

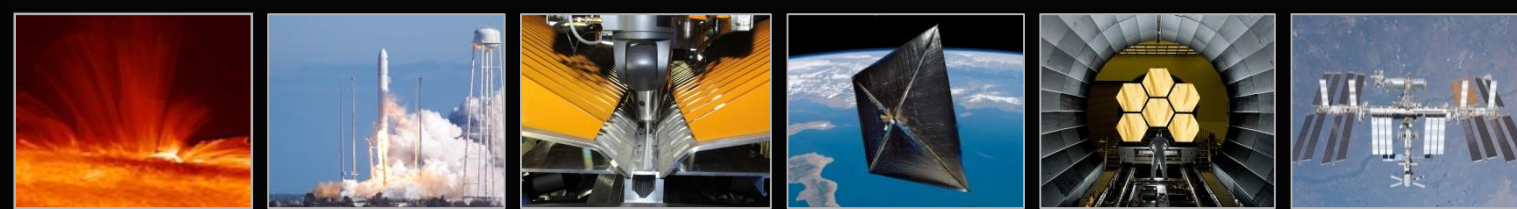


# Past Performance Evaluations in Competitive Acquisitions

**Jeff Jackson**  
Director, Source Selection Division  
MSFC Office of Procurement



# marshall



June 15, 2021

# Evaluation of Past Performance

---

## What is it?

Per FAR 2.101- Past performance is defined as an offeror's or contractor's performance on active and physically completed contracts.

Per FAR 15.305 Proposal evaluation- paragraph (a)(2)(i) -

Past performance information is ***one indicator of an offeror's ability to perform the contract successfully***. The ***currency*** and ***relevance*** of the information, ***source*** of the information, ***context*** of the data, and ***general trends*** in contractor's performance shall be considered. This comparative assessment of past performance information is separate from the responsibility determination required under [subpart 9.1](#).

Per NFS 1815.304-70 NASA evaluation factors – paragraph (d)(1)

This factor indicates the ***relevant quantitative and qualitative*** aspects of each offeror's record of performing services or delivering products ***similar in size, content, and complexity*** to the requirements of the instant acquisition.

# Regulatory Requirements

---

## Why do it?

Per FAR 15.304, Evaluation factors and significant subfactors, paragraph (c)(3)(i)-

Past performance, except as set forth in paragraph (c)(3)(iii) of this section, ***shall be evaluated in all source selections for negotiated competitive acquisitions expected to exceed the simplified acquisition threshold.***

It also-

- Allows for verification of claims made in the proposal
- Provides motivation for contractors to strive for excellent performance
- Recognizes strong performance
- Reduces risk
- Allows for a more comprehensive best value tradeoff

# Reference Contracts/Subcontracts

---

## How many are allowed?

MSFC acquisitions, including those conducted as Product Service Line (PSL) activities, typically request a maximum of five referenced contracts or subcontracts.

This larger number is particularly important for acquisitions with a large number of PWS elements which might require teaming/subcontracting to perform the full breadth of services or where disparate performance locations also might require a large number of team members.

# Establishing Relevancy Thresholds (Size)

---

Per the GAO, in evaluating proposals, an agency properly may take into account specific, albeit not expressly identified, matters that are logically encompassed by, or related to, the stated evaluation criteria. Size is a proper consideration in determining whether an offeror has experience and a record of past performance under similar contracts.

There appears to be no consistent regulatory bar for size relevancy. GAO affords agency's latitude in establishing a relevancy bar specific to each acquisition. However, GAO can determine that bars can be too low. In the GAO case of *XPO Logistics* (B-412628.6), average annual values of approximately 3% of the acquisition average annual value were determined to be unreasonably low.

Typically, we consider roughly 25% of the average annual value as the floor for size relevancy (we like to establish a commensurate dollar value for both offerors and subcontractors). It can be higher. Conversely, we have, for small business set-asides and for PSL activities, substantially reduced this floor based on market research and consolidation of Center efforts into a single contract vehicle that may greatly exceed the size experience of the small business community.

# Establishing Relevancy Thresholds (Content)

---

The evaluation of content relevancy considers how well the referenced contract aligns with the technical requirements of the acquisition.

For offerors (i.e., the proposed prime contractor) content relevancy is assessed relative to all applicable elements of the PWS as they are ultimately responsible for performance of the entire effort, regardless of how they choose to subcontract portions of the effort.

For example, the RFP may specify six PWS areas as applicable (to include contract management) and indicate that for a reference to be considered relevant, three PWS areas must be considered relevant. While not disclosed in the RFP, the Government would also establish a bar for a high degree of relevancy, for example four or more PWS areas for that referenced contract must be relevant. [Note: this approach does not eliminate the subjective assessment of each PWS area.]

For proposed subcontractors, content relevancy is assessed relative to the technical requirements assigned to that entity. The standard can be higher since subcontractors may be brought in to plug specific performance gaps of the proposed prime contractor.

For example, for a reference to be relevant, the reference may be required to have more than half of the assigned PWS areas determined to be relevant, and for the reference to be highly relevant, the reference might need to have all (which could be one) of the assigned PWS areas determined to be relevant.

# Establishing Relevancy Thresholds (Complexity)

---

The evaluation of complexity relevancy considers how well the referenced contract aligns with the complexity of the acquisition.

For example, the technical requirements of the acquisition may require the contractor to perform window washing services for a large building campus.

While window washing services may use similar types of equipment, if the acquisition requires washing 500 window per week, and the referenced contract indicated the entity only washed 10 windows per week, while the referenced contract might be relevant in content it might not be relevant in complexity.

Other complexity considerations could include, for example-

- Performance across disparate geographic locations
- Manned vs unmanned operations
- Scale of hazardous operations
- Number of employees
- Scale of managed infrastructure

# Establishing Relevancy Thresholds (Recency)

---

NFS 1815.304-70(d)((2)(i) states- Normally, the requested contracts are limited to those awarded in the last **three years** (normally relative to the due date for receipt of proposals). However, in acquisitions that require longer periods to demonstrate performance quality, such as hardware development or small business set-asides where the small business community may have a smaller experience base, the time period can be tailored accordingly in the RFP (e.g., five or six years).

The window established will also typically establish a minimum timeframe of performance within this window (e.g., six months within a three-year window, one year within a five-year window).

Bear in mind that the longer performance window could also bring in less than optimum performance experienced early in a referenced contract.

Please make sure you consider this when selecting the references for inclusion in the Past Performance volume.



# Establishing Performance History

---

Once we get passed the size, content, and complexity gates, then we look at the CPARS and PPQ data to establish an overall performance rating for that reference.

If a referenced contract is not relevant, the reference will not be considered.

If relevant, we look at both CPARS and PPQ data (just PPQ data for subcontractors) to establish an overall rating (e.g., Exceptional, Very Good, Satisfactory).

For CPARS, we can also factor Satisfactory ratings for categories like Cost Management (which for fixed price contracts is about as high as the contractor could get) or Regulatory Compliance where, if they comply, Satisfactory might also be as high as the contractor could get.

# Establishing an Overall Confidence Level

**What is it?** A confidence level is essentially the level of confidence the SEB has in an offeror's team to successfully perform the immediate acquisition based on their history of performance on past, similar efforts. GAO has indicated that the evaluation of the entire past performance factor is by its very nature subjective.

NFS 1815.305(a)(2)(A) provides definitions for the confidence levels of "Very High," "High," "Moderate," "Low," "Very Low," and "Neutral."

At MSFC, if all of the references provided were considered to be not relevant, based on either size, content, or complexity, a "Neutral" level of confidence level is assigned (i.e., evaluated neither favorably nor unfavorably).

The SEB can also consider other factors such as-

- Whether the proposed prime contractor has demonstrated relevant past experience as a prime contractor
- The extent to which the offeror's referenced contracts demonstrate relevant coverage across the breadth of the PWS

# Affiliation

---

**What is an affiliate?** Per FAR 9.403-

Affiliates.—

(1) Business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly—

(i) Either one controls or has the power to control the other; or

(ii) A third party controls or has the power to control both.

(2) Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended, or proposed for debarment.

# Affiliation (continued)

---

Per the Government Accountability Office, the relevant consideration for the acceptable use of affiliate past performance is whether the resources of the parent or affiliated company – its workforce, management, facilities, or other resources – will be provided or relied upon, such that the parent or affiliate will have ***meaningful involvement*** in contract performance.

Provided there is no provision in the solicitation that precludes offerors from relying on the resources of their corporate parent or affiliated companies in performing the contract, and an offeror represents in its proposal that resources of a related company will be committed to the contract, the agency may properly consider those resources in evaluating the proposal.

What we do – Per Section L, Past Performance Factor Instructions, Section II, paragraph (3) –

When a referenced contract was awarded to or performed by a legal entity different from the offeror (or any proposed subcontractor), offerors shall thoroughly explain, in a manner that supports use of the referenced contract for the proposed effort (e.g., shared workforce, management, facilities, or other resources), the relationship between the other legal entity and the offeror (or any proposed subcontractor).

# Affiliation (Reasonable credit)

In the matter of *Hot Shot Express, Inc.*, B-290482 (for transporting laundry between VA medical centers)-

The record indicated the resources of CSS's parent and affiliated companies would have meaningful involvement in contract performance based on-

- CSS was part of a family of wholly-owned subsidiaries and closely-held affiliates with interlocking officers and boards of directors providing services to the federal government, and the parent of which was Crown Management Services, Inc. Although Crown companies operated as independent cost centers, they reported to the corporate office from which they receive corporate resources and support.
- The effort would be managed from the corporate office which would provide contract administration, quality control, safety, finance/accounting, payroll and accounts payable.
- The proposal also indicated -
  - The project manager would be the president of CSS.
  - The president of CSS was also VP of Crown Management Services
  - The chairman of CSS was also the CEO and president of both Crown Management Services and Crown Healthcare Laundry Services and VP of Crown Healthcare Laundry Services
  - The controller of CSS was also the controller of Crown Management Services and Crown Healthcare Laundry Services
- The proposal indicated Crown companies' laundry services experience.

In short, the proposal made the necessary connections of the affiliates to the immediate acquisition to leverage affiliate experience.

# Affiliation (Reasonable credit)

In the matter of *TOTE Services, Inc.*, B-414295 (for operation and maintenance of that agency's Sea Band X-Band Radar vessel)-

The record indicated the resources of the two affiliates would meaningfully influence the effort based on-

- The proposal included a cover letter on company letterhead, signed by corporate officers, expressly representing that award would provide access to the worldwide resources and capabilities parent/affiliate.
- The proposal was replete with references to the resources the parent/affiliate would bring to the contract, including –
  - A personnel database
  - A budgeting, purchasing, and accounting system
  - Emergency response, crisis management plan, and business continuity plan
  - Small business subcontracting plan
  - A certificate of protection and indemnity insurance

In short, the proposal did a good job of demonstrating the meaningful involvement that the parent/affiliate would have in contract performance.

# Affiliation (Unreasonable credit)

In the matter of *Language Select LLP*, B-415097 (for telephone interpretation services)-

The record did not indicate that the affiliate would be meaningfully involved-

- References were for three contracts performed by affiliates.
- No identification of proposed resources was provided, only stating that the affiliate was a wholly-owned subsidiary and that its services were “provided and managed” by CII.

In short –

- The fact of ownership of an affiliate company was not sufficient to show that the past performance of one can be attributed to the other.
- Absence of a factual basis to conclude a commitment of resources and meaningful involvement from other separate corporate subsidiaries, attribution of those affiliate’s past performance and experience was improper.

Lessons learned –

- If you want to claim a parent or affiliate’s experience, the proposal must **clearly** establish the role and meaningful involvement of the parent/affiliate in the effort for which you are proposing.
- The Government should not have to infer that the relationship will affect performance or even accept an offeror’s general representation that the affiliate’s performance should be attributed to the offeror. Make it plain to the reader.

# Affiliation (Caveat)

---

The GAO cases provide helpful examples of whether meaningful involvement exists. However, having the same elements as the cited GAO cases does not necessarily equate to having or not having meaningful involvement. Likewise, having different elements than the cited GAO cases does not necessarily equate to having or not having meaningful involvement. Agencies have wide discretion when evaluating past performance. In addition, the same set of elements associated with meaningful involvement may be considered adequate by one agency and inadequate by another agency, and both decisions could be considered reasonable by the GAO. There simply is no magic formula for meaningful involvement.



# Affiliation (Other Considerations)

---

FAR 15.305(a)(2)(i) requires that agencies consider the source of past performance information as part of the past performance evaluation.

In the matter of *PacArctic, LLC* (B-413914.3), the GAO determined that the Government's decision to not consider one of the protester's past performance questionnaires (PPQs) was proper as the agency reasonably determined that the questionnaire lacked credibility as it was completed by the president of the protester's sister company, with which the protester shared common ownership and control, and which was proposed as one of the protester's subcontractors under the solicitation. The Government attempted to verify performance by other means but was unsuccessful.

Lesson learned – An independent PPQ evaluator, either not on your team or on a competitor's team, is the best source of PPQ information.

# HR 6395 William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021

## SEC. 868. PAST PERFORMANCE RATINGS OF CERTAIN SMALL BUSINESS CONCERNS.

- (a) PAST PERFORMANCE RATINGS OF **JOINT VENTURES** FOR SMALL BUSINESS CONCERNS.—Section 15(e) of the Small Business Act (15 U.S.C. 644(e)) is amended by adding at the end the following new paragraph:

“(5) PAST PERFORMANCE RATINGS OF JOINT VENTURES FOR SMALL BUSINESS CONCERNS.—With respect to ***evaluating an offer for a prime contract made by a small business concern that previously participated in a joint venture*** with another business concern (whether or not such other business concern was a small business concern), the Administrator shall establish regulations-

“(A) ***allowing the small business concern to elect to use the past performance of the joint venture if the small business concern has no relevant past performance of its own;***

“(B) ***requiring*** the small business concern, when making an election under subparagraph (A) –  
“(i) to ***identify to the contracting officer the joint venture*** of which the small business concern was a member; and

“(ii) to ***inform the contracting officer what duties and responsibilities the small business concern carried out as part of the joint venture;*** and

“(C) ***requiring a contracting officer, if the small business concern makes an election under subparagraph (A), to consider the past performance of the joint venture when evaluating the past performance of the small business concern, giving due consideration to the information provided under subparagraph (B)(ii).***”.

# HR 6395 William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021

---

What we do-

## Section M – Past Performance Factor Evaluation

“If an offeror is a new joint venture (JV) without a past performance record, past performance will be evaluated for each individual JV partner for which a referenced contract is submitted, in accordance with the relevancy thresholds established for the offeror. References for protégé members of any proposed mentor-protégé JV agreement will be evaluated in accordance with the relevancy thresholds established for proposed subcontractors (see 13 C.F.R. § 125.8(e)). Participation of an individual JV partner in another JV will be evaluated provided that the partner’s sole effort is clearly described and meets established relevancy criteria.”

This MSFC provision language for the evaluation of past performance makes allowance for lower thresholds for protégé members as the managing partner of joint ventures in order to gain valuable experience.

# HR 6395 William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021

---

(b) PAST PERFORMANCE RATINGS OF FIRST-TIER SMALL BUSINESS SUBCONTRACTORS.—Section 8(d)(17) of the Small Business Act (15 U.S.C. 637(d)(17)) is amended to read as follows:

“(17) PAST PERFORMANCE RATINGS FOR CERTAIN SMALL BUSINESS SUBCONTRACTORS.—***Upon request by a small business concern*** that performed as a *first tier subcontractor* on a covered contract (as defined in paragraph (13)(A)), the ***prime contractor*** for such covered contract ***shall submit*** to such small business concern ***a record of past performance for such small business concern*** with respect to such covered contract. If a small business concern elects to use such record of past performance, a contracting officer shall consider such record of past performance when evaluating an offer for a prime contract made by such small business concern.”

# HR 6395 William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021

---

## What we do-

Presently, we do not recognize the performance of subcontractors for referenced contracts if the prime contractor will not complete a PPQ for that subcontractor. MSFC will attempt to establish performance using means other than a prime contractor PPQ, such as COR knowledge of performance.

When the Section 868 language is implemented in applicable regulations, these referenced contracts/subcontracts can be evaluated for relevancy.

# Ways to Get Relevant Experience

---

## **Mentor – Protégé Joint Ventures**

The lack of demonstrated relevant performance as a prime contractor can have an impact on the confidence level assigned.

One way to gain valuable management experience is for the protégé to be the managing partner of a Mentor-Protégé joint venture agreement.

Please ensure that you comply with Small Business Administration regulations regarding formulation of such arrangements as well as the content requirements of the agreement.

See <https://www.sba.gov/federal-contracting/contracting-assistance-programs/sba-mentor-protége-program>

This site also provides qualification requirements for both the protégé and the mentor.

# Ways to Get Relevant Experience

## Mentor – Protégé Joint Ventures

In the case of *Innovate Now, LLC* (B-419546), the GAO held that “A procuring activity may not require the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems and certifications necessary to perform the contract.”

They also stated the joint venture created under the Mentor-Protégé Program “should be a tool to enable it [the protégé firm] to win and perform a contract in an area that it has some experience but that it could not have won on its own.”

## Protégé Benefits

- Guidance on internal business management systems, accounting, marketing, manufacturing, and strategic planning
- Financial assistance in the form of equity investments, loans, and bonding
- Assistance navigating federal contract bidding, acquisition, and the federal procurement process
- Education about international trade, strategic planning, and finding markets
- Business development, including strategy and identifying contracting and partnership opportunities
- General and administrative assistance, like human resource sharing or security clearance support

# Impacts of PSL Activities

---

The greatest impact resulting from PSL activities is the reduced number of prime contracts awarded across the Agency. However, teaming/subcontracting with similarly situated small businesses across the performance region should help to lessen this impact.

MSFC has not yet implemented a streamlined approach (e.g., Price Performance Tradeoff) for PSL activities, and has been evaluating a Mission Suitability volume as part of a three factor trade. The relative weighting of these factors will always be provided in the solicitation. This can help to lesson the impact of the lack of experience for contracts of this magnitude for the small business community.

MSFC also tries to utilize small business set-asides for PSL activities; however, the increased size of these acquisitions can exceed the experience base of much of this community. Lower size standards can help to address this issue.



# Enterprise Delivery Model Transformation

## CONOPS to implement a successful transition of Procurement Assignments

- A matrix procurement workforce that supports the buying office that is responsible for the Procurement Assignment
- May participate on SEB and administration may be performed locally (i.e. issue Task Orders on Enterprise Contracts)
- Local Center Leadership may contact local POs/Chiefs of Contracting for all Procurement inquiries

## Governance

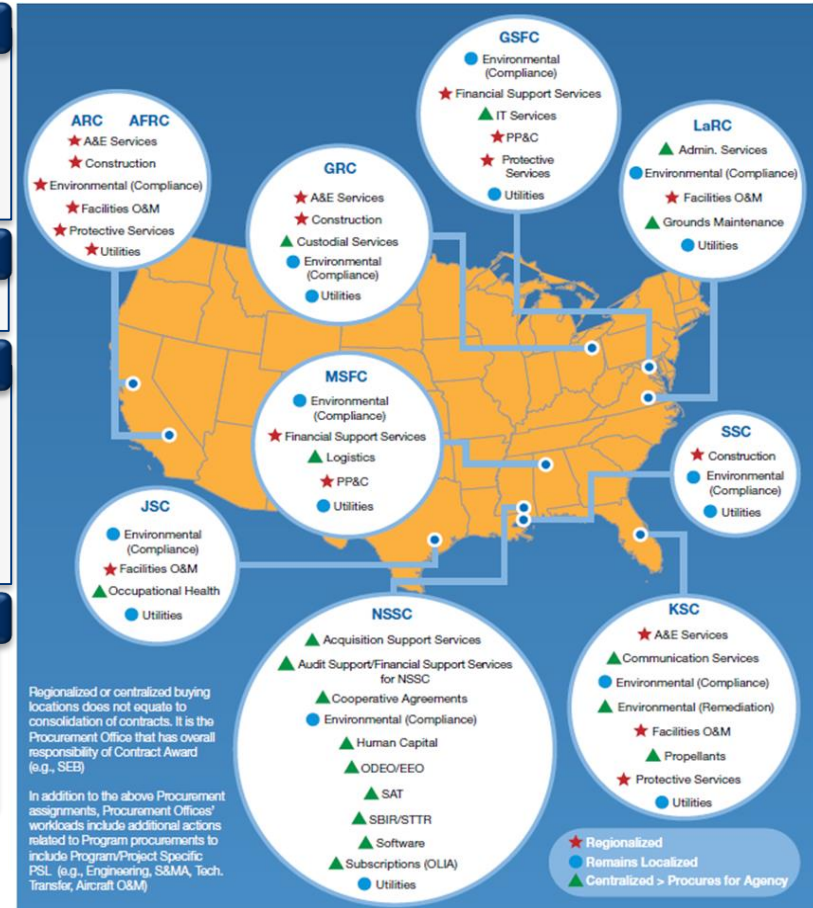
- Strategy for each PSL will be documented in [NASA FAR Supplement Appendix A](#)

## Buying Office implementation of long-term strategies for each PSL

- Phased approach as strategies are developed considering existing contract off-ramps
- Each buying location identifies a PSL POC, Lead Contracting Officer (CO) responsible for PSL at the Buying Office (Procurement Assignment) Works closely with the PPMs and ERMs to complete a smooth handoff from the strategy development phase to the execution phase
- Works closely with one or more matrixed COs (including OSBP) from requiring Center to develop plan for the procurement and requirements development

## Communicating the Change

- Ongoing communications with stakeholders
  - POs ongoing communication with COs and entire workforce and local stakeholders
  - Functional Owners / ERMs ongoing communication of PSL strategy with local technical requirement owners
- Develop outreach website to provide procurement entry points, roadmap of process, and guides (i.e. Doorway to Procurement)



# Important Considerations

---

- The evaluation of past performance is subjective and an offeror's disagreement with an agency's evaluation judgement does not necessarily demonstrate that those judgements are unreasonable. (see *Maxim Healthcare*, B-412967) This includes the weight assigned to a subcontractor's past performance. (see *Veteran National Transportation*, B-415696)
- Make sure you provide all of the information that the solicitation requests to allow for a correlation to the immediate acquisition.
- Relevancy and quality are two sides of the same coin. If not relevant, we are not interested in how you did. If relevant, we need to know how you did.
- If you are going to claim the experience of an affiliate, clearly explain how that entity will meaningfully influence the acquisition.
- Make sure to validate the referenced contract's size value to avoid the Government having to reconcile differences between the proposal, CPARS reports, and PPQs.
- When describing the past effort in terms of content, try to correlate the description to specific requirements in the PWS (e.g., PWS 3.2, 4.3.3).
- Confirm past performance reference contact data in case the Government needs to follow up.
- Follow up with customers filling out PPQs to make sure they are able to submit to the Government by the due date for receipt of proposals.