

# CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

## A Lawyer's View of the Economy Act

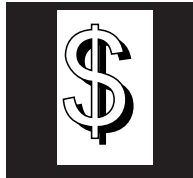
June 20, 1992

### The Economy Act and You

by Mark Langstein

It's 3:15 on a hot August afternoon. You've just successfully dodged your seventh agency protest on award of Micro IX. You lean back languidly in your chair, fighting sleep-swollen eyes from the greasy lunch which you only had 15 minutes to wolf down. You start thinking...Micro X--aahhh!!...the RFP is supposed to hit the streets in 30 days...there must be an easier way!

There is — well sort of — at least some of the time. It's called the Economy Act and you can find it at 31 U.S.C. § 1535 and, according to the FAR, you can use it to obtain supplies or services available from other agency's contracts so long as it is in the Government's best interest to do so. Oh, there are a couple of nit-picking caveats — there must be legal authority for the acquisition and the action cannot conflict with the authority or responsibility of any other agency. FAR §§ 17.502, 17.503.



One of the recognized exceptions to competition found in the Competition in Contracting Act (CICA), 41 U.S.C. § 253(c)(5), permits agencies to use other than full and open competition when "a statute expressly authorizes or requires that the procurement be made through another executive agency or from a specified source...." The Economy Act certainly appears to "authorize" you to use available other-agency contracts to meet your requirements. However, although the General Accounting Office (GAO) and at least one District Court have concluded that the Economy Act generally qualifies under the CICA exception, the General Services Board of Contract Appeals (the Board) has emphatically held that Economy Act transfers of ADP resources remain subject to the Brooks Act and thus may not be used to circumvent competition requirements.

### The Case Law — Such As It Is

In 70 Comp. Gen. \_\_ (1991) Liebert Corporation protested, as a violation of CICA, FAA's attempt to procure uninterruptible power supplies from an Air Force requirements contract. GAO

first rejected Liebert's unstated contention that the Economy Act was impliedly overruled by CICA's enactment and held that agencies other than the Air Force could properly use that contract to meet their needs. Section 1535(a)(4) of the Economy Act also requires "the head of the agency [to decide] that ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise." Prior to making the purchase under the Economy Act, FAA analyzed the offers received by the Air Force and relied upon FAA in-house estimates to assess the current market state. Liebert alleged that, because industry prices had declined dramatically in the eighteen months since the Air Force contract had been let, FAA could not reasonably have made such a decision. However, GAO concluded that FAA's actions were reasonable in finding that an Economy Act transfer was likely to be cheaper and more convenient. Although Liebert's protest ultimately was sustained, it was not on Economy Act grounds, but rather on general contract principles. Although FAA's Economy Act order was well within the indefinite quantity contract dollar maximum, the proposed order was far in excess of the maximum units which could be ordered for that CLIN under the contract. Thus, GAO held that filling the order would result in a contract materially different than that entered into by the Air Force and would give rise to a CICA violation.

In 1988 the District Court weighed into the Economy Act controversy with a decision involving an Air Force purchase of IBM mainframes through a recently-awarded contract with the Defense Intelligence Agency (DIA). *Nat'l. Gateway Telecom., Inc. v. Aldridge*, 701 F. Supp. 1104 (D.N.J. 1988). Neither of these transac-

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tions was subject to the Brooks Act. The DIA requirement in *Gateway* apparently was for IBM compatible computers, but the solicitation was written in such a manner as to eliminate Amdahl from consideration as well as imposing a substantial penalty on non-IBM proposers. Because of national security concerns, the DIA RFP was sent only to a limited circle of vendors. IBM was the only offeror. After first issuing two successive RFPs, which were also canceled in succession, the Air Force concluded that it should purchase IBM equipment using the DIA contract. Alleging that the Air Force had failed to comply with CICA's competition mandate and had unlawfully used sole-source procedures, *Gateway* moved for injunctive relief. The Court concluded that the Air Force had reasonable grounds to believe that the prices available from DIA were equal to or less than the two RFP-offered prices. The Court also held that the fact that the Air Force had not justified a sole-source acquisition for IBM equipment was of no consequence because the salient fact was that the Air Force procurement was under the Economy Act exception to CICA and that the Air Force could rely on a presumption that the originally acquiring agency, DIA, had complied with all competitive requirements. Indeed, for purposes of CICA, the Court held that the Air Force had not entered into a contract at all, but had merely obtained supplies contracted for by a sister agency. However, when acquiring ADP resources, the District Court *Gateway* decision must be balanced against the Board's prior decision in *Amdahl Corp.*, GSBCA No. 7859-P, 85-2 BCA ¶ 18,111.

In *Amdahl* the Treasury Department sought to acquire a used IBM mainframe from Freddie Mac under the Economy Act. Treasury had initially requested GSA to grant a DPA for the Economy Act transaction, but, after GSA's refusal, had to settle for a DPA on a "sole-source" basis which required it to obtain "maximum practicable competition." Despite the DPA limitations, Treasury proceeded with the Economy Act transfer and in due time received several protests. In granting Amdahl's protest, the Board rejected Treasury's contention that the Economy Act was

a separate means for agencies to acquire ADP resources apart from the GSA Delegation process. The Board concluded that the Brooks Act preempted the Economy Act and that Treasury was bound to procure within the confines of the DPA conditions. Although stating that in "appropriate circumstances" GSA could certainly delegate authority for agencies to use the Economy Act, it had not here done so, resulting in Treasury's delegation violation. In passing, the Board also noted that Treasury had paid an exorbitant price for the Freddie Mac resources and concluded that it had not complied with FIRMR 201-4 to meet its requirements at the lowest overall cost.

### Sorting Out the Pieces

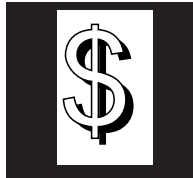
There are too few cases spread among too many forums to give "protest-proof" guidance. However there are some things that can be said with relative certainty:

- **Whether you're seeking to acquire Brooks Act or non-Brooks Act items, despite CICA, Economy Act transfers can be done and should not be shielded away from as long as consistent with Department procurement policy.**

- **If you are acquiring items which do not require a DPA, all that appears to be necessary is to determine that the Economy Act transfer price is reasonable and any reasonable means that you use to make that determination will likely be upheld.**

- **For Economy Act acquisitions, the critical transaction is the contract entered into by the transferring agency.** If that contract either complied with CICA or was not protested it is likely that an Economy Act transfer from that contract will be upheld. Although the Board didn't reach this point in *Amdahl*, it is doubtful whether even it would scrutinize a contract already in place and not protested. To permit such a challenge in the context of an Economy Act transfer would encourage vendors who failed to protest the first time around and slept on their rights. It would also disturb already-established contract rights.

- An Economy Act transfer may proceed even where the original contract was not fully



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competitive. Once again, although *Amdahl* did not discuss this aspect, it would be unlikely that the Board would prohibit such transactions. Were it to do so, the Brooks Act would then effectively amend the Economy Act to flatly prohibit transfers from substantial numbers of agency contracts. Also, it might mean that an agency could not take advantage of a low price available on a non-competitive contract and would instead have to procure at higher prices. This would not square with the FIRMR 201-4 lowest-cost admonition, discussed above, nor with the Brooks Act mandate to the Board to promote economic and efficient procurement of ADP resources. See 40 U.S.C. § 759(f)(5)(A).

- **If you are relying on Blanket Delegation Authority you should take steps to assure that the Economy Act price represents the lowest cost to the Government.** I can give you no firm advice on how to accomplish this, but *PTO*, in one recent acquisition, used a method which would have a good chance of being upheld. *PTO* synopsized its intention to use the Economy Act and invited vendors to submit a competitive "offer." The Contracting Officer invited the vendors in individually for talks in order to clear up any confusion relating to their proposals and then allowed them to revise their "offers." After concluding that the Economy Act represented the best deal, *PTO* proceeded with the transfer. Had the Contracting Officer concluded otherwise, a competitive procurement would have been conducted. In performing the "best deal" analysis, it appears reasonable to add to the "offers" the administrative costs of conducting a competitive procurement. This is consistent with Section 1535(a)(4) of the Act which permits agencies to consider both convenience and price in deciding whether to pursue an Economy Act transfer. The FAR provisions for multiple awards suggest a minimum amount to add for these types of costs. See FAR § 52-214-22. This amount, currently \$500, would almost certainly be upheld. A higher amount, adding the costs associated with issuing a solicitation, if adequately justified, would also likely be upheld.



**should try to have GSA endorse the Economy Act transfer.** Failing that, I believe it would still be possible to compare the prices received under a competitive solicitation to those from a prospective Economy Act source. If the Economy Act source would cost less, you should be able to acquire the resources using that vehicle. The solicitation should probably advise offerors that it is subject to cancellation should an Economy Act transfer prove more advantageous.

- **You cannot use the Economy Act to go sole-source.** Any test of the market to determine whether the Economy Act price is one that is in the Government's best interests to accept must include all makes and models capable of meeting your needs. You cannot restrict the market test to the make and model offered under the Economy Act contract unless you have a justifiable need to so restrict your sources.

- **Where quality is your overriding concern, you should not use the Economy Act.** The current law makes no allowance for gauging technical merit in deciding whether an Economy Act transfer is in the best interests of the Government. If technical merit is paramount, your best bet is probably a competitive procurement.

Because the march of technology places increasing pressure to acquire the latest and greatest, there will be continued need to find ways to shorten procurement timelines. As a result, attempts to use Economy Act transfers will almost certainly multiply. Although, with the market as it is now, it would be difficult to use the Economy Act to acquire Micro X, it can be used in many other circumstances to acquire goods and services without proceeding through an entire procurement cycle. Used judiciously, the Economy Act can help you meet your client's needs faster and more effectively while at the same time reducing your administrative burden. Used precipitously, the Economy Act will likely lengthen your acquisition timeline as first you fend off protests and then conduct a full-and-open competition when you ruefully discover that the Economy Act transfer cannot be upheld.

- **If you have a specific Delegation, you**