The Federal Acquisition Reform Act of 1994

by

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INTRODUCTION

The Federal Acquisition Streamlining Act of 1994 (FASA, hereinafter referred to as "the Act"), which some consider the most significant acquisition reform since the Armed Forces Procurement Act of 1947, was signed by President Clinton on October 13, 1994.[1] It represents the culmination of four years of cooperative bipartisan activity, including the Section 800 Panel review of over 600 procurement-related laws, the adoption of many of the panel's recommendations by the Office of Federal Procurement policy (OFPP), the President and Vice President, the DoD, the defense industry, and the six committees in Congress that reviewed and refined the legislation. The Act repeals or substantially modifies 225 procurement statutes throughout its 166 pages. It will dramatically impact how the U.S. Government spends approximately $200 billion a year (of which DoD spent about $138.3 billion in FY 1993) on the procurement of products and services.[2] (FY 1993 is the latest year for which complete award data is available.) Acquisition in support of foreign military sales (FMS) will be affected as billions of dollars are spent each year on behalf of FMS customers. For example, $9.9 billion of the $138.3 billion spent by DoD in FY 1993 and over $6 billion spent in FY 1994, were for FMS customers requirements.[3]

The need to reduce the enormous cost of government procurement, especially as incurred by contractors carrying an inordinate amount of government-induced overhead costs, has been well documented by two recent studies. These overhead and regulatory cost studies underscore the need for major procurement reform. In 1994, the CPA firm, KPMG Peat Marwick, under sponsorship of the U.S. Army Material Command, conducted a study that found DoD unique requirements, e.g., military standards and specifications and FAR clauses like the Truth in Negotiations Act, add about a 20 percent premium to government contracts. In addition, the study, which was entitled "Activity Based Cost Management Study of DOD-Unique Requirements," found that out of 90 DoD unique requirements, the top 18 accounted for 91 percent of the DoD unique costs. For example, MIL-Q-9858A, DOD's quality assurance standard, accounted for 28 percent of those costs, according to the study.[4] The second study, issued in December 1994, was prepared for the Secretary of Defense by Coopers & Lybrand and TASC, and was entitled "The DoD Regulatory Cost Premium: A Quantitative Assessment." This study found that DoD unique requirements add an approximate 18 percent cost premium to government contracts.[5] According to Colleen Preston, the Deputy Undersecretary of Defense for Acquisition Reform, this is the first study in recent history where the Pentagon sought an outside

[1] Federal Acquisition Streamlining Act of 1994, P.L. 103-355.

[2] J.A. Drelicharz, "Highlights of the Federal Acquisition Streamlining Act of 1994 - Lowering Government's Cost of Doing Business," Program Manager, Nov.-Dec. 1994, p.12. DOD Prime Contract Awards, Fiscal Year 1993, Washington Headquarters Services, Directorate for Information Operations and Reports, p. 5.

[3] *Ibid.*, p.1 and for the FY 1994 figure, an estimate based on $3.1 billion spent in first half of FY 1994, according to the DOD Prime Contract Awards, First Half FY 1994, p.1.

[4] Based on telephone discussion on March 21, 1995, with Larry Huff, partner at KPMG, Peat Marwick responsible for the conduct of the study for the U.S. Army Material Command.

[5] Defense News, December 19, 1994.

third party to assess the overhead caused by unique requirements, regulations, and oversight the Pentagon demands of its contractors. The study said that "DoD has the authority to substantially reduce compliance costs." Preston emphasized that the FASA will permit DoD to make "many corrective actions" to eliminate some or all of the main cost drivers.[6]

Even before the passage of FASA, DoD implemented measures to reduce regulatory compliance and overhead costs. In January 1994, John Deutch, then Undersecretary of Defense (Acquisition and Technology), authorized DoD program managers to use commercial industry quality assurance standards "for the first time." In June 1994, Dr. Perry directed program managers to start using performance specifications instead of military specifications and standards, which exhaustively detail most aspects of weapons development. Now, program managers must obtain a waiver from OSC to use military specifications and standards.

As will be discussed below, FASA has eliminated or modified many obsolete and redundant laws, and has also disposed of unnecessarily burdensome oversight policies and regulations. One author has stated that the intent of the Act is, "to develop a more equitable balance between government-unique requirements and the need to lower the government's cost of doing business."[7]

Ms. Colleen A. Preston reports a more global and national policy foundation driving this reform:

> In order to meet the national security requirements of the post-Cold War world and comply with national domestic policy, we must be able to procure state-of-the art technology and products rapidly from reliable suppliers who utilize the latest manufacturing and management techniques; assist United States companies now predominantly dependent on DoD business to transition to dual-use production; aid in the transfer of military technology to the commercial sector; and preserve defense-unique core capabilities.[8]

The effective dates and implementation of the amendments made by the Act are effective on the earlier of the dates specified in the final implementing regulations (no earlier than 30 days following publication of the final regulations or October 1, 1995, whichever comes first). There are, however, 52 sections designated in Section 10001(c) of the Act that took effect immediately, e.g., the micropurchase $2,500 threshold of Section 4301, which will be discussed below, and the statutory continuation of the $500,000 threshold by Section 1201, for submittal of certified cost or pricing data by U.S. prime contractors and subcontractors when there is inadequate price competition. [When there is "adequate price competition"—two or more responsible and responsive offerors—as provided in FAR 15.804-3(b), then certified cost or pricing data shall not be required by the contracting officer (Sections 1202 and 1203).]

The major features of the Act that will be discussed in this article are the establishment of a Simplified Acquisition Threshold (SAT) of $100,000 and its relationship to the use of electronic commerce in source selection; a micropurchase threshold of $2,500, to simplify small purchases; the exclusive reservation of procurements up to $100,000 to small businesses; the statutory preference for government use of commercial items or products; and the "contingency operation" threshold of up to $200,000 for acquisitions outside the U.S., e.g. for peacekeeping purposes.

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[6] *Ibid.*

[7] *Ibid.*, note 2 Drelicharz article supra, p. 12.

[8] C.A. Preston, "Acquisition Reform: Making It a Reality, "*Acquisition Review Quarterly*, Winter 1994, pp. 6-11, p. 8.

MAJOR FEATURES

Simplified Acquisitions (SAT), Electronic Commerce, and Micropurchases

SAT. The Act eliminates the "small purchase threshold" of $25,000 and replaces it with a "simplified acquisition threshold" of $100,000 (Sec. 4001). The Act expands the pre-existing small purchase streamlined process for acquisitions or procurements up to $100,000, which reduces the administrative overhead needed for such acquisitions and should result in significant savings for the U.S. Government as this is implemented and executed over the next several years. The proposed SAT rule (revised FAR Part 13), calls for simpler, streamlined solicitations, evaluation methods, and awards with less stringent documentation. For example, shorter solicitation periods will be permitted after the initial 15-day notification published in the Commerce Business Daily (CBD). While the evaluation criteria established in the SAT-solicitation must be complied with in conducting the evaluation, "formal evaluation plans, conduct of discussions, and scoring of quotes or other offers are not required."[9] In regard to the potential cost savings of this change, one author has reported that eliminating obsolete and redundant laws and statutes should result in " a less than four-percent cost saving."[10] The Act and proposed SAT rule list those laws made inapplicable by FASA to all contracts and subcontracts under the SAT. For examples, purchases up to $100,000 are exempt from examination of records (audit by U.S.), contingent fee certifications, and Drug-Free Workplace Act provisions (Sections 4102,4103, 4104). If the existing rules and regulations are streamlined and carefully executed, under the Act, the U.S. "could increase that savings to as high as 60 percent."[11]

Initially, SAT procurements are limited to those between $2,500 and $50,000, effective immediately upon implementation of the Act in the FAR. Proposed implementing regulations are under review and should be finally approved by October 1, 1995, if not sooner. When issued in final form, procurement or contract activities will be authorized to use simplified acquisition procedures on all contracts valued below $50,000. Procurement contracting between $50,000 and $100,000 is *linked* to a contracting activity's ability to conduct its source selection and contract award process by electronic commerce.

Electronic commerce source selection. Electronic commerce, or electronic data interchange (EDI) as some call it, means using computers to electronically give public notice of solicitations, issue solicitations, receive bids and proposals, receive and answer questions from bidders or offerors, award contracts, and make payments. This electronic commerce will be implemented via the Federal Acquisition Computer Network architecture (FACNET) in two phases called "interim FACNET" and "full FACNET" for contracts up to $100,000. Interim FACNET certification will be issued once the contracting activity is able to provide *widespread* electronic source selection communications to the private sector, as stated above. This capability includes "enabling the private sector to access both notices of solicitations and to respond to solicitations electronically."[12] Certification (for DoD contracting purposes) would be made by the Under Secretary of Defense (Acquisition and Technology) to conduct eligible item electronic procurement through FACNET for procurements up to the $100,000 SAT (Section 9001).

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[9]L.H Armes, "Acquisition Reform - Proposed FASA Rule Links Phases of FACNET Capabilities, Simplified Acquisition Procedures," Federal Contracts Report, March 6, 1995, p. 309, at p. 310.
[10]*Ibid.*, note 2 supra, p.12.
[11]Id.
[12]Federal Contracts Report, March 6, 1995.

Full FACNET capability, which contracting agencies must have by January 1, 2000, means that an agency will have implemented all of the FACNET functions stated in the newly proposed FAR subpart 4.5. Also, FACNET must be used for "at least 75 percent of eligible contracts (not otherwise exempted from FACNET) valued between $2,500 and $100,000 during the preceding fiscal year."[13] This certification must be made by the head of the agency, with the concurrence of the Office of Federal Procurement Policy. Once full FACNET has been accomplished *government-wide*, then solicitations on procurements up to $250,000 would be exempt from publication in the CBD.

As a caution, the use of FACNET at present is limited to base operations contracting requirements. Such use will expand for other types of contracting as contracting agencies make progress toward achieving interim FACNET capability.

As a result of FASA, the simplified procedures described above could be used to achieve streamlining and cost savings related to "an additional 45,000 procurement actions that have an aggregate value of approximately $3 billion per year."[14]

Micropurchases. The Act permits purchases of $2,500 or less to be made by authorized nonprocurement personnel without obtaining competitive quotations "if the contracting officer determines that the price for the purchase is reasonable." (Section 4301) These purchases must be "distributed equitably among qualified suppliers." (Section 4301) Agency officials may make simplified purchases and credit card purchases up to $2,500 per occurrence and up to $20,000 per year, per official, with several restrictions. In addition, these purchases are not subject to the Buy American Act (41 USC 10a-10c) and the Small Business Act (15 USC 644(j)). (Section 4301) This Section is effective upon enactment (October 13, 1994) and must be implemented within 60 days of enactment.

Actually, the credit card authority began in 1987, when OMB asked GSA to provide commercial credit cards for government agencies to use for small purchases.[15] It was then called the International Merchant Purchase Authorization Card (IMPAC) program. Since the award by GSA of the first contract was issed to the Rocky Mountain Bank Card System in 1989, the program had grown by FY 1994 to 89,000 credit-card holders from more than 3,600 offices in 66 government agencies. Nine out of ten of the 2.5 million transactions worth $808.5 million, were accomplished by mail or telephone. Typical purchases include, office products, computer hardware and software, tools, building supplies, electronic equipment, and subscriptions to periodicals. The card cannot be used to lease or rent buildings, to obtain cash advances from ATMs or banks, or for telecommunications services under the FTS 2000 contract. In 1994 when FASA was enacted, "Agencies were told they should use the card for most purchases under $2,500, with the exception of mandatory-source purchases and purchases exempt under agency-specific regulations."[16] One article stated the "savings are enormous: *Each transaction* made with the IMPAC card saves the government an estimated $54 over the traditional paper-based method."[17] Also, according to an article in the March 1995 issue of *Government Executive*, initial fears of abuse or fraud have proved to be unfounded.

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[13] *Ibid.*
[14] Armes, Op. Cit.; p. 13.
[15] M. Amtower, "The Federal Marketplace - Charging Small Purchases," Government Executive, March 1995, p.52.
[16] Id.
[17] Id.

The Department of Defense (DoD) accounts for 45 percent of government -wide credit-card purchases. In DoD, the Army spends the most.[18] For more information on the program, call Mary Lou Benzel at GSA's Federal Supply Service (703-304-6658).

Small Businesses

Under FASA, procurement contracts between $2,500 and $100,000 "are reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive with regard to the quality and delivery of the goods or services being purchased." (Section 4004) In addition, set-asides for small disadvantaged businesses (SDBs) will continue for contract awards from $2,500 to $100,000, for socioeconomic improvement purposes. The DoD 5 percent goal for awards to SDBs will continue and be extended to NASA and the Coast Guard (Section 7105). A 5 percent goal program for contracts and subcontracts with SDBs owned and controlled by women has been established (Section 7106). No longer will offerors (small or large businesses alike) have to certify that they are either manufacturers or regular dealers for government procurement purposes (Section 7201).

Preference for Commercial Items/Products

One of the most important features of FASA is the establishment of a statutory preference for U.S. Government procurement (and use) of commercial items (Title VIII of FASA and Section 8104). Due to the fast-paced changes in technology and the high cost of maintaining a separate defense industrial base with thousands of military specifications, DoD is being compelled to use commercially developed systems and items. In the opinion of one industry commentator, DoD cannot afford anymore to "maintain a separate defense industrial base regulated by more than 30,000 military specifications and standards."[19] However, for the foregoing reasons and the widely-accepted fact of commercial companies finding it difficult and costly to sell to the U.S., many commercial firms have avoided selling to the government.

FASA establishes two preferences, first for commercial items, and the second for non-commercial, non-developmental items (Sections 8104, 8203). Only if items under these two preferred categories are unavailable, should the government purchase products or services that meet government unique requirements or specifications. The definition of "commercial item" is so broad as to encompass almost "anything other than real property sold to the general public."[20] The expansive definition in the law provides more categories of commercial item products. Commercial items that the U.S. government should purchase, if available, are those that:

- are customarily sold and used by the general public (including those requiring customary or minor modifications),

- have evolved from existing commercial products and although not available in the marketplace, will be in time to meet government requirements,

- have been modified for government use,

- services to support commercial items or services sold in substantial quantities in commercial marketplace, based on catalog prices (competitively),

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[18] Id.

[19] V. Grimes, "Hands-On Learning - 'US Versus Them' Attitude Improves After Course," Program Manager, January-February 1995, p. 26.

[20] *Ibid.*, note 2 Drelicharz supra, p.13.

- nondevelopmental items developed solely at private expense and sold in substantial quantities on a competitive basis to multiple sate and local governments,

- leased or licensed to general public. (Sections 8001, 8103, and 8202 of FASA.)

FASA is designed to enable the government to procure commercial items on commercial terms, even to use commercial financing practices (up to 15 percent of the contract price in advance of any performance) compatible with the product category being procured.[21] As a further inducement for commercial firms to sell to the U.S., many of the same laws and regulations deemed inapplicable to procurements under the SAT, discussed above, are also deemed inapplicable to commercial item firms (Sections 8003, 8105, 8301). Procurement-related laws made inapplicable to purchases of commercial items include some requiring certain *accounting and certification* of compliance requirements, e.g. Drug-Free Workplace Act of 1988, the prohibition against payment of contingent fees, Federal Water Pollution Control Act, Contract Work Hours and Safety Standards Act of 1962. The law authorizes the FAR Council to exempt certain subcontract flow-down requirements for commercial item acquisitions (Section 8002). The term *subcontract* "includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor." In addition, commercial item firms are exempt from the certified cost or pricing data threshold of $500,000 when there is adequate price competition or if the item cannot be competitively purchased, but the contracting officer is able to establish price reasonableness based on analysis of "typical commercial data" available from the commercial marketplace. As a safeguard, government agencies retain the authority to audit any commercial item contract for up to two years after the date of the contract award.

Contingency Operation Contracting

A procurement "contract to be awarded and performed, or purchase to be made, outside the United States in support of a contingency operation," can be awarded under procedures for simplified acquisition if the value of the contract is not greater than $200,000. [Section 1502(2)] There is one document in process and another one in use that may be helpful to those involved in contingency contracting, e.g. peacekeeping, humanitarian assistance, and so on. The one in process is called the "Contingency Contracting Deliberate Planning Handbook" (LC943271). This is a high priority project of the Air Force Logistics Management Agency for FY95. The other one is entitled "Commander's Handbook for Peace Operations (A Logistics Perspective)." It is available from the Headquarters, Department of the Army as Department of the Army Pamphlet 700-31, 1 July 1994.

CONCLUSION

This article has highlighted certain major features of FASA, such as the Simplified Acquisition Threshold (SAT) of $100,000, with the initial threshold limited to contracts under $50,000 until contracting activities are certified as having interim FACNET capability; the caution that presently, the use of FACNET is limited to base operations contracting; the micropurchase threshold of $2,500; the exclusive reservation of contracts between $2,500 and $100,000 to small business concerns unless there is no price competition from responsible small businesses; the statutory preference for government to purchase commercial items; and the contingency operation contracting threshold to simplify and facilitate procurements outside of the U.S. While significant cost savings have been estimated and forecasted by various experts, it will take several years before we will be able to determine the true measure of real cost savings

[21] *Ibid.*, note 2 Drelicharz supra, p. 14.

and streamlining. These will depend on how well the hands-on personnel in the agencies implement the FASA.

ABOUT THE AUTHOR

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