DID YOU KNOW?

The Iron Law of Privity is not a new concept, but Noblis and ASRC Federal are useful reminders that it is unforgiving.

COUNSEL COMMENTARY

Whose Past Performance Is It Anyway?

Two recent bid protest decisions provide critical guidance for contractors that rely on past performance of their affiliates.

BY STEPHEN L. BACON

Many government contractors do not operate as a single legal entity. They often operate as a corporate family comprised of a parent company and one or more subsidiaries under common ownership.

When it comes time to compete, contractors naturally want to put their best foot forward by drawing on the past performance and experience of the corporate family of affiliates. This approach is understandable, but it has consistently tripped up offerors that treat their corporate family as a single entity for proposal purposes.

Two recent decisions from the U.S. Court of Federal Claims – *Noblis MSD, LLC v. United States*[1] and *ASRC Federal Infrastructure Support, LLC v. United States*[2] – provide a stark warning to contractors that intend to rely on their affiliates' past performance and experience. These decisions emphasize that the offeror's proposal must identify, with specificity, the affiliate resources that will meaningfully contribute to the performance of the contract. Affiliation alone is not enough.

These decisions are required reading for contractors that rely on affiliates to perform work for the government. For protesters, they offer a clear roadmap for challenging an award where the agency improperly credits the experience or past performance of an affiliate to the offering entity.

Chief Judge Solomson's Four Permutations

The *Noblis* decision involved a challenge to the Navy's award of an approximately $100 million contract to Solute, Inc. for engineering services in support of the Consolidated Afloat Networks and Enterprise Services (CANES) program. The Navy rated Solute and Noblis essentially equal on the non-cost factors and selected Solute's lower-cost proposal for award.

Noblis' protest included an attack on the agency's past performance evaluation. Noblis argued that Solute had improperly relied on the experience of its parent company, Sigma Defense Systems, LLC, without ever explaining what Sigma would actually do on the contract.

Before reaching the merits of this argument, Chief Judge Solomson laid out a comprehensive framework for how agencies may consider affiliate and subcontractor past performance. The decision identified four "permutations" of solicitation language:

- **Permutation One** is a total exclusion. The solicitation expressly prohibits reliance on affiliates and subcontractors. In that situation, only the offeror's own track record counts.
- **Permutation Two** permits the offeror to use subcontractors or affiliates but bars the agency from giving credit for their past performance under the past performance factor. The agency may consider those entities in the evaluation of other factors, but the offeror's past performance rating must rest on the offeror's own record.
- **Permutation Three** allows affiliate or subcontractor past performance, but the solicitation requires documented commitments, agreements, or other specific evidence showing that the entity will meaningfully participate in performance of the contract.
- **Permutation Four** is the silent solicitation. Where the solicitation says nothing about affiliate or subcontractor past performance, the default rule applies: the agency may consider it, but only if the proposal explains how the affiliate's resources will affect the offeror's performance of the contract.[3]

The unifying principle running through these permutations is what Chief Judge Solomson called the "Iron Law of Privity." There is one offeror, which becomes the prime contractor upon award of the contract, and that entity alone is in privity of contract with the government and remains ultimately responsible for performance.

Affiliated entities and subcontractors are separate legal entities, and their experience belongs to them. When an agency considers the past performance of an entity that is not the offeror, it is making a prospective judgment that the offeror will leverage that entity to perform the contract.

Solute's Proposal Comes Up Short

The CANES solicitation at issue in *Noblis* fell into Permutation Four of Chief Judge Solomson's framework. It said nothing about affiliate past performance, neither prohibiting nor specifying what an offeror had to show to obtain credit for it.

As a result, the "default rule" applied. For the Navy to reasonably credit Sigma's past performance, Solute had to identify the specific personnel, facilities, or systems of Sigma that would be deployed on the CANES contract, and demonstrate that Sigma was committed to providing them. Solute's proposal failed to do that with adequate specificity.

Solute submitted three past performance references: one from itself, one from its proposed subcontractor, and one from Sigma. Solute's own reference earned a "satisfactory" rating, while the agency assigned an "exceptional" rating to the references from Solute's affiliate and subcontractor. These collective ratings resulted in an overall "Substantial Confidence" rating for Solute under the Past Performance factor, which put Solute on equal footing with Noblis.

In the Court's view, the problem was that Solute's proposal repeatedly referred to "Team Solute" without ever defining the term and the narrative blurred these two distinct entities together. The proposal did not identify which Sigma personnel would work on the contract, what percentage of work Sigma would perform, what intra-corporate agreements existed, or how Solute would manage and oversee Sigma's employees.

Solute tried to salvage the Navy's evaluation by pointing to its separate cost proposal volume, which described the integration of Solute and Sigma under shared management. The Court, however, rejected this argument on two grounds. First, the Navy's Source Selection Plan provided that the technical evaluators would not have access to the cost proposals and, thus, the evaluators who rated past performance had no reason to see or basis to consider anything in the cost volume. Second, even the cost-volume's discussion of corporate integration was insufficient because it did not commit Sigma resources to specific contract tasks.

The Court also noted that Solute's proposal contained a table introducing "Team Solute" as 10 named companies, but Sigma was not among the entities listed. Ultimately, Chief Judge Solomson ruled that the Navy could not reasonably have concluded that Sigma's experience would meaningfully affect Solute's performance based on the contents of its proposal.[4]

COUNSEL COMMENTARY CONT'D

ASRC Federal: Different Permutation, Same Problem

Shortly after the *Noblis* decision was issued, Judge Hertling had the opportunity to apply Chief Judge Solomson's framework. The decision in *ASRC Federal Infrastructure Support, LLC v. United States* involved contracts awarded to Dawson MCG, LLC for student services and facilities operations at the Department of Homeland Security's Federal Law Enforcement Training Center in Charleston, South Carolina.

ASRC Federal Infrastructure Support, LLC (AFIS) protested the awards on multiple grounds, including challenges to the agency's evaluation of Dawson under the experience and past performance factors.

The solicitations at issue were not silent on affiliate past performance. Section M of those solicitations expressly permitted the agency to consider past performance from any critical subcontractor, parent, affiliated company, or predecessor company. In addition, Section L allowed offerors to submit additional past performance information for affiliates, provided that the proposal demonstrated that the affiliate's resources would affect contract performance and the affiliate would have meaningful involvement in the contract.

Dawson asserted that the solicitations reflected Chief Judge Solomson's "Permutation Three," and argued that the agency was allowed to consider the past performance of its affiliates based on general references to those affiliates in its proposals.

The Court rejected this contention and held that, even under Permutation Three, "an agency may only credit an offeror for the past performance of the offeror's affiliates if the offer demonstrates that those affiliates will have a significant, committed role in the contract."[5]

Dawson's proposal did not clear that bar. For the facilities operations contract, Dawson submitted six past performance references and claimed to have performed each one itself. But the record showed that all six had been performed by affiliates.

For the student services contract, Dawson submitted six references and four of those were attributed to its proposed subcontractors. Of the two reference attributed to Dawson, only one was performed by Dawson and other was performed by an affiliate.

Dawson's explanation of how its affiliates would participate in the two contracts was limited to a single statement on the cover page of each past performance section. That language did not identify which affiliates would participate, which personnel from those affiliates would perform which tasks, or what resources the affiliates would contribute.

As Judge Hertling put it, Dawson's proposals "merely aggregate the entire corporate family under the single name 'DAWSON' without distinction, and propose that the whole team will be available to support work under the contracts."[6]

The agency argued that Dawson's oral presentation supplied the missing detail because team members from Dawson's affiliates were introduced and their roles were discussed. The Court disagreed.

The capabilities of key personnel were evaluated under a separate factor, and the record contained no indication that the evaluators considered key personnel when assessing prior experience or past performance. According to the Court, an agency "may not simply treat affiliate personnel as alter-egos of the affiliate itself."[7]

Given the lack of information in Dawson's proposal about how its affiliates would be meaningfully involved, the Court held that, on the preliminary injunction record before the Court, AFIS was likely to succeed on its challenge to the agency's evaluation of Dawson under the experience and past performance factors. (The Court did not ultimately grant the preliminary injunction requested by AFIS because it did not establish that it would suffer irreparable harm in the absence of an injunction.)

Practical Takeaways for Contractors

For contractors that intend to rely on affiliate past performance, *Noblis* and *ASRC Federal* offer helpful guidance:

- ***Identify which permutation applies.*** Contractors should carefully parse the language of the solicitation to determine whether and under what circumstances the procuring agency will consider past performance of an affiliate.
- ***Clarify ambiguous instructions.*** The question-and-answer process is your opportunity to lock in the agency's interpretation of the evaluation criteria. A well-framed question about whether and how affiliate past performance will be evaluated can resolve uncertainty before the proposal is due.
- ***Link the affiliate's prior record to contract performance.*** Your proposal should clearly identify the affiliates whose experience you are claiming and describe what resources (e.g., personnel, facilities, systems, certifications, etc.) those affiliates will contribute. If possible, describe the intra-corporate arrangement that ensures the affiliate will deliver the relevant contribution.

- ***Put critical information in the right proposal volume.*** Make sure that the explanation of how the affiliate's resources will be deployed is included in the section of the proposal that will be read by past performance evaluators. As the *Noblis* decision illustrates, a corporate integration story placed in the wrong proposal section does you no good.
- ***Be careful with "Team [Prime]" labels.*** Both *Noblis* and *ASRC Federal* flagged the practice of aggregating the corporate family under a single team name as a vulnerability. Use the actual legal names of the entities whose experience you are claiming and identify what each one will contribute to contract performance.
- ***For protesters, consider how the awardee handled affiliates.*** When an awardee is part of a larger corporate family, it is important to consider whether the awardee has its own past performance or relied on affiliates. A proposal that fails to clearly identify how affiliate resources will be leveraged to support contract performance creates a substantial protest vulnerability that may be exploited.

Conclusion

The Iron Law of Privity is not a new concept, but *Noblis* and *ASRC Federal* are useful reminders that it is unforgiving. If permitted by the solicitation, contractors can leverage affiliate past performance to improve the competitiveness of their proposals.

However, as both *Noblis* and *ASRC Federal* make clear, reliance on affiliate past performance will not survive scrutiny unless the offeror's proposal creates a clear connection between the affiliate's prior work and how the affiliate's resources will be deployed to perform the contract at issue. **CM**

Stephen L. Bacon is a shareholder in the Washington, D.C. office of the law firm Rogers Joseph O'Donnell, where he represents government contractors in bid protests, claims, terminations, investigations, and suspension and debarment proceedings. He frequently litigates cases at the U.S. Court of Federal Claims, the Government Accountability Office, the Boards of Contract Appeals, and the Small Business Administration's Office of Hearings and Appeals. He also provides advice and counseling to clients on a broad range of contractual and regulatory compliance issues that confront government contractors.

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ENDNOTES

1 Noblis MSD, LLC v. United States, --Fed. Cl.--, 2026 WL 851951 (Fed. Cl. Mar. 25, 2026).
2 ASRC Federal Infrastructure Support, LLC v. United States, --Fed. Cl.--, 2026 WL 1021231 (Fed. Cl. Apr. 14, 2026).
3 The default rule is supported by longstanding precedent. See, e.g., Femme Comp Inc. v. United States, 83 Fed. Cl. 704, 747 (2008); Hot Shot Express, Inc., B-290482, Aug. 2, 2002, 2002 CPD ¶ 139; IAP World Servs., Inc., B-407917.2, Jul. 10, 2013, 2013 CPD ¶ 171.
4 The Court denied the plaintiff's request for injunctive relief because it did not brief the injunctive relief factors, a separate cautionary tale for plaintiffs' counsel.
5 ASRC Federal, 2026 WL 1021231, *7.
6 Id. at *8.
7 Id.