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*Striking a Balance Between Government Efficiency and Fairness to Contractors: Past Performance Evaluations in Government Contracts*

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Abstract by Ryann Kathleen Bernard

In 1994, Congress passed the Federal Acquisition Streamlining Act (FASA), which requires that federal agencies implement past performance as a criterion, along with price, rate, and quality, in evaluating competitively negotiated proposals. Procurements are governed by Federal Acquisition Regulation (FAR). The author identifies two problems that arise with the use of past performance information. First, the agency decides which provided references to consider and is not required to seek information that would mitigate negative past performance evaluations. Second, the individual evaluator is allowed to consider personal knowledge based on past experience with the offeror. Significant discretion is given to agencies in conducting these evaluations. Revisions to FAR only allow the most highly rated offers to advance, but this remains at the discretion of the contracting officer. The revisions also allow negative past performance evaluations from sources provided by the offeror to be addressed, which the author views as an acknowledgment of the subjectivity of the evaluation process.

The author sets forth some recommendations. First, that offerors are provided the opportunity to address adverse past performance information obtained from references that they provide. Second, that offerors are given the opportunity to amend their proposals before the agency determines the competitive range. In conclusion, the author argues that the way past evaluations are presently used makes an already subjective process even more subjective. Even though an offeror can address negative information from sources they provide, the agency still has the discretion to prevent comment on other negative evaluations. If the process is to become less subjective, the author deduces that offerors must be able to effectively address past performance information.