performance evaluation on a single contract might be used repeatedly to deny an offeror contract awards. Moreover, in cases where past performance was negative, the offeror might be highly motivated to improve its track record by incorporating lessons learned in their current operation but be unable to get future awards to do so. Industry feared that instead of indicating future successes or failures, the past performance evaluation might turn into a subjective tool for agencies to use arbitrarily in selecting business partners. Because of these concerns, companies might refrain from applying for contracts, thereby decreasing competition and increasing costs to DoD.

Secondly, industry believed it would be impossible to create a feasible standardized approach for the collection and use of past performance information due to the volume and variety of the procurement actions within DoD. They argued that legal requirements to evaluate PPI would increase the administrative burden on the contracting

officer and lead to increased requirements for manning resources. They believed the process would increase costs of data collection, maintenance and verification for both DoD and prospective offerors, resulting in higher award and proposal development costs.

A third area of concern was that the increased weight of evaluating past performance in source selection would serve as a barrier to entry, keeping new and small firms out of the Federal market. According to the rules, a new contractor or any contractor without past performance was rated neutrally with respect to past performance. That rule had the potential to put a new contractor at a disadvantage when competing against old contractors with past performance even if the old contractors' performance was only satisfactory. This would result in a decrease in competition and could serve to increase the cost of goods and services for the Department of Defense. There was also concern from the commercial sector that the use of past performance information unfairly favored the incumbent. An Association of Proposal Management Professionals (APMP) position paper stated:

We, in industry, are concerned that the result of the past performance emphasis will be evaluations that favor the incumbent contractor. While the FASA rule states that similar experience in any agency or commercial entity is acceptable and that the lack of experience is to be a neutral evaluation point, actual practice is resulting in higher scores for the incumbent and no bidding by qualified companies who are concerned about past performance evaluation. In fact, in several recent procurements, the stated general evaluation criteria in Sections L and M and the evaluation sub-factors appeared to favor the incumbent contractor. The past performance

measures appeared to be tied specifically to experience that could only be possessed by the incumbent and its employees. While this issue was addressed through questions, no clarification was provided, nor were any changes made to the evaluation factors. The award was subsequently made to the incumbent. [Ref. 35]

A fourth area of concern was the subjectivity of past performance rating areas. A fear among contractors was that contracting officers and program managers might use the new rules to penalize them for protests by giving them a poor performance evaluation.

The characterization of an offeror's past performance is frequently controversial. The genesis of an offeror's problems with performance of a particular contract might be due to its own inefficiency or in the manner of administration by the Government. Should an offeror become embroiled in a good faith contract performance dispute, the collateral effects of that might now reach well beyond the contract at issue. Should those particular Government contract administrators choose to characterize the contractor as a poor or even mediocre performance risk, the contractor may be significantly impaired in its ability to obtain additional Government work, even if it offers a clearly superior technical proposal at an otherwise competitively advantageous price. [Ref. 13:p.42]

E. SUMMARY

The FAR requires the collection and use of past performance information in the source selection process, and the latest Guide to Collection and Use of Past Performance Information goes to great lengths to make the process as fair as possible. The purpose of collecting and using past performance information in the source selection process is a valid one, as are the concerns presented by

the defense industry and the commercial sector. Unfortunately, FASA did not provide an administrative process to challenge derogatory past performance information or establish mandatory and uniform criteria. Nor did it set a fixed period of time that past performance information could be retained and used in source selections as desired by the commercial sector. However, the concerns expressed by industry were considered during the drafting of the Federal Acquisition Circular 90-26, which included specific guidance on the use of past performance information as a criterion for source selection as well as the schedule for implementation. It also limited the time past performance information could be retained to a three-year period. This provision was included to alleviate fears in the commercial sector that a contractor would never be able to overcome a bad performance rating.

The next chapter will look at the protest process and how the Comptroller General has dealt with recent past performance protests. It will also provide a list of the remedies available to the Comptroller General and a breakdown of some of the common grounds for protests. Finally, it will identify case principles from both sustained and denied past performance protests.

THIS PAGE INTENTIONALLY LEFT BLANK

III. PAST PERFORMANCE PROTESTS

A. INTRODUCTION

This chapter begins with an overview of the GAO Comptroller General protest process. It then examines protests that were filed from July 1, 2000 to September 30, 2001 where past performance was an element of the protest. The protests are then broken down into sustained and denied categories and the case principles are identified.

B. THE PROTEST PROCESS

The following is an explanation of the protest process as set forth in the General Accounting Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts 4CFR Part 21, effective date August 8, 1996. [Ref. 12]

The process begins when an interested party files a written protest with the General Accounting Office no later than 10 days after the basis for the protest is known or should have been known. A protest challenging a procurement conducted on the basis of competitive proposals, where a debriefing has been requested, shall be filed not later than 10 days after the date on which the debriefing is held.

An interested party may protest a solicitation for a contract for the procurement of property or services; the cancellation of such a solicitation; an award or proposed award of a contract; and the termination of a contract, if the protest alleges that the termination was based on improprieties in the award of the contract. [Ref. 12:p.2]

The protest must include:

- The name, address and telephone number of the protester,
- Be signed by the protester or its representative,
- Identify the contracting agency and the solicitation number and/or contract number,
- Set forth a detailed statement of the legal and factual grounds of protest including copies of relevant documents,
- Set forth all information establishing that the protester is an interested party for the purpose of filing a protest,
- Set forth all information establishing the timeliness of the protest,
- Specifically request a ruling by the Comptroller General of the United States, and
- State the form of relief requested.

The protester is required to notify the Contracting Officer within one calendar day of filing with the GAO. The GAO is required to notify the agency within one day as well. Once the Contracting Officer is notified of a protest, he is required to notify other interested parties, including the otherwise successful awardee within three days. The procurement action is automatically suspended when a protest is received. If a protestor fails to notify the Contracting Officer, the GAO can dismiss the protest.

If the protest is not dismissed due to procedural or substantive defects it becomes a merit protest. The

contracting agency is required to file a report on the protest with GAO within 30 days. The report includes the contracting officer's statement of the relevant facts, a best estimate of the contract value, a memorandum of law, and a list of all relevant documents. A copy of the report must be provided to the protestor as well. The protestor is then given 10 days to file comments on the agency's report. The protestor can file comments on the report or request that the case be decided on the existing record. The GAO has 100 calendar days to make a decision from the time a protest is filed. Protests may be denied or sustained. If sustained, the Comptroller General can recommend that the contracting agency implement any combination of the following remedies as stipulated in the Code of Federal Regulations. [Ref. 12:p.9]

- Refrain from exercising options under the contract;
- Terminate the contract;
- Re-compete the contract;
- Issue a new solicitation;
- Award a contract consistent with statute and regulation; or
- Such other recommendations that GAO determines necessary to promote compliance.

The Defense Acquisition University's Government Contract Law Course Text listed the following as some of the more common grounds for a protest. [Ref. 7]

- Improper Agency evaluation: Where a procuring agency, having announced the award criteria for a procurement, fails to follow that criteria. Examples include when an agency relaxed the announced criteria; imposed additional unannounced criteria, and/or failed to follow existing criteria. Another example is when an agency conducted an improper cost to technical trade-off analysis in a negotiated procurement. Where the agency has done an improper analysis, a protest may be brought before the GAO.
- Lack of Meaningful Discussions: In a negotiated procurement, Federal agencies must hold discussions with all offerors within the competitive range. During these discussions, the agency must point out to the offeror deficiencies and weaknesses in its proposal. The agency must tell the offeror where its proposal can be improved upon. Where the discussions are general in nature, the offeror may file a protest with the GAO claiming that discussions were not "meaningful" with the agency.
- Defects in the Solicitation: Defects apparent on the face of the solicitation may be brought before the GAO for a decision on whether or not the solicitation was defective. Examples of solicitation defects include instances of ambiguities in the requirements solicited, where a brand name has been solicited without a statement that a product of equal functionality will also be acceptable, and/or the requirements of the solicitation are overly restrictive such that competition is diminished.
- Cancellation of a Solicitation: A protest may be brought where, after bids have been opened or offers accepted, the agency cancels the procurement and the cancellation is not supported by a rational basis.
- Improper Exclusion from the Competitive Range: The GAO will closely scrutinize protested

procurements where only one competitor has been determined to fall within the competitive range. Although the determination of a competitive range is one primarily within the discretion of the agency, the GAO will closely scrutinize the selection of only one competitor as falling within the competitive range to ensure that the procurement is being conducted fairly and without agency bias.

- **Cost Realism:** Contracting officers are required to perform a cost analysis when cost or pricing data is required. When that analysis is done in a mechanical manner with little or no independent analysis, GAO will review the cost analysis and determine its appropriateness.
- **Changes/Changed Conditions:** Many times an agency will issue changes to an already published solicitation due to changing Government needs. These changes can include modifying the scope of work to canceling the procurement in its entirety. The GAO looks for evidence of a "cardinal change," one that improperly exceeds the scope of the procurement. If a change to a solicitation is one that could have been reasonably anticipated by offerors, then the GAO normally will uphold the change as valid; but if the change is one which could not have been anticipated, then the GAO may recommend that the procurement be canceled and re-bid.
- **Bias or Bad Faith on the Part of the Agency:** Protests brought on the basis of agency bias or bad faith, require evidence of specific and malicious intent. The GAO will not accept as evidence of bias or bad faith unsupported allegations by a protester who may be disappointed in the results of a particular procurement. While many protesters have complained about agency bias, few have had their protests sustained on those grounds.

Once a GAO protest decision is made, the procurement action is no longer suspended, freeing the affected Federal agency to accept or reject the GAO's non-binding advisory recommendation. Any decision offered may also include a recommendation that the agency reimburse the protesting contractor for its costs of consultants and expert witnesses. While most GAO recommendations are followed, the GAO does not have the authority to force its decisions upon agencies of the Executive Branch. The GAO reports all instances of non-compliance to Congress in an annual report.

C. SUSTAINED PROTEST BREAKOUT

From July 2000 through September 2001, there were 256 merit protests decided by the GAO. Of those 256 protests, a total of 50 or 19.5% listed past performance as an element of the protest. Of the 50 protests that listed past performance as an element of the protest, the GAO sustained only three. Two of the sustained protests occurred in Fiscal Year 2000 and one occurred in Fiscal Year 2001. The data presented in Table 3.1 were developed by the researcher from information obtained from the Comptroller General's Office and a comprehensive review of the protests involving past performance. Protest information for years 1997 through 1999 was taken from historical data presented in Mark F. Walkner's thesis: A Model for the Effective Integration of Past Performance Information Into Organizational Acquisition and Contracting Processes [Ref. 34:p.36] An in-depth analysis of the data will be conducted in Chapter V.

GAO's Bid Protest Statistics (Fiscal Years)					
	1997	1998	1999	2000	2001
Merit Protests (Sustained & Denied)	501	406	347	306	226
Protests Sustained	61	63	74	63	61
Sustainment Rate (%)	12%	16%	21%	20.6%	27%
Past Performance Statistics (Fiscal Years)					
	1997	1998	1999	2000	2001
Past Performance Protests (Sustained & Denied)	40	43	62	60	35
Protests Sustained	6	13	15	15	1
Sustainment Rate (%)	15%	30%	24%	25%	2.8%
Comparison of GAO Statistics & Past Performance Statistics (Fiscal Years)					
	1997	1998	1999	2000	2001
Past Performance Protests as a Percentage of Merit Protests	8%	11%	18%	19.6%	15.4%
Past Performance Protests as a Percentage of Sustained Protests	10%	21%	21%	23.8%	1.6%

Table 3.1 Past Performance Protests

Figure 3.1, was originally developed by Mr. Walkner from an analysis of forty-one sustained past performance protests from Fiscal Year 1998 through the first three quarters of Fiscal Year 2000. [Ref. 34:p.38] It provides a breakdown of the sustained protests into different categories and has been updated by this researcher to reflect the sustained past performance protests in last quarter of Fiscal Year 2000 and Fiscal Year 2001. There were only three sustained past performance protests in the last 15 months and only one of those occurred in Fiscal Year 2001. However, there were 50 past performance protests that were deemed to have merit by the Comptroller General during that time period. Both the sustained and denied protests will be examined for lessons learned within the context of the categories in Figure 3.1.

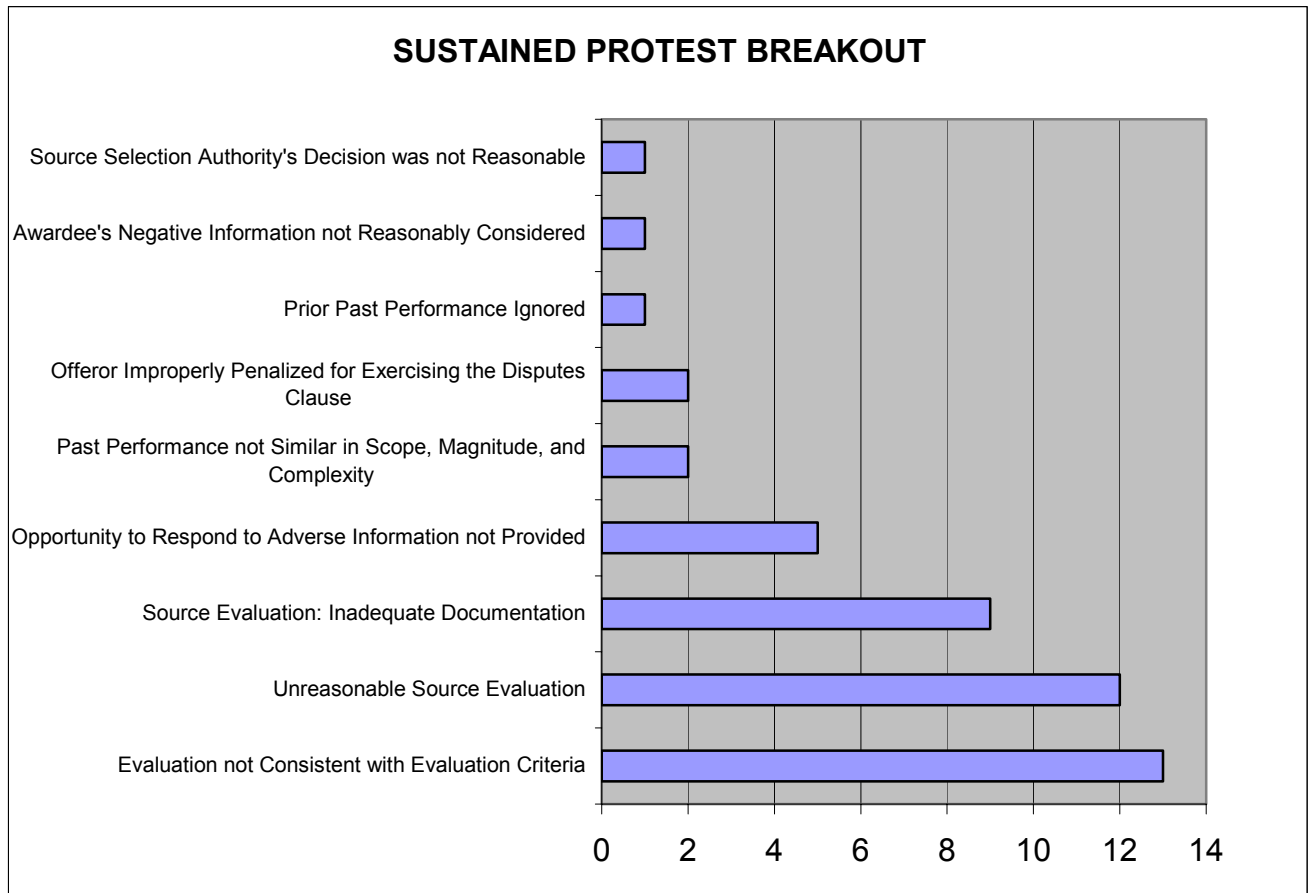


Figure 3.1 Past Performance Sustained Protests

The 50 past performance protests are categorized below based on the focus of their principle argument:

- 29 protested that the agency's source evaluation was unreasonable;
- 17 protested that the source selection evaluations were not consistent with the evaluation criteria;
- Two argued inadequate opportunity to respond to adverse information;
- One protested that there was inadequate documentation of the source evaluation; and

- One protested the improper application of a FAR clause.

The principal arguments of the protests make it possible to separate the protests in terms of the reasonableness of the source evaluation and arguments involving the evaluation criteria but the two are inextricably linked in GAO's examination process. When determining the reasonableness of the source evaluation, GAO examines the agency's evaluation to ensure that it is reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations.

D. CASE PRINCIPLES

Representative protests will be discussed from each category to identify the case principles that apply. The protest will be identified and the protestor's position will be briefly reviewed. Next, the process the Comptroller General used to review the case will be noted and each ruling will be linked to the key case principle that the Comptroller General relied upon in either sustaining or denying the protest.

1. Reasonableness of Source Evaluations and Consistency with Evaluation Factors

a. *Matter of: Beneco Enterprises, Inc., B-283512.3, July 10, 2000*

In this case the protestor's (Beneco Enterprises, Inc.) principal argument was that the past performance evaluation of the awardee (Hammer LGC, Inc.) was improperly based on the experience of Hammer's key personnel rather than on Hammer's performance under prior contracts. Also that the agency unreasonably evaluated the past performance of Hammer's key personnel to be equal to the past

performance of Beneco's corporate past performance, and that the resulting source selection was unreasonable. The Comptroller General sustained the protest on the principle that:

In reviewing a protest of an agency's evaluation of proposals, we examine the record to ensure that the agency's evaluation was reasonable and consistent with the terms of the solicitation. [Ref. 15]

The agency stated that it considered Beneco and Hammer to be tied under the past performance evaluation. GAO concluded that the record of evaluation provided no reasonable basis to support the agency's finding. Specifically, the agency considered Hammer to be a new entity, apparently in order to justify evaluating past performance based on one of Hammer's key employees. An RFP provision stated that the past performance for an offeror that is a "newly formed entity" "without prior contracts" can be based on past performance information for all key personnel. Hammer did not claim to be a new entity without prior contracts but instead listed many contracts that they had been awarded for similar projects. GAO determined that the agency's consideration of Hammer's key personnel in evaluating that firm's past performance, in lieu of that entity's past performance on the contracts it had completed, was not consistent with the RFP evaluation scheme. GAO also called the agency's judgment flawed when it rated one person's performance as a project manager under one job order prime contract as essentially equivalent to all of Beneco's performance under that same contract and many other job order prime contracts.

b. Matter of: Green Valley Transportation, Inc., B-285283, August 9, 2000

In this case, the protestor's (Green Valley Transportation, Inc.) principal argument was that the agency's evaluation was faulty. In its comments, the firm specifically argued that the agency improperly failed to consider all the information available to it when evaluating proposals under past performance actions. Green Valley argued that the evaluation team improperly discounted its volume of shipments in rating its proposal. The protestor asserted that it had fewer negative performance actions relative to its number of shipments than one offeror with a higher rating and fewer than another offeror with the same rating. After reviewing the records, the Comptroller General ruled that it was unreasonable for the agency to compare the absolute number of negative performance actions an offeror received, without considering that number in the context of the number of shipments the offeror had made over the relevant time period. The protest was sustained on the principle that:

The evaluation of an offeror's past performance is a matter within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based past performance ratings. However, we will question such conclusions where they are not reasonably based or are undocumented. [Ref. 22]

The GAO reviewed the pleadings, the evaluation materials, the proposals, and the explanations provided by the agency during a hearing, and concluded that the

agency's evaluation of the technical proposals with respect to the two past performance sub-factors was unreasonable.

c. Matter of: Gray Personnel Services, Inc., B-285002, June 26, 2000

In this case, the protestor's (Gray Personnel Services, Inc.) principal argument was that the agency's past performance evaluation was unreasonable. The protestor contended that it was unreasonably downgraded on past performance based solely upon a negative comment made by a Walter Reed Army Medical Center (WRAMC) contract administrator concerning Gray's low fill rate, referring to their ability to provide nursing staff when requested under a prior contract. Gray asserted that there was nothing in the current RFP that stated fill rates under prior contracts would be evaluated and that the availability of personnel in the region had caused the previous problems. The Comptroller General denied the protest on the principle that:

Agencies are required to evaluate proposals consistent with the RFPs stated evaluation criteria, including considerations reasonably and logically encompassed by the stated factors.
[Ref. 21]

The GAO ruled that consideration of Gray's fill rate under a prior contract was consistent with the RFP. The current requirement was for a contractor to provide qualified health care professionals for routine work schedules, as well as for additions to and surges in work requirements as required under delivery orders, and to provide competent substitutes as needed. The RFP specifically stated that, "the agency would consider an offeror's ability to provide quality personnel and to maintain schedules as part of the

past performance evaluation." GAO concluded that consideration of Gray's ability to provide nursing staff when requested under a prior contract was encompassed within the RFP's evaluation scheme.

d. Matter of: Birdwell Brothers Painting & Refinishing, B-285035, July 5, 2000

In this case, the protestor's (Birdwell Brothers Painting & Refinishing) principal argument was that the agency performed an unreasonable evaluation of its past performance because the agency accepted the opinions of the Government inspectors. The protestor asserted that the quality assurance evaluators (QAEs) did not have the capacity to judge whether performance problems should be attributed to a prime contractor or to a subcontractor. Birdwell contended that the agency should have reviewed the relevant contract files, which contained information on whether the prime contractor or the subcontractor was responsible for defects. This argument was not considered because the agency had only sent past performance questionnaires to the prime contractors identified by Birdwell in its proposal. The Comptroller General denied the protest on the two principles that:

An agency may base its evaluation of past performance upon its reasonable perception of inadequate prior performance, regardless of whether the contractor disputes the agency's interpretation of the facts. [Ref. 16]

A protestor's mere disagreement with the agency's judgment is not sufficient to establish that the agency acted unreasonably. [Ref. 16]

Even though the prime contractor is responsible for supplier management and for subcontract performance, the

GAO concluded that the agency's evaluation of "customer satisfaction" was reasonable where it considered specific examples of the protestor's past performance problems that had been noted by Government inspectors, even though the protestor was only a subcontractor in those examples.

e. Matter of: Symtech Corporation, B-285358, August 21, 2000

In this case, the protestor's (Symtech Corporation) principal argument was that NASA's past performance evaluation was unreasonable. The protestor asserted that the agency arbitrarily excluded two of the six references it had provided because they were deemed irrelevant to the procurement. Symtech also complained about the methodology the agency used to obtain past performance information from its references and that the approach improperly penalized offerors with no experience in some functional areas. The Comptroller General denied the protest on the principle that:

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. [Ref. 29]

The GAO concluded that, while the RFP requested a maximum of 10 references relevant to the procurement, it did not specify the number of references that the agency would contact for the purposes of the evaluation. Of the six references Symtech provided, the agency reasonably determined that two were for contracts or projects that had little or no relevance to the current requirement. To the

extent that Symtech challenged the questions, the GAO found nothing unreasonable about NASA seeking information about the offeror's performance on other contracts relative to the seven functional areas covered by the requirement.

f. Matter of: Menendez-Donnell & Associates (MDA), B-286599, January 16, 2001

In this case, the protestor's (MDA) principal argument was that it was improper for the agency to reject its proposal as unacceptable without first seeking to clarify its experience and past performance information, either by soliciting additional information from it, or by consulting the agency's own records, which contained information relating to its prior contracts. The protestor also asserted that, in the absence of past performance information, it was improper for the agency to rate its proposal as unacceptable but should have assigned a neutral rating instead. The Comptroller General denied the protest on the principle that:

Since an agency's evaluation is dependent upon the information furnished in a proposal, it is the offeror's burden to submit an adequately written proposal for the agency to evaluate, especially where, as here, the offeror is specifically on notice that the agency intends to make award based on initial proposals without discussions. An agency reasonably may reject a proposal for informational deficiencies that prevent the agency from fully evaluating the proposal. [Ref. 23]

The GAO disagreed with the protestor's contention that the agency was required to assign a neutral rating to its proposal based on the absence of information relating to its key subcontractors. Although FAR 15.305(a)(2)(iv) required an agency to assign a neutral rating where past

performance information was not available, the protestor's proposal represented that its proposed subcontractors were engaged in projects that could have illustrated their performance capability. The information was available but MDA chose not to include the information in its proposal.

2. Adverse Information

a. Matter of: TLT Construction Corporation, B-286226, November 7, 2000

In this case, the protestor's (TLT Construction Corporation) principal argument was against the agency's intention to rely on, among other things, information obtained from an electronic database to assess offeror's past performance. TLT believed this action was arbitrary and capricious because it did not guarantee an opportunity to respond to alleged negative past performance information in that database. The protester argued that the announced approach would effectively preclude TLT from competing under the RFP.

The past performance evaluation sources included all Army Corps of Engineers' Construction Contractor Appraisal Support System (CCASS) database factors relative to Timely Performance and/or communication with the points of contact listed by the offeror. The RFP stated that the offeror must have received an average satisfactory performance rating on all CCASS data related to Timely Performance with no individual factor rated unsatisfactory. The Comptroller General denied the protest on the principle that:

The record showed that TLT had had ample opportunity to comment on its unsatisfactory performance, the Contracting Officer reasonably could exercise her discretion in deciding not to communicate further with TLT regarding alleged

negative past performance information in the CCASS database. Given the permissive language of FAR 15.306(a)(2), the fact that TLT may wish to rebut or provide further comments on the information in the database does not give rise to a requirement that the Contracting Officer give TLT an opportunity to do so. [Ref. 30]

After reviewing the record, including the protestor's arguments, the agency's explanations and the procedures established for evaluating a construction contractor's performance, the GAO found no basis to object to the agency's approach under the RFP. The procedure required that contractors to be notified when an agency was preparing an unsatisfactory performance evaluation to permit the contractors to submit written comments on that evaluation. GAO found that the procedure had been followed and ruled in favor of the agency.

b. Matter of: NMS Management, Inc., B-286335, November 24, 2000

In this case, the protestor's (NMS Management, Inc.) principal argument was that the procurement was flawed because the agency failed to provide it and its team member, MC Contracting, an opportunity to comment on the adverse past performance information reported by the MC reference. The Comptroller General denied the protest on the principle that:

An agency has broad discretion to decide whether to communicate with a firm concerning its performance history. [Ref. 26]

The GAO concluded that the agency reasonably exercised its discretion in deciding not to communicate with NMS and MC regarding the adverse past performance information reported

by one of MC's contract references. GAO found no inconsistency between the reference's narratives and the overall marginal rating assigned for MC's performance of the particular contract. The fact that NMS and MC wanted to respond to the comments made by the MC reference did not give rise to a requirement that the agency give these firms an opportunity to do so.

3. Inadequate Documentation

In the matter of: Myers Investigative and Security Services, Inc., B-287949.2, July 27, 2001, the protestor's (Myers Investigative and Security Services, Inc.) principal argument was that GSA had solicited offers based on price alone but made the award decision after a consideration of both past performance and price. The protestor also asserted that GSA had improperly evaluated the past performance of the awardee and Myers and had failed to give Myers an opportunity to respond to adverse past performance information. The Comptroller General sustained the protest on the principle that:

GSA's decision not to defend against the protest, together with its statement that adequate documentation of the actual evaluation and selection does not exist, as, in effect, a concession that the evaluation and award decision were not done properly. In the absence of an evidence to show that the evaluation and award decision were properly done, and in view of GSA's decision not to defend itself against the protest, we sustain the protest. [Ref. 25]

4. FAR Application

In the matter of: Finlen Complex, Inc., B-288280, October 10, 2001, the protestor's (Finlen Complex, Inc.) principal argument was that the agency violated FAR 12.206,

which provides that, "past performance should be an important element of every evaluation and contract award for commercial items" by assigning a five percent weight to the past performance evaluation factor.

The Army argued that there was nothing inherently improper in assigning a weight of five percent to a past performance factor. They contended that FAR Part 12.206 was not mandatory, but discretionary; and that the requirements of the FAR were met by including past performance as an evaluation factor. The Army also asserted that it was an important element because it could be the determining factor in award in a close competition. The Comptroller General denied the protest on the principle that:

The agency's decision to assign a weight of 5 percent to a solicitation's past performance evaluation factor is not a violation of FAR Part 12.206 because the provision is discretionary, not mandatory. [Ref. 19]

The GAO did comment that the Army's approach to using past performance was inconsistent with the exhortation of the FAR, and with the general emphasis on past performance in all DoD procurements. Although the GAO's comments did indicate they believed a five percent weighting was inadequate or under-weighted, they refused to sustain the protest because the provision was not mandatory.

E. SUMMARY

In this chapter, the researcher reviewed the GAO protest process and provided a breakdown of past performance protests that were decided from July 01, 2000 to September 30, 2001. From the 50 past performance

protests, both sustained and denied, the researcher identified 10 case principles that will be used to develop lessons learned to assist Department of Defense acquisition personnel to more effectively incorporate PPI into the contracting process.

The next chapter will provide an overview of the claims process and review those claims where past performance was an element of the claim. The claims will be broken down into upheld and dismissed categories and the case principles identified.

THIS PAGE INTENTIONALLY LEFT BLANK

IV. PAST PERFORMANCE CLAIMS

A. INTRODUCTION

This chapter begins with a brief discussion of the background of the United States Court of Federal Claims. It then provides a brief overview of the claims process within the Court of Federal Claims and reviews those claims where past performance was an element of the claim from February 1997 through September 2001. The claims are then broken down into categories based on their principal argument and the case principles are identified.

B. THE CLAIMS PROCESS

1. Background and Jurisdiction

The Federal Courts Improvement Act recreated the United States Court of Federal Claims pursuant to Article I of the United States Constitution in October 1982. The Court consisted of sixteen judges nominated by the President and confirmed by the Senate for a term of fifteen years. It retained all the original jurisdiction of the Court of Claims that had operated for 140 years. Over the past two decades, the Court has been given new equitable jurisdiction in the area of bid protests, vaccine compensation, civil liberties, product liability and oil spills. The Court was named the United States Claims Court from 1982 until its name was changed as part of the Federal Court Administration Act of 1992.

The Court of Federal Claims is authorized to hear money claims founded upon the Constitution, Federal statutes, executive regulations, or contracts, express or implied-in-fact, with the United States. It has national

jurisdiction and is now made up of twenty-five active judges and senior judges who hear cases around the country at locations that are most convenient to the litigants and the witnesses.

On December 31, 1996, the Administrative Dispute Resolution Act of 1996 granted the court jurisdiction over both pre and post award protests.

The Dispute Resolution Act removed the Court's limited protest jurisdiction, a breach of the implied contract of fair consideration of bids or proposals; and substituted in its place the violation of statute or regulation protest jurisdiction that had been in place at the United States General Accounting Office (GAO) since passage of the Competition in Contracting Act of 1984. [Ref. 39]

It was within the public contracts jurisdiction that the Court was given new equitable authority in late 1996. Contract claims now make up a significant portion of the Court's workload. The Administrative Dispute Resolution Act of 1996 included the following provisions:

- Both the United States Court of Federal Claims and the district Courts of the United States shall have jurisdiction to render judgments on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district Courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

- To afford relief in such an action, the Courts may award any relief that the Court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.
- In exercising jurisdiction under this subsection, the Courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

2. Process

The claims process begins when a contractor files a claim with the Contracting Officer, who must then take action within 60 days. If the claim is less than \$100,000 the Contracting Officer must issue a decision within 60 days. If the claim exceeds \$100,000, the Contracting Officer has 60 days to issue a decision or notify the contractor of a reasonable time within which a decision will be issued. If the Contracting Officer fails to issue a decision within the 60 days, the contractor can consider the inaction a denial of the claim and file an appeal with the Board of Contract appeals within 90 days or he may file an appeal with the U.S. Court of Federal Claims within 12 months.

The rules of the Court of Federal Claims are based on the Federal Rules of Civil Procedures. The claims process is a civil action that begins when the complaint or appeal is filed with the Clerk of the Court of Federal Claims. The claim is then delivered to the United States, through delivery by the clerk, to the Attorney General. Once a claim is filed with the Court, the U.S. Attorney General's Office begins its representation of the Contracting Officer and his agency before the Court. The Contracting Officer

will then perform a supporting function by providing all documentation regarding the subject contract and claim to the assigned legal counsel.

C. CLAIMS BREAKOUT

From February 1, 1997 to September 30, 2001 there were 816 decisions issued by the Court of Federal Claims. Of the 816 claims, a total of 243 were contract related claims. Past performance was an element of the contract claim in 23 or 9.5% of the contract cases. Of the 23 claims that listed past performance as an element of the claim, the Court of Claims upheld only two. The data presented in Table 4.1 were developed by the researcher from information obtained from the Court of Federal Claims and a comprehensive review of the claims involving past performance.

Court of Claims Statistics (Calendar Years)					
	1997	1998	1999	2000	2001 (Dec-Sept)
Contract Claims (Upheld & Dismissed)	50	69	67	53	54
Contract Claims Upheld	10	13	13	10	7
Upheld Rate (%)	20%	18.8%	19.4%	18.9%	13%
Past Performance Statistics					
	1997	1998	1999	2000	2001
Past Performance Claims (Upheld & Dismissed)	6	3	7	2	7
PPI Claims Upheld	0	0	2	0	0
Upheld Rate (%)	0	0	28.5%	0	0
Comparison of Court Statistics & Past Performance Statistics					
	1997	1998	1999	2000	2001
Past Performance Claims as a Percentage of Contract Claims	12%	4.3%	10.5%	3.7%	13%
Past Performance Claims as a Percentage of Upheld Claims	0	0	15%	0	0

Table 4.1 Past Performance Claims

The 23 past performance claims are categorized below based on the focus of their principal argument:

- 12 claimed that the agency's source evaluation was unreasonable, arbitrary and capricious;
- Four claimed that the source selection evaluations were not consistent with the evaluation criteria;
- Four claimed the past performance information evaluation was improper or unlawful;
- Two argued lack of meaningful discussions with regard to past performance information; and
- One claimed overly restrictive solicitation.

When determining the reasonableness of the source evaluation, the Court of Federal Claims examined the agency's evaluation to ensure that it is reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations.

D. CASE PRINCIPLES

Representative claims will be discussed from each category to identify the case principles that apply. The claim will be identified and the claimant's position will be briefly reviewed. Next, the process the Court of Federal Claims used to review the case will be noted and each ruling will be linked to the key case principle that the Court relied upon in either upholding or dismissing the claim.

1. Reasonableness of Source Evaluation and Consistency with Evaluation Factors

a. Matter of: Unified Architecture & Engineering, Inc., 99-514C, February 25, 2000

In this case, the plaintiff's (Unified Architecture & Engineering, Inc.) principal argument was that the defendant disregarded the relative importance of the evaluation factors identified in the solicitation under the guise of a best value selection. The plaintiff argued that the defendant's award decision was based solely on the experience and past performance factors rather than the factors specified in the solicitation. Specifically, the plaintiff alleged that NASA disregarded Unified's higher mission suitability score and lower evaluated probable price, and relied only on the experience and past performance factor.

The Court held that the administrative record showed that the Source Selection Authority (SSA) had considered all three evaluation factors detailed in the solicitation. The solicitation required that the evaluation factors be treated approximately equal but also required the SSA to select the best value contractor. In the source selection decision, the SSA acknowledged that Unified was rated higher than Gilcrest (awardee) in the mission suitability factor and that the proposals were "essentially equal" with respect to the cost/price factor. In the final evaluation factor, experience and past performance, the SSA noted a clear distinction between Gilcrest's and Unified's proposals, which was attributed to Gilcrest's familiarity with the Glenn Research Center facilities and systems. The SSA concluded that the

strength of the Gilcrest's past performance and familiarity with the facilities significantly lowered performance risk, which justified its selection over Unified's small numerical scoring advantage.

The Court found that the SSA provided adequate rationale in his selection document to support his determination that Unified's higher mission suitability score was more than offset by Gilcrest's superior experience and past performance rating. The administrative record illustrated that the SSA did not arbitrarily discount Unified's higher mission score as the plaintiff contended, but that the SSA considered it along with the other two evaluation factors as required by the evaluation scheme established in the solicitation. The Court dismissed the claim on the principle that:

The determination of what constitutes an advantage over other proposals and what features would be beneficial to NASA was within the discretion of the Source Selection Authority.
[Ref. 31]

The Court concluded that the SSA's best value decision was made in accordance with the evaluation scheme outlined in the proposal, grounded in reason, and was completely within the SSA's discretion.

***b. Matter of: Seattle Security Services, Inc.,
99-139C, January 28, 2000***

In this case, the plaintiff's (Seattle Security Services, Inc.) principal argument was that the defendant's failure to evaluate the past performance of the incumbent contractor was arbitrary and capricious. The plaintiff was the incumbent contractor for the services being solicited,

providing armed guard services for Federal office buildings and courthouses in the states of Washington and Oregon. The plaintiff argued that if the contracting officer had evaluated the Washington and Oregon contracts on a combined basis, instead of excluding the Oregon contract, it would have received the highest past performance score among the offerors and thus, received the contract award.

The contracting officer stated that she did not review the plaintiff's past performance on the Oregon contract because she was the contracting officer for that contract and was concerned that it would appear prejudicial if she evaluated the plaintiff on that contract.

While reviewing the record, the Court conceded that agency personnel are generally given great discretion in determining what references to review in evaluating past performance and that there is no requirement that all references listed in a proposal be checked. However, the Court stated that the "exercise of this discretion obviously must be reasonable--and here it was not." [Ref.30:p.9] The Court upheld the claim, basing its ruling on a previous GAO decision, on the principle that:

Some information is simply too close at hand to require offerors to shoulder the inequities that spring from an agency's failure to obtain and consider the information. The contracting officer may not disregard the past performance of an incumbent on the very contract to be re-solicited. [Ref. 27]

The Court ruled that the contracting officer had ignored some of the most relevant past performance information of the plaintiff by not considering the performance of the incumbent at the very facilities covered

by the new contract. The result was arbitrary and capricious as to the incumbent since the solicitation emphasized that "each offeror would be evaluated on his performance under existing and prior contracts for similar products or services." The Court also commented that it has been repeatedly held by the GAO that it is proper for evaluators to use their personal knowledge of an offeror's performance of a contract with an agency.

c. Matter of: Miller-Holzwarth, Inc., 98-576C, January 6, 1999

In this case the plaintiff's (Miller-Holzwarth, Inc.) principal argument was that the terms of the solicitation rendered the apparent awardee, OPTEX Systems, Inc., ineligible for the "superior" past performance rating that it was given. The plaintiff argued that OPTEX had not yet produced a single production unit periscope in the three-year evaluation period prior to the solicitation. Therefore, the Army could not meaningfully evaluate its production and manufacturing capability and should not have considered OPTEX's past performance on the Abrams contract. The plaintiff also argued that the Army's evaluation ignored the significance of delays encountered by OPTEX during the performance of the Abrams contract.

The Court noted that assessing some aspects of OPTEX's past performance would have been difficult if the Army had been restricted to only examining performance prior to the issuance of the solicitation as argued by the plaintiff. However, the Court went on to show that the same documents upon which the plaintiff relied for its argument also indicated that OPTEX deliveries were ahead of schedule for the quarter following the issuance of the

solicitation. The Court dismissed the claim based on the principle that:

No provision in the solicitation precluded the Army from considering OPTEX's performance after the date the solicitation was issued. Contrary to the plaintiff's position, it would be unreasonable under the terms of the solicitation, and no less unfair to each offeror, if the Army were to disregard meaningful and pertinent information that could only render a more informed and considered award decision. [Ref. 24]

The Court also noted that the plaintiff's assertion, that performance delays on the Abrams contract should have precluded OPTEX from receiving the highest past performance rating, was not considered in the correct context. The initial evaluation of OPTEX's performance on the Abrams contract plainly stated that there were Government caused delays due to the need to incorporate Engineering Change Proposals. Nothing on the evaluation forms indicated that OPTEX caused any of the delays.

2. Past Performance Evaluation was Unlawful or Improper

a. Matter of: Forestry Surveys and Data (FSD), 98-844C, August 12, 1999

In this case, the plaintiff's (FSD) principal argument was that the past performance evaluation was improper because the evaluators failed to consider its good performance on four other contracts identified as references in its offer. FSD argued that all the referenced contracts should have been weighed equally in the past performance evaluation, and since it performed well on the other four contracts, it should have been rated excellent for past performance instead of poor.

The Court dismissed the claim, basing its ruling on a previous GAO decision, on the principle that:

The past project experience evaluation factor clearly put offerors on notice that the agency intended to consider factors—such as the degree of relevance and similarity in the projects—that would demonstrate the offeror’s understanding of and ability to perform the current requirement. [Ref. 20]

The Court held that the solicitation did not require the Forest Service to weigh all prior contracts equally when considering an offeror’s past performance. It also noted that agency evaluation personnel are given great discretion in determining the scope of an evaluation factor so it was within the agency’s discretion to weigh one contract more heavily than others if it is more relevant to an offeror’s future performance on a solicited contract. In the subject claim, the prior contract considered by the evaluators for the past performance evaluation was an identical contract for the prior year. The Court ruled that it was reasonable to assume that the requirements for the prior contract closely paralleled the requirements for the protested contract and that FSD’s performance on the prior contract would be indicative of its potential quality of work for the protested contract.

b. Matter of: Advanced Data Concepts, Inc., 98-495C, April 14, 1999

In this case, the plaintiff’s (Advanced Data Concepts, Inc.) principal argument was that the Department of Energy (DOE) unlawfully evaluated its past performance. The plaintiff cited the three categories of past performance information that could legally be evaluated by

the agency. The first category was past performance evaluations generated after contract performance was complete. The second category was agency "interim evaluations" for contracts not fully performed and the third category was "ad hoc" past performance information. The ad hoc past performance information could be obtained by affording offerors the opportunity to identify other similar contracts that the offeror had performed, which would allow the agency to verify the offeror's past performance on those contracts. The plaintiff conceded the lack of past performance evaluations as described in the first category but claimed that the DOE ignored several interim and ad hoc evaluations.

On the issue of interim evaluations, the Court ruled that the evaluations were not presented to the DOE as part of the plaintiff's bid and that the evaluations did not comply with DOE's guidelines. The DOE required a particular form that contained a specific rating scale for interim evaluations. Therefore, DOE did not violate the FAR requirement to share interim evaluations, because none existed. As for the ad hoc past performance evaluations, DOE sent requests for such reports to all three of the plaintiff's references. None of the references returned the questionnaires so the category was given a neutral rating as the solicitation mandated. The Court dismissed the claim on the principle that the solicitation stated:

If an offeror's client is unwilling to provide the Government requested information in support of the Government's past performance evaluation, that experience will be given a neutral rating.
[Ref. 14]

The Court also held that even if the plaintiff had received a perfect score of "10" for past performance, it would not have been selected for award based on the overall scoring scheme.

***c. Matter of: Stratos Mobile Networks USA, LLC.,
99-402C, September 29, 1999***

In this case, the plaintiff's (Stratos Mobile Networks USA, LLC.) principal argument was that it had been denied the evaluative benefit of a superior past performance record and rating in the source selection process. The Technical Evaluation Board (TEB) found both Stratos and the apparent awardee, COMSAT Corporation, had demonstrated excellent past performance on substantially similar work. The TEB prepared a past performance summary chart that recorded the numerical past performance evaluations and the similarity-of-work ratings each offeror had received and, based on that data, developed a composite score for each of the offerors. Both offerors were given a composite score of 4.9 on a 5.0 scale. Stratos argued that the composite scores were derived from a weighting formula that had the effect of diminishing the higher similarity-of-work ratings that it had received, thereby giving COMSAT a boost in the past performance evaluation. The relevance of the contractor's work experience to the tasks required by the subject procurement was a critical aspect of the past performance evaluation.

The Court agreed with the plaintiff's criticism that the methodology the Navy adopted to convert the numerical ratings into a single composite score had resulted in a "downgrade" of its past performance rating, but the Court rejected the proposition that Stratos had

identified an issue of decisive importance to the outcome of the procurement. It reached its conclusion because it found that the higher numerical ratings Stratos claimed to have been denied the competitive advantage of, was much less significant than the difference between the numbers would suggest. Stratos had received a rating of "5" on similarity-of-work while COMSAT had received a rating of "4". The Court dismissed the claim based on the declarations made by the chairman of the Technical Evaluation Board:

Stratos' sole advantage in the evaluation of the similarity between its past performance and the subject procurement lay in the fact that it was the contractor that performed the Navy's first contract involving similar services. The recognition of this difference through the assignment of different numerical ratings was not meant to say, contrary to the argument Stratos raises, that Stratos' past performance experience was 20 percent more relevant than COMSAT's. To the contrary, both offerors evidenced significant experience in providing the services; hence, there was little difference in the excellent past performance of both competitors. [Ref. 28]

Based on the documentation provided by the TEB and the declarations made by that board's chairman, the Court rejected the contention that Stratos was denied the evaluative benefit of a superior past performance record and rating.

3. Failure to Conduct Meaningful Discussions

In the matter of: Cubic Defense Systems, Inc., 99-144C, December 3, 1999, the plaintiff's (Cubic Defense Systems, Inc.) principal argument was that the Air Force had failed to identify two contracts that were considered

in evaluating Cubic's past performance, which deprived it of the opportunity to respond to weaknesses noted in those contracts. The plaintiff contended that the omission violated the Air Force's duty to conduct "meaningful discussions" with offerors.

When debriefing Cubic, after award to another contractor, the Air Force's briefing slides listed two additional contracts that had been used in the risk assessment process that had not been provided to Cubic for comment. However, the performance problems associated with the two contracts were identical to the problems found on contracts that had been provided to Cubic for clarification on the noted past performance risk issues. The Court dismissed the claim on the principle that:

Although a protestor may not be provided the opportunity to comment on every past performance survey response, the identification of categories in which past performance was deficient imparted sufficient information to afford the offeror a fair and reasonable opportunity to respond to the problems identified. [Ref. 18]

The Court ruled that Cubic was placed on notice of significant management problems that rendered the discussions meaningful.

4. Overly Restrictive Solicitation

In the matter of: Chas H. Tompkins Company 99-122C, May 12, 1999, the plaintiff's (Tompkins) principal argument was that the past performance evaluation, section 1.24 of the solicitation, was overly restrictive and therefore a violation of the Competition in Contracting Act (CICA). The plaintiff's challenge was based on the first sentence of section 1.24 of the solicitation:

The apparent low bidder shall supply the Name, Point of Contact, Address and Telephone Numbers for at least five (5) Government Agencies and/or Private Owners from which it was contracted to perform the same or similar projects with respect to scope, size, and dollar value within the last three (3) years. [Ref. 17]

Tompkins had filed a protest on the same grounds with the General Accounting Office (GAO) prior to this case. By decision dated March 5, 1999, the GAO dismissed Tompkins' protest by ruling "that the language in section 1.24 expresses precatory guidance rather than establishing a mandatory standard." [Ref. 35:p.2] GAO held that the only requirement in the clause, as expressed by the use of the word shall, referred to the literal submission of information and not to the scope of the past performance. They also noted that the clause merely provided guidelines for bidder information for use in the agency's assessment of past performance.

The Court of Federal Claims found GAO's interpretation of the first sentence of the provision in section 1.24 to be unreasonable. The Court held that:

The language of a contract (or solicitation) must be given the meaning that a reasonably intelligent person acquainted with the contemporaneous circumstances would reach. [Ref. 17]

The Court found that section 1.24 of the solicitation set forth definitive responsibility criteria, which included the submission of a listing that had to specify at least five contracts of similar scope, size, and dollar value of the present project within the last three years. The Court ruled that the past performance evaluation had been

overstated and was overly restrictive of competition and that the plaintiff was entitled to a "declaration that the solicitation unduly restricted competition in violation of CICA." The procurement was cancelled.

E. SUMMARY

In this chapter, the researcher reviewed the Court of Federal Claims' claims process and provided a breakdown of past performance claims that were decided from February 1997 through September 2001. From the 23 past performance claims, both sustained and denied, the researcher identified 9 case principles that will be used to develop lessons learned to assist Department of Defense acquisition personnel to more effectively incorporate PPI into the contracting process.

The next chapter will provide an analysis of common elements between the Comptroller General's decisions and the rulings handed down by the Court of Federal Claims. Next, the GAO's protest decisions and the Courts' interpretations of the statutory requirements will be analyzed in terms of current procurement policies to determine if acquisition professionals are allowed more or less discretion in making responsibility determinations and best value decisions. This chapter will also examine circumstances likely to draw a protest or claim.

V. ANALYSIS

A. INTRODUCTION

This chapter documents a trend analysis of GAO protest decisions and Court of Federal Claims decisions. It examines common elements between the decisions from the Comptroller General and the rulings handed down by the Court of Federal Claims. Next, the GAO's protest decisions and the Court's interpretations of the statutory requirements are analyzed in terms of current procurement policies to determine if acquisition professionals are allowed more or less discretion in making responsibility determinations and best value decisions. This chapter also examines circumstances likely to draw a protest or claim.

B. TREND ANALYSIS OF GAO DECISIONS AND COURT RULINGS

GAO's Bid Protest Statistics (Fiscal Years)					
	1997	1998	1999	2000	2001
Merit Protests (Sustained & Denied)	501	406	347	306	226
Protests Sustained	61	63	74	63	61
Sustainment Rate (%)	12%	16%	21%	20.6%	27%
Past Performance Protests (Sustained & Denied)	40	43	62	60	35
PPI Protests Sustained	6	13	15	15	1
Sustainment Rate (%)	15%	30%	24%	25%	2.8%

Table 5.1 Summary of GAO Protest Statistics

Table 5.1 is a summary of the GAO's protest statistics and past performance protest statistics that were identified during data collection in Chapter III. Analysis of the data shows a number of trends developed after the introduction of the requirement to utilize past performance in the DoD acquisition process. During the five-year period between 1997 and 2001, the total number of merit protests declined each year, while the number of past performance related protests increased each year from 1997 through 2000.

The number of total sustained protests remained relatively stable throughout the timeframe reported but the number of sustained protests as a percentage of total protests increased each year. The number of past performance protests increased from 1997 through 1999, leveled off in 2000 and then decreased by almost half in 2001. Past performance protests as a percentage of merit protests increased from 8% in 1997 to almost 20% in 2000 before decreasing to 15% in 2001. Past performance protests as a percentage of sustained protests also increased from 10% in 1997 to 23.8% in 2000 before dropping off to less than 2% in 2001.

The dollar threshold requiring the collection and use of past performance decreased from \$1,000,000 in 1995 to \$100,000 in January 1999. As the use of a contractor's past performance in the source selection process increased, the number of GAO protests citing past performance as an element of the protest increased. It should be expected that as the use of past performance information became more prevalent in the source selection process, businesses would

increasingly challenge its application until they could fully understand its use. The data trend indicates that there were growing pains as DoD acquisition personnel learned how to incorporate the collection and evaluation of PPI into the procurement process. It also indicates that businesses, after a significant number of challenges to the GAO, gained a better understanding of the boundaries of PPI in the procurement process.

The researcher believes there are at least three reasons that explain the dramatic drop in the number of past performance protests in 2001. First, DoD acquisition professionals have learned how to effectively incorporate past performance information into the source selection process in a manner that is fair to all parties. It took the acquisition community a few years to become skilled at using PPI and to digest the rulings from the GAO to understand where mistakes had been made in the rating process. The Office of Federal Procurement Policy first published the Best Practices for Collecting and Using Current and Past Performance in May 2000. It is likely this guide, as well as others, served procurement activities to better incorporate PPI without putting their activities at risk to protests.

A second reason for the drop in past performance protests can be a contractor's unwillingness to invest the time and money into the protest process when, historically, he only has about a one in four chance of being successful. With such a low probability of success, contractors may feel they cannot win and choose not to protest to avoid the expense of protesting and gaining a bad reputation. In an

era of decreased defense spending and the availability of fewer contracts, it does not make good business sense for a company to tie up resources in the protest process without a reasonable chance of success.

The third reason for the drop in past performance protests is the precedent set by earlier GAO decisions. When PPI was first used in the source selection process, there were very few cases to demonstrate how the GAO might rule on specific fact patterns. As the number of protests increased, the GAO decisions set precedents for future rulings. With the bulk of past performance protests challenging the reasonableness of the contracting officer's rating, the database of previous GAO decisions grew quickly. Contractors now have the ability to compare their potential protests to more than 200 GAO decisions on past performance protests. It is likely the precedents set by the earlier decisions at the GAO preclude contractors from filing protests with similar fact patterns.

Thus, the dramatic drop in past performance protests resulted from an improved application of PPI by DoD procurement personnel, low sustainment rates at the GAO, and the precedents established by previous past performance protests. This trend is likely to continue, resulting in fewer past performance protests in the future.

Court of Claims Statistics (Calendar Years)					
	1997	1998	1999	2000	2001 (Dec- Sept)
Contract Claims (Upheld & Dismissed)	50	69	67	53	54
Contract Claims Upheld	10	13	13	10	7
Upheld Rate (%)	20%	18.8%	19.4%	18.9%	13%
Past Performance Claims (Upheld & Dismissed)	6	3	7	2	7
PPI Claims Upheld	0	0	2	0	0
Upheld Rate (%)	0	0	28.5%	0	0

Table 5.2 Summary of Claims Statistics

Table 5.2 is a summary of the Court of Federal Claims' claims statistics and past performance claim statistics that were identified during data collection in Chapter IV. Analysis of the data shows that both the total number of claims heard by the court each year and the total number of contract claims did not vary significantly from year to year. Past performance claims as a percentage of contract claims varied between 3.7% and 13% with no discernable trend or pattern. The rate at which contract claims were upheld remained stable at approximately 20% during the period examined. There were only 23 past performance claims between 1997 and September 2001, and only two of those were upheld, so it is not possible to determine if a useful trend exists.

What is clear from the analysis is that fewer contractors choose to bring suit in the Court of Federal Claims than choose to have it resolved by the GAO. Based on percentages alone, contractors were more likely to be successful by appealing to the GAO instead of to the Courts. The Court is not bound by the decisions of the GAO, but based on the past performance cases analyzed by the researcher, it was rare for the Court of Federal Claims to rule in favor of a plaintiff who had been unsuccessful at the GAO. While analyzing past performance protests, the researcher found only one past performance claim where the Court disagreed with a previous GAO ruling. Based solely on the past performance protests identified in Chapter IV, it was more common to see the Court base its rulings on the very same principles that the GAO had cited in its decisions.

C. CASE PRINCIPLES AND STATUTORY REQUIREMENTS

There are several case principles, identified in Chapters III and IV of this research, that show common elements between decisions issued by the GAO and decisions handed down by the Court of Federal Claims. Two case principles, that were often interlinked, in both GAO and Court decisions included the broad discretion afforded to DoD contracting officers in the performance of their duties and the Agency's responsibility to evaluate proposals in a manner consistent with the factors stated in the solicitation. Discretion, or the freedom to make a decision, was the cornerstone of several of the case principles from both the GAO and the Court of Federal Claims. When determining the reasonableness of the evaluation, both the GAO and the Courts analyzed the

decision within the context of the evaluation factors stated in the solicitation. This is an extremely important point because 92% of the past performance protests brought before the GAO challenged the agency's decision based on either the reasonableness of the contracting officer's evaluation or the consistency of the evaluation with the evaluation criteria stated in the solicitation.

Of the 23 claims brought before the Court of Federal Claims, 16, or 70%, made the same challenge to the reasonableness of the evaluation or the consistency of the evaluation with the evaluation criteria stated in the solicitation.

When the protests and claims are combined, 85% challenged either the reasonableness of the evaluations or the consistency of the evaluation with evaluation criteria or both. This percentage highlights the importance of the GAO and Court decisions relating to these issues. Case principles, from both the Courts and GAO, that cited discretion and/or solicitation criteria include:

- The evaluation of an offeror's past performance is a matter within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based past performance ratings. However, we will question such conclusions where they are not reasonably based or are undocumented. [Ref. 22]
- Agencies are required to evaluate proposals consistent with the RFP's stated evaluation criteria, including considerations reasonably and logically encompassed by the stated factors. [Ref. 21]

- An agency may base its evaluation of past performance upon its reasonable perception of inadequate prior performance, regardless of whether the contractor disputes the agency's interpretation of the facts. [Ref. 16]
- In reviewing a protest of an agency's evaluation of proposals, we examine the record to ensure that the agency's evaluation was reasonable and consistent with the terms of the solicitation. [Ref. 15]
- 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. [Ref. 29]
- The determination of what constitutes an advantage over other proposals and what features would be beneficial to NASA was within the discretion of the Source Selection Authority. [Ref. 31]

These case principles demonstrate that both the GAO and the Court convey a significant amount of freedom and authority to DoD procurement personnel to enable them to perform their duties. Agencies are allowed to determine the scope of the offeror's performance histories they will consider, whether or not to communicate with a firm concerning its performance history, what constitutes an advantage over other proposals and what features are considered beneficial to the agency.

Both the GAO and the Courts asserted in several of their discussions that they will not substitute their judgment for reasonably based past performance ratings and

that the protestor's disagreement with the agency's judgment is not sufficient to establish that the agency acted unreasonably. The key for DoD procurement personnel is to ensure all proposals are evaluated on the same basis and that the evaluation is consistent with the solicitation requirements.

The third set of case principles that were common to the GAO and the Courts dealt with communications between the contracting officer and firms, or more specifically, a protestor's opportunity to respond to problems identified in its performance history. This is an important area because industry has continued to express concerns about being able to provide comments on, or to rebut, poor past performance reports. Case principles, from both the Courts and GAO, that cited communications include:

- An agency has broad discretion to decide whether to communicate with a firm concerning its performance history. [Ref. 26]
- The record showed that TLT had ample opportunity to comment on its unsatisfactory performance, the Contracting Officer reasonably could exercise her discretion in deciding not to communicate further with TLT regarding alleged negative past performance information in the CCASS database. Given the permissive language of FAR 15.306(a)(2), the fact that TLT may wish to rebut or provide further comments on the information in the database does not give rise to a requirement that the Contracting Officer give TLT an opportunity to do so. [Ref. 30]
- Although a protestor may not be provided the opportunity to comment on every past performance survey response, the identification of categories in which past performance was deficient imparted sufficient information to afford the offeror a

fair and reasonable opportunity to respond to the problems identified. [Ref. 18]

Once again, these rulings provide DoD procurement personnel with a tremendous amount of discretion in the area of communications while executing their duties.

A fourth set of case principles that were common to both the GAO and the Court dealt with the responsibility of the contractor to furnish an adequate proposal and to understand how an agency intended to use that information based on the solicitation. These case principles are important because they make firms responsible for the information they furnish in their proposals. Case principles, from both the Court and GAO, that cited the contractor's responsibility to provide an adequate proposal and to understand how that information would be used in the past performance rating include:

- Since an agency's evaluation is dependent upon the information furnished in a proposal, it is the offeror's burden to submit an adequately written proposal for the agency to evaluate, especially where, as here, the offeror is specifically on notice that the agency intends to make award based on initial proposals without discussions. An agency reasonably may reject a proposal for informational deficiencies that prevent the agency from fully evaluating the proposal. [Ref. 23]
- The past project experience evaluation factor clearly put offerors on notice that the agency intended to consider factors, such as the degree of relevance and similarity in the projects, that would demonstrate the offeror's understanding of and ability to perform the current requirement. [Ref. 20]

- If an offeror's client is unwilling to provide the Government requested information in support of the Government's past performance evaluation, that experience will be given a neutral rating. [Ref. 14]

These case principles assist DoD procurement personnel by putting the burden to provide adequate information in their proposals on the contractors. Procurement personnel do not have the resources to spend their time trying to make a firm's proposal acceptable so that it can be considered for award. Nor do they have the time to search out other areas of past performance information if an offeror's client is unwilling to complete a past performance evaluation for the Government.

The last set of case principles that were discussed by both the GAO and the Court in their decisions dealt with responsibility of the contracting officer to determine what information to consider during the evaluation. It is not always clear what information a contracting officer should consider during the evaluation of an offeror's past performance, but again the contracting officer is afforded a significant amount of discretion when deciding. The one exception can be taken from the first case principle listed below. Based on one of only two claims that were upheld, the contracting officer is expected to consider an incumbent's performance on a contract being re-solicited:

- Some information is simply too close at hand to require offerors to shoulder the inequities that spring from an agency's failure to obtain and consider the information. The contracting officer may not disregard the past performance of an

incumbent on the very contract to be re-solicited. [Ref. 27]

- No provision in the solicitation precluded the Army from considering OPTEX's performance after the date the solicitation was issued. Contrary to the plaintiff's position, it would be unreasonable under the terms of the solicitation, and no less unfair to each offeror, if the Army were to disregard meaningful and pertinent information that could only render a more informed and considered award decision. [Ref. 24]

As outlined in the guiding principles of the FAR, these case principles reinforce the contracting officer's responsibility to make prudent business decisions during the performance of their duties. Part of that responsibility demands that contracting officers recognize what information is pertinent and meaningful to the current acquisition and what is not.

To be determined responsible, a prospective contractor must have a satisfactory performance record. [Ref. 10:9.104-1(c)] The determination of what constitutes a satisfactory performance record can be highly subjective. The case principles identified during this research, as well as the high number of dismissed protests and claims, indicate that DoD procurement personnel are afforded a tremendous amount of discretion when making responsibility determinations that relate to past performance issues.

The same broad discretion is afforded to DoD procurement personnel in their determination of what constitutes a best value in negotiated procurements. Contracting officers are able to use past performance as the discriminating factor in best value procurements. The

determination of what constitutes an advantage over other proposals and what features would be beneficial for an agency are left to the agency's discretion. The case principles identified in this research demonstrate the freedom and authority that is provided to DoD procurement personnel in their best value determinations. The DoD acquisition workforce is empowered by the GAO and Court decisions.

D. CIRCUMSTANCES LIKELY TO DRAW A PROTEST OR CLAIM

It is clear from the research that the most likely way for an award decision to draw a protest or claim is if the source selection decision does not appear to be reasonable or if the evaluation is not conducted in accordance with the evaluation factors described in the solicitation. To this end, DoD procurement professionals should strive to document their thought processes in their source selection decisions so they can properly debrief unsuccessful offerors. The debrief should show how the decision was made by comparing the offeror's proposal to the requirements and evaluation factors outlined in the solicitation. An offeror will be less likely to file a protest if the contracting officer can demonstrate how the source selection was made. Based upon the preceding analysis, it appears that the GAO and the Courts will not substitute their judgment for reasonable past performance ratings and source selections.

E. SUMMARY

In this chapter, the researcher documented a trend analysis of GAO protest decisions and Court of Federal Claims decisions. The trend analysis indicated that the

number of past performance protests increased as the requirement to evaluate past performance information was enacted but then fell off sharply as both Government and industry professionals learned how to incorporate it into the source selection process. It then examined common elements between the decisions from the Comptroller General and the rulings handed down by the Court of Federal Claims. Those common elements highlighted the broad discretion that is given to procurement professionals in the performance of their duties. Next, it was determined that the GAO's protest decisions and the Court's interpretations of the statutory requirements allowed DoD procurement professionals a significant amount of discretion in making responsibility determinations and best value decisions. The chapter also examined circumstances likely to draw a protest or claim.

The next chapter will provide conclusions, recommendations and answers to the primary and secondary research questions. It will also include suggested areas of further research.

VI. CONCLUSIONS AND RECOMMENDATIONS

A. INTRODUCTION

This chapter presents the researcher's conclusions and makes recommendations for using past performance information in the source selection process. It then provides a summary of the research presented in this thesis by reviewing the primary and the secondary research questions. Each question is restated, and then the answer(s) that were developed during the research are presented. The chapter concludes with the researcher's recommended areas for further study and analysis.

B. CONCLUSIONS

DoD acquisition personnel are afforded a tremendous amount of discretion in the use of past performance information in the procurement process. Based on the analysis documented in Chapter V of this research it is clear that past performance information can be effectively incorporated into the source selection process. DoD acquisition personnel are able to make responsibility determinations as well as best value determinations to ensure their agency gets the most benefit possible from the available offers.

As should have been expected, there were a significant number of growing pains between 1997 and 2000 while both the DoD acquisition community and industry learned how to incorporate and evaluate past performance information into the acquisition process. As procurement professionals began using past performance information to comply with procurement regulations, contractors began challenging its

use at the GAO and, to a lesser extent, in the Court of Federal Claims. The number of protests increased for the first few years, as did the percentage of upheld protests. This research suggests that procuring agencies learned quickly from early GAO decisions and Court rulings to better evaluate and incorporate past performance information into the source selection process.

During the same time period, the Office of the Under Secretary of Defense For Acquisition Reform released A Guide to Collection and Use of Past Performance Information. The guide is designed to provide additional guidance for both the collection and use of past performance information. Agencies began to incorporate best practices and lessons learned to make their evaluations and source selections less susceptible to protests and claims. The data analysis suggests procurement professionals have been very successful in learning how to effectively use past performance information in the acquisition process. The case principles show that contracting officers can use past performance information to effectively discriminate between offeror's proposals and that those same subjective determinations can withstand challenges at the GAO and in the Court of Federal Claims.

There are three reasons that explain the dramatic drop in the number of protests in 2001. First, DoD acquisition professionals have learned how to effectively incorporate past performance information into the source selection process in a manner that is fair to all parties. It took the acquisition community a few years to become skilled at

using PPI and to digest the rulings from the GAO to understand where mistakes had been made in the rating process. The Office of Federal Procurement Policy first published the Best Practices for Collecting and Using Current and Past Performance in May 2000. It is likely this guide, as well as others, served procurement activities to better incorporate PPI without putting their activities at risk to protests.

The second is that contractors are less willing to invest the time and money into the protest process when, historically, they only have about a 1 in 4 chance of being successful. With such a low probability of success, contractors may feel they cannot win and choose not to protest to avoid gaining a bad reputation. In an era of decreased defense spending and the availability of fewer contracts, it does not make good business sense for a company to tie up resources in the protest process without a reasonable chance of success.

The third reason for the drop in past performance protests is the precedent set by earlier GAO decisions. When PPI was first used in the source selection process, there were very few cases to demonstrate how the GAO might rule in a particular situation. As the number of protests increased, the GAO decisions set precedents for future rulings. With the bulk of past performance protests challenging the reasonableness of the contracting officer's rating, the database of previous GAO decisions grew quickly. Contractors now have the ability to compare their potential protests to more than 200 GAO decisions on past performance protests. It is likely, the precedents set by

the earlier decisions at the GAO preclude contractors from filing protests with similar fact patterns.

Thus, the dramatic drop in past performance protests resulted from the improved collection and application of PPI by DoD procurement personnel, low sustainment rates at the GAO, and the precedents set by previous past performance protests. This trend is likely to continue resulting in fewer past performance protests in the future.

C. RECOMMENDATIONS

DoD procurement personnel should be aware of the circumstances that are likely to draw a claim or protest so they can effectively incorporate PPI into procurements without putting the agency at risk for a protest. When unsuccessful offerors are debriefed it is vital that contracting officers provide a well-reasoned explanation of how the past performance evaluation was conducted. The most recent update to the Guide to Collection and Use of Past Performance Information was published in May 2001. DoD procurement personnel should be provided training on the contents of the guide so they can more effectively use past performance information. Using the techniques outlined in the guide, DoD acquisition personnel can avoid the perception of being unreasonable or arbitrary and capricious. Based on the analysis of the case principles in Chapters III and IV, DoD procurement personnel should:

- Use all means practicable, draft solicitations, Industry Days and pre-award conferences, to ensure offerors understand how they will be evaluated for award.

- Make certain the source selection evaluation criteria are detailed in the solicitation to ensure prospective offerors understand how they will be evaluated.
- Make certain the source selection evaluation is conducted in accordance with the evaluation criteria stated in the solicitation.
- Make certain the source selection evaluation process is well documented to assist in the debriefing process and to prove reasonableness if challenged at the GAO or in the Courts.
- Provide contractors the opportunity to respond to adverse past performance evaluations if they have not already had the opportunity to do so.
- Ensure debriefings to unsuccessful offerors give full coverage of how PPI was evaluated.
- Ensure the weight given to PPI as an evaluation factor is sufficient to ensure it is meaningfully considered during source selection.

D. ANSWERS TO RESEARCH QUESTIONS

The primary research question of this thesis dealt with the question of, "What are the key case principles and trends involving past performance issues brought before the Court of Federal Claims and the General Accounting Office (GAO), and how might this information be used to improve the Department of Defense's Acquisition Process?"

The case principles analyzed in Chapter V demonstrate that both the GAO and the Court convey a significant amount of authority to DoD procurement personnel to enable them to

perform their duties. The case principles are listed in Appendix "A". The overriding theme of the case principles, taken from 50 GAO protests and 23 Court claims, was the broad discretion afforded to both the agency and contracting officer in the acquisition process. With past performance information, agencies decide what, when, where, and how they intend to evaluate. They also decide whether or not to communicate with firms concerning the data and perhaps most importantly they decide what constitutes an advantage over other proposals and what features are considered beneficial to the agency.

This information can be used to improve the Department of Defense's acquisition process because it reinforces the guiding principles of the FAR. Acquisition professionals should make prudent business decisions and the GAO's decisions give them the discretion to do just that. This research also shows that they can avoid protests by ensuring offerors understand how they will be evaluated and the thought process used by the contracting officer during the evaluation of their proposal.

The first secondary question raised the question of "What is the background and history of using past performance in DoD procurement?"

The research presented in Chapter II of this thesis has shown that the use of past performance information started as an idea in the 1980s to mimic what was commonplace in the commercial sector. It then took the form of policy with the release of OFPP Policy Letter 92-5 and subsequently became regulation as part of the Federal Acquisition Streamlining Act of 1994. The dollar threshold

requirement for the application of PPI went from \$1,000,000 in 1995 to all contracts above \$100,000 in 1999.

The second secondary research question asked, "What are the current methods of using past performance information in DoD procurement?"

In Chapter II, it was shown how the May 2001, A Guide to Collection and Use of Past Performance Information, was being utilized by DoD procuring agencies. The guide is designed for use by the both the acquisition workforce in the Department of Defense and industry. It details best practices for the use of past performance information during the periods of source selection, ongoing performance, and collection of information. It also provides ten important tips for working with past performance information. It also provides answers to common questions, key definitions, and references, and offers examples of how to obtain, weigh and rate past performance data.

The third secondary question posed the question, "Have the interpretations of the statutory requirements by the Comptroller General and the Court of Federal Claims allowed acquisition professionals more or less discretion in making responsibility determinations and best value decisions?"

The analysis presented in Chapter V demonstrated that the GAO's protest decisions and the Court's interpretations of the statutory requirements allowed DoD procurement professionals a significant amount of discretion in making responsibility determinations and best value decisions. The case principles identified during this research, as well as the high number of dismissed protests and claims,

indicate that DoD procurement personnel are afforded a tremendous amount of discretion when making responsibility determinations that relate to past performance issues.

The same broad discretion is afforded to DoD procurement personnel in their determination of what constitutes a best value in negotiated procurements. Contracting officers are able to use past performance as the discriminating factor in best value procurements. The determination of what constitutes an advantage over other proposals and what features would be beneficial for an agency are left to the agency's discretion. The case principles identified in this research demonstrate the freedom and authority that is provided to DoD procurement personnel in their best value determinations. The DoD acquisition workforce is empowered by the GAO and court decisions.

The fourth secondary research question asked, "Under what circumstances is an offeror likely to file suit over the use of past performance information in the Court of Federal Claims?"

The analysis in Chapter V showed that award decisions were most likely to draw a protest or claim if the source selection decision did not appear to be reasonable or if the evaluation was not conducted in accordance with the evaluation factors described in the solicitation. When the protests and claims were combined, 85% challenged either the reasonableness of the past performance evaluation or the consistency of the evaluation with evaluation criteria or both.

DoD acquisition professionals can mitigate the risk of a protest or claim in a number of ways. First, they should use all means practicable to ensure offerors understand how they will be evaluated for award. This can be done with draft solicitations, Industry Days for question and answer sessions and pre-award conferences. Second, contracting officers should make certain the source selection evaluation criteria are detailed in the solicitation to ensure prospective offerors understand what will be evaluated. Finally, procurement professionals should ensure the source selection evaluation is conducted in accordance with the evaluation criteria stated in the solicitation.

The fifth and final secondary research question asked "What changes are needed to mitigate the risk of past performance information claims and protests?"

The analysis in Chapter V indicates that DoD acquisition professionals have learned the lessons of how to be successful at the GAO and in the Court. The focus now should be to prevent ever having to go to the GAO or the Court for a decision or ruling. Better solicitations, use of pre-award conferences, and more transparency in the evaluation process might prevent offerors from ever feeling that they have been treated unfairly. Contracting officers should make certain the source selection evaluation process is well documented to assist in the debriefing process and to prove reasonableness if challenged at the GAO or in the Court. The thought processes that were used during the past performance rating and the source selection process are key to providing an adequate debriefing to unsuccessful

offerors. The documentation is also the key to convincing the GAO or the Court that the decision was reasonable.

Contracting Officers should provide contractors with the opportunity to respond to adverse past performance evaluations if they have not already had the opportunity to do so. The GAO has given contracting officers broad discretion in this area but it is in the procuring agencies' best interest to allow contractors the opportunity to comment on adverse performance evaluations to prevent the appearance of bias.

Contracting officers should develop debriefing skills so they can better articulate the reasoning they used to determine the best value for their agencies. Proper file documentation will ensure debriefings to unsuccessful offerors are as detailed as possible and should give full coverage of how PPI was evaluated. Offerors might disagree with the contracting officers decision but they would be less likely to challenge it in court if they could at least understand how the decision was made.

Procurement personnel should ensure the weight given to PPI as an evaluation factor is sufficient to ensure it is meaningfully considered during source selection. The FAR gives contracting officers broad discretion when assigning weights to past performance information and other evaluation factors. The application of this discretion in FAR may leave contractors confused about whether an agency has assigned appropriate weight to PPI as the GAO case, Finlen Complex, Inc., B-288280, has shown. Contracting Officers should strive to make PPI a meaningful evaluation factor.

E. SUGGESTED AREAS FOR FURTHER RESEARCH

- Conduct follow-on analysis of protests brought before the GAO Comptroller General for fiscal years 2002 and beyond, to determine if the dramatic drop in past performance protests in 2001 was indicative of better application by procurement personnel or if the year represented a statistical outlier. New case principles could be identified that could modify current interpretations of FAR requirements.
- Conduct an analysis of past performance issues that have been settled within the Court of Federal Claims' Alternative Disputes Resolution (ADR) pilot program that commenced in April 2001. The number of past performance issues settled by the ADR process might explain the drop in the number of past performance protests at the GAO and in the courts.
- Conduct an analysis of how industry is dealing with the Department of Defense's use of past performance information. Do they feel they are being treated fairly by the Government and has it been an effective motivator of performance as Government literature suggests?
- Conduct an analysis of what it costs commercial firms to protest the award of a contract. As the dollar threshold requiring the use of PPI has decreased from \$1,000,000 to \$100,000, have small businesses been able to invest the resources necessary to pursue a protest? Does the resource requirement keep potential protestors from filing what might be successful protest or claim?

THIS PAGE INTENTIONALLY LEFT BLANK

APPENDIX A. PAST PERFORMANCE PROTESTS

CASES WITH SUSTAINED PAST PERFORMANCE PROTESTS

Protestor	B-Number	Date
Beneco Enterprises, Inc.	B-283512	Jul. 10, 2000
Green Valley Transportation, Inc.	B-285283	Aug. 9, 2000
Myers Investigative Services, Inc.	B-287949	Jul. 27, 2001

CASES WITH DENIED PAST PERFORMANCE PROTESTS

Protestor	B-Number	Date
Si-Nor, Inc.	B-282064	May 25, 1999
Oregon Iron Works, Inc.	B-284088	Jun. 15, 2000
J.A. Jones Management, Inc.	B-284909	Jul. 31, 2000
Gray Personnel Services, Inc.	B-285002	Jun. 26, 2000
Birdwell Brothers Painting	B-285035	Jul. 5, 2000
Ostrom Painting Inc.,	B-285244	Jul. 18, 2000
Airwork Limited Corporation	B-285247	Aug. 8, 2000
Parmatic Filter Corporation	B-285288	Aug. 14, 2000
Symtech Corporation	B-285358	Aug. 21, 2000
DGR Associates, Inc.	B-285428	Aug. 25, 2000
DUCOM, Inc.	B-285485	Aug. 23, 2000
North American Aerodynamics, Inc.	B-285651	Sep. 15, 2000
Lynwood Machine & Engineering	B-285696	Sep. 18, 2000
Instrument Control Services, Inc.	B-285776	Sep. 6, 2000
SDS International	B-285822	Sep. 29, 2000
Neeser Construction, Inc.	B-285903	Oct. 25, 2000
Northeast MEP Services, Inc.	B-285963	Jan. 5, 2001
Day & Zimmerman Pantex Corporaton	B-286016	Nov. 9, 2000
Wackenhut Services, Inc.	B-286037	Nov. 14, 2000
SWR, Inc.	B-286044	Nov. 1, 2000
National Systems Management Corp.	B-286112	Nov. 16, 2000
TLT Construction Corporation	B-286226	Nov. 7, 2000
Sterling Services, Inc.	B-286326	Dec. 11, 2000
NMS Management, Inc.	B-286335	Nov. 24, 2000
Hernandez Engineering, Inc.	B-286336	Jan. 2, 2001
World Travel Service	B-284155	Mar. 26, 2001
J.A. Jones/Bell Joint Venture	B-286458	Dec. 27, 2000
OSI Collection Services, Inc.	B-286597	Jun. 12, 2001
Menedez-Donnell Associates	B-286599	Jan. 16, 2001
Bluff Srings Paper Company	B-286797	Aug. 13, 2001
Thomas Brand Siding Company	B-286914	Mar. 12, 2001
Myers Investigative Services, Inc.	B-286971	Apr. 2, 2001

Protestor	B-Number	Date
Boland Well Systems, Inc.	B-287030	Mar. 7, 2001
FC Construction Company, Inc.	B-287059	Apr. 10, 2001
C. Lawrence Construction Company	B-287066	Mar. 30, 2001
MCR Engineering Company, Inc.	B-287164	Apr. 26, 2001
Urban-Meridian Joint Venture	B-287168	May 7, 2001
Strategic Resources, Inc.	B-287398	Jun. 18, 2001
W R Systems, Ltd.	B-287477	Jun. 29, 2001
Beacon Auto Parts	B-287483	Jun. 13, 2001
CWIS, LLC	B-287521	Jul. 2, 2001
Maytag Aircraft Corporation	B-287589	Jul. 5, 2001
Fisherman's Boat Shop, Inc.	B-287592	Jul. 11, 2001
Lynwood Machine & Engineering	B-287652	Aug. 2, 2001
Gulf Group, Inc.	B-287697	Jul. 24, 2001
Medical Information Services	B-287824	Jul. 10, 2001
Daly Associates	B-287908	Aug. 2, 2001

APPENDIX B. PAST PERFORMANCE CLAIMS

CASES WITH SUSTAINED PAST PERFORMANCE CLAIMS

Protestor	C-Number	Date
Chas. H. Tompkins Company	99-122C	May 12, 1999
Seattle Security Services, Inc.	99-139C	Dec. 9, 1999

CASES WITH DENIED PAST PERFORMANCE CLAIMS

Protestor	C-Number	Date
Cubic Applications, Inc.	97-29C	Feb. 25, 1997
CINCOM Systems, Inc.	97-72C	Apr. 11, 1997
Day & Zimmerman Services, Inc.	97-90C	Jul. 14, 1997
Delbert Wheeler Construction, Inc.	97-586C	Oct. 3, 1997
W&D Ships Deck Works, Inc.	97-308C	Dec. 1, 1997
Wackenhut International, Inc.	97-680C	Jan. 13, 1998
Miller-Halzwarth, Inc.	98-576C	Jan. 6, 1999
Advanced Data Concepts, Inc.	98-495C	Apr. 14, 1999
Marine Hydraulics International	99-107C	Apr. 27, 1999
Forestry Surveys & Data	98-844C	Aug. 12, 1999
Stratos Mobile Networks USA, LLC.	99-402C	Sep. 29, 1999
Cubic Defense Systems, Inc.	99-144C	Dec. 3, 1999
The Cube Corporation	99-914C	Feb. 22, 2000
Unified Architecture, Inc.	99-514C	Feb. 25, 2000
CCL Service Corporation	00-361C	Oct. 6, 2000
Biospherics, Inc.	00-429C	Oct. 17, 2000
Ryder Move Management, Inc.	00-599C	Jan. 3, 2001
SDS International	00-610C	Feb. 21, 2001
OAO Corporation	01-245C	May 5, 2001
JWK International Corporation	01-26C	May 10, 2001
Southgulf, Inc.	00-352C	Jun. 20, 2001

THIS PAGE INTENTIONALLY LEFT BLANK

APPENDIX C. COMPTROLLER GENERAL'S PRINCIPLES

1. REASONABLENESS OF SOURCE EVALUATIONS AND CONSISTENCY WITH EVALUATION FACTORS

- In reviewing a protest of an agency's evaluation of proposals, we examine the record to ensure that the agency's evaluation was reasonable and consistent with the terms of the solicitation. Matter of: Beneco Enterprises, Inc., B-283512.3, July 10, 2000
- The evaluation of an offeror's past performance is a matter within the discretion of the contracting agency, and we will not substitute our judgment for reasonably based past performance ratings. However, we will question such conclusions where they are not reasonably based or are undocumented. Matter of: Green Valley Transportation, Inc., B-285283, August 9, 2000
- Agencies are required to evaluate proposals consistent with the RFPs stated evaluation criteria, including considerations reasonably and logically encompassed by the stated factors. Matter of: Gray Personnel Services, Inc., B-285002, June 26, 2000
- An agency may base its evaluation of past performance upon its reasonable perception of inadequate prior performance, regardless of whether the contractor disputes the agency's interpretation of the facts. Matter of: Birdwell Brothers Painting & Refinishing, B-285035, July 5, 2000
- A protestor's mere disagreement with the agency's judgment is not sufficient to establish that the agency acted unreasonably. [Ref. 21:p.5]

- 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. Matter of: Symtech Corporation, B-285358, August 21, 2000
- Since an agency's evaluation is dependent upon the information furnished in a proposal, it is the offeror's burden to submit an adequately written proposal for the agency to evaluate, especially where, as here, the offeror is specifically on notice that the agency intends to make award based on initial proposals without discussions. An agency reasonably may reject a proposal for informational deficiencies that prevent the agency from fully evaluating the proposal. Matter of: Menendez-Donnell & Associates (MDA), B-286599, January 16, 2001

2. ADVERSE INFORMATION

- The record showed that TLT had had ample opportunity to comment on its unsatisfactory performance, the Contracting Officer reasonably could exercise her discretion in deciding not to communicate further with TLT regarding alleged negative past performance information in the CCASS database. Given the permissive language of FAR 15.306(a)(2), the fact that TLT may wish to rebut or provide further comments on the information in the database does not give rise to a requirement that the Contracting Officer give TLT an opportunity to do so. Matter of: TLT Construction Corporation, B-286226, November 7, 2000

- An agency has broad discretion to decide whether to communicate with a firm concerning its performance history. Matter of: NMS Management, Inc., B-286335, November 24, 2000

3. INADEQUATE DOCUMENTATION

- GSA's decision not to defend against the protest, together with its statement that adequate documentation of the actual evaluation and selection does not exist, as, in effect, a concession that the evaluation and award decision were not done properly. In the absence of an evidence to show that the evaluation and award decision were properly done, and in view of GSA's decision not to defend itself against the protest, we sustain the protest. Matter of: Myers Investigative and Security Services, Inc., B-287949.2, July 27, 2001

4. FAR APPLICATION

- The agency's decision to assign a weight of 5 percent to a solicitation's past performance evaluation factor is not a violation of FAR Part 12.206 because the provision is discretionary, not mandatory. Matter of: Finlen Complex, Inc., B-288280, October 10, 2001

THIS PAGE INTENTIONALLY LEFT BLANK

APPENDIX D. COURT OF FEDERAL CLAIMS PRINCIPLES

1. REASONABLENESS OF SOURCE EVALUATION AND CONSISTENCY WITH EVALUATION FACTORS

- The determination of what constitutes an advantage over other proposals and what features would be beneficial to NASA was within the discretion of the Source Selection Authority. Matter of: Unified Architecture & Engineering, Inc., 99-514C, February 25, 2000
- Some information is simply too close at hand to require offerors to shoulder the inequities that spring from an agency's failure to obtain and consider the information. The contracting officer may not disregard the past performance of an incumbent on the very contract to be re-solicited. Matter of: Seattle Security Services, Inc., 99-139C, January 28, 2000
- No provision in the solicitation precluded the Army from considering OPTEX's performance after the date the solicitation was issued. Contrary to the plaintiff's position, it would be unreasonable under the terms of the solicitation, and no less unfair to each offeror, if the Army were to disregard meaningful and pertinent information that could only render a more informed and considered award decision. Matter of: Miller-Holzwarth, Inc., 98-576C, January 6, 1999

2. PAST PERFORMANCE EVALUATION WAS UNLAWFUL OR IMPROPER

- The past project experience evaluation factor clearly put offerors on notice that the agency intended to consider factors—such as the degree of relevance and similarity in the projects—that would demonstrate the offeror's understanding of and ability to

perform the current requirement. Matter of: Forestry Surveys and Data (FSD), 98-844C, August 12, 1999

- If an offeror's client is unwilling to provide the Government requested information in support of the Government's past performance evaluation, that experience will be given a neutral rating. Matter of: Advanced Data Concepts, Inc., 98-495C, April 14, 1999
- Stratos' sole advantage in the evaluation of the similarity between its past performance and the subject procurement lay in the fact that it was the contractor that performed the Navy's first contract involving similar services. The recognition of this difference through the assignment of different numerical ratings was not meant to say, contrary to the argument Stratos raises, that Stratos' past performance experience was 20 percent more relevant than COMSAT's. To the contrary, both offerors evidenced significant experience in providing the services; hence, there was little difference in the excellent past performance of both competitors. Matter of: Stratos Mobile Networks USA, LLC., 99-402C, September 29, 1999

3. FAILURE TO CONDUCT MEANINGFUL DISCUSSIONS

- Although a protestor may not be provided the opportunity to comment on every past performance survey response, the identification of categories in which past performance was deficient imparted sufficient information to afford the offeror a fair and reasonable opportunity to respond to the problems identified. Matter of: Cubic Defense Systems, Inc., 99-144C, December 3, 1999

4. OVERLY RESTRICTIVE SOLICITATION

- The language of a contract (or solicitation) must be given the meaning that a reasonably intelligent person acquainted with the contemporaneous circumstances would reach. Matter of: Chas H. Tompkins Company, 99-122C, May 12, 1999

THIS PAGE INTENTIONALLY LEFT BLANK

LIST OF REFERENCES

1. A Guide to Collection and Use of Past Performance Information, Office of Defense for Acquisition Reform, May 2001.
2. A Guide to Best Practices for Past Performance, Office of Federal Procurement Policy, May 1995.
3. ASN (RDA) Memorandum, Considerations in the Use of Past Performance Information in Source Selection: March 13, 1998.
4. Beausoleil, Joseph. "Past Performance is Not Working". Contract Management (July 2000): 28-31.
5. Best Practices for Collecting and Using Current and Past Performance, Office of Federal Procurement Policy, May 2000.
6. Competition in Contracting Act of 1984. 41 USC 253.
7. Defense Acquisition University, Government Contract Law Course Text (1999 Edition) Department of Defense Deskbook Compact Disc Winter 2000 Version.
8. Defense Acquisition University, Intermediate Contracting (CON 202) Student Guide, 2000.
9. Department of Defense Guide to Collection and Use of Past Performance Information: May 1999.
10. Federal Acquisition Regulation (FAR), Government Printing Office, July 26, 2000.
11. Federal Acquisition Streamlining Act 1994 (FASA), Pub. Law No. 103-355, 108 Stat. 3243
12. General Accounting Office, Administrative Practice & Procedure, Bid Protest Regulations, 4 CFR Part 21, August 08, 1996.
13. Madden, Thomas J. and Marvin, Charles R. Jr., Is Full and Open Competition Already Dead? Acquisition Issues, 1995.

14. Matter of: Advanced Data Concepts, Inc., 98-495C, April 14, 1999.
15. Matter of: Beneco Enterprises, Inc., B-283512.3, July 10, 2000.
16. Matter of: Birdwell Brothers Painting & Refinishing, B-285035, July 5, 2000.
17. Matter of: Chas H. Tompkins Company 99-122C, May 12, 1999.
18. Matter of: Cubic Defense Systems, INC., 99-144C, December 3, 1999.
19. Matter of: Finlen Complex, Inc., B-288280, October 10, 2001.
20. Matter of: Forestry Surveys and Data (FSD), 98-844C, August 12, 1999.
21. Matter of: Gray Personnel Services, Inc., B-285002, June 26, 2000.
22. Matter of: Green Valley Transportation, Inc., B-285283, August 9, 2000.
23. Matter of: Menendez-Donnell & Associates (MDA), B-286599, January 16, 2001.
24. Matter of: Miller-Holzwarth, Inc., 98-576C, January 6, 1999.
25. Matter of: Myers Investigative and Security Services, Inc., B-287949.2, July 27, 2001.
26. Matter of: NMS Management, Inc., B-286335, November 24, 2000.
27. Matter of: Seattle Security Services, Inc., 99-139C, January 28, 2000.
28. Matter of: Stratos Mobile Networks USA, LLC., 99-402C, September 29, 1999.

29. Matter of: Symtech Corporation, B-285358, August 21, 2000.
30. Matter of: TLT Construction Corporation, B-286226, November 7, 2000.
31. Matter of: Unified Architecture & Engineering, Inc., 99-514C, February 25, 2000.
32. Office of Federal Procurement Policy (OFPP) Policy Letter 92-5: December 1992.
33. Source Selection Activities Guide (Performance Risk Assessment Group (PRAG)), Air Force Material Command, April 2000.
34. Walkner, Mark F. "A Model for the Effective Integration of Past Performance Information into Organizational Acquisition and Contracting Processes". December 2000.
35. Association of Proposal Management Professionals (APMP) position paper, <http://www.apmp.org/gltf/stdsols>
36. Website: The Federal Register, National Archives and Records Administration, Federal Register Requests for Comments 1994. <http://www.nara.gov/fedreg/index.html>
37. Website: General Accounting Office (GAO). <http://www.gao.gov>
38. Website: Department of the Navy (DoN) Contractor Performance Reporting System (CPARS). <http://wwwnslcptsmh.navsea.navy.mil/cparsmenu.htm>
39. Website: United States Court of Federal Claims. <http://www.contracts.ogc.doc.gov/fedcl/index.html>
40. Website: Where in Federal Contracting. <http://wifcon.com>

THIS PAGE INTENTIONALLY LEFT BLANK

INITIAL DISTRIBUTION LIST

1. Defense Technical Information Center
Ft. Belvoir, Virginia
2. Dudley Knox Library
Naval Postgraduate School
Monterey, California
3. Jeffrey R. Cuskey
Naval Postgraduate School
Monterey, California
4. Dr. David V. Lamm
Naval Postgraduate School
Monterey, California
5. Ron B. Tudor
Naval Postgraduate School
Monterey, California
6. LCDR Eric S. Stump
Graham, Texas