



# CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

## A Lawyer's View of FARA

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### Federal Acquisition Reform Act of 1995

by  
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Congress makes a real effort to reform federal acquisition for agencies and contractors in the Federal Acquisition Reform Act of 1996 (FARA), enacted as part of the National Defense Authorization Act for Fiscal Year 1996. FARA creates options for agencies to implement more efficient procedures and exempts contractors from some burdensome requirements. The reforms are addressed in three categories: competition, commercial items, and some miscellaneous reforms including procurement integrity.

#### COMPETITION

The Act captures the theme of the revisions in the specific requirement that the FAR ensure that full and open competition is implemented in a manner "consistent with the need to efficiently fulfill the government's requirements." § 4101. In support of this theme, the more substantive changes to 41 U.S.C. §§ 251 *et seq.* include:

- **Increasing dollar thresholds:**

Section 4103(b) raises the dollar thresholds triggering the need for a justification for other than full and open competition as follows: for the competition advocate, the \$100,000 threshold is raised to \$500,000; for the head of the procuring activity, the \$1,000,000 threshold is now \$10,000,000; and for the senior procurement executive of the agency, the \$10,000,000 threshold is raised to \$50,000,000.

- **Limiting Proposals:**

In competitive negotiations, section 4103(b) allows an agency to limit the number of proposals in the competitive range to the greatest number that would permit an efficient competition among the most highly-rated competitors. Without further guidance on the number that

would achieve efficient competition, in its Conference Report, Congress recommends the agency make this decision after the initial evaluation of the proposals, on the basis of proposal ratings. The agency uses price, quality, and other factors as specified in the solicitation. This section amends 41 U.S.C. § 253b(d).


- **Preaward Debriefings on Exclusion:**

If an offeror is excluded from the competitive range, that offeror has an automatic right to a debriefing before the contract award. In accordance with § 4104, if the offeror exercises this right in writing, and within 3 days of the notice of exclusion, the agency must conduct the debriefing at some point before the contract award, unless it determines it is not in the Government's best interest. The agency shall inform the offeror of the reasons for the exclusion. However, the agency "may not disclose the number or identity of other offerors and shall not disclose information about the content, ranking or evaluation of other offerors' proposals." Because the debriefing occurs before contract award, the agency could easily remedy an exclusion by putting the offeror back in the competitive range, if necessary. The FAR will direct agencies to encourage ADR before the contractor files a bid protest.

- **Design and build selection procedures:**

Although the "IT" Brooks Act has been repealed, the traditional design-bid-build approach for A-E contracts remain. Section 4105(b) does not modify the Brooks A-E Act, 41 U.S.C. § 251, but does require the use of a two-phase selection



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process in certain circumstances. The agency must use this two-phase approach when it expects (i) three or more offerors will make submissions and (ii) the offerors will incur considerable expense in the design work necessary to develop a contract price.

In the two-phase process, the first solicitation is narrow in scope; proposals should only include information on the offeror's technical approach and technical qualifications. This first solicitation does not request detailed design information or cost or price information. The solicitation identifies the maximum number of offerors to be included in the competitive range; this number cannot exceed 5 (unless in the Government's interest). Evaluation criteria include experience, competence, capability, and past performance of the offeror's team. After selecting from these proposals, the agency requests this most-highly qualified group to submit second-phase proposals with specific design and cost or price information. In this phase, the agency evaluates in accordance with 41 U.S.C. § 253a and makes award in accordance with section 41 U.S.C. § 253b. Before finally electing the two-phase selection process, the agency must consider how other factors will impact the project (e.g., the extent to which requirements have been defined, time constraints, experience of contractors, the suitability for two-phases, etc.). Look for FAR implementing regulations to provide guidance on this process.

### COMMERCIAL ITEMS

As we move toward the 21st century, so do the rules on acquisition of commercial items. If the Government has a need for an "off-the-shelf" commercial item, the Government can purchase the item with ALMOST the same amount of ease as a regular customer. Many of the rules that defeat the efficient and economical purposes of purchasing commercial items are gone.

- **TINA**

For efficiency and economy, the theme of the FARA revisions, Commercial suppliers can avoid the certification requirements of the Truth in

Negotiations Act, at 41 U.S.C. § 254b(b)-(d). Suppliers of commercial items can claim the exception (i) when there is adequate price competition or prices are set by law or regulation; (ii) when supplying a statutorily-defined "commercial item"; or (iii) when the agency head grants a waiver. However, the HCA has the non-delegable discretionary authority to justify a request for additional contractor data to determine price reasonableness. The HCA must make a written justification.

Before anyone could even become familiar with the agency specific audit authority provided by FASA, Congress changed its mind. FARA removes the agency specific authority to review alternative cost or pricing information. Only GAO shall review information submitted by vendors in lieu of certified cost or pricing data.

- **Simplified Acquisitions**

SAP now applies to acquisition of commercial items of \$5 million or less as authorized in § 4202(b). The SAP notice must allow all responsible sources a reasonable opportunity to participate in the procurement and agency consideration of all responsible offers. Sole source procurement is prohibited for commercial items unless the need is justified in writing in accordance with the competition requirements of 41 U.S.C. § 253. But first, Congress wants to see how well the agencies perform with these simplified procedures. SAP authorization in § 4202(e) expires three years after the effective date of the Act (February 10, 1996). If the agency issues the solicitation before the expiration of this authority, the agency may to complete the procurement action.

- **Exemptions for Commercial Items**

"Commercially available off-the-shelf" items will also be easier to procure. OFPP is tasked to propose for elimination a list of government-unique rules for procurement of property or services (unless the Administrator determines the provision is in the best interest of the United States). "Commercially available off-the-shelf items" are defined, in § 4203(a), as goods sold in substantial quantities to the general public and





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are offered to the federal government in the same form sold to the general public. Services that are commercially available can now include service tasks sold for "market" prices as well as those sold for catalog prices as stated in § 4204.

Finally, § 4205 of the Act exempts contracts for commercial items from the cost accounting standards found in 41 U.S.C. § 422(f). The exemption applies where the contract price is negotiated on the basis of catalog or market prices. The Cost Accounting Standards Board, in consultation with the DCAA, will issue guidance to ensure contractors appropriately assign costs to contracts covered by the exemption.

### MISCELLANEOUS REFORMS

#### • **Certifications:**

Contractors can also look forward to the elimination of some FAR certification requirements. As directed by § 4301(b), within 7 months of the effective date of the Act, OFPP is to publish a list of regulatory certifications for elimination. Agencies cannot create any new certifications unless the OFPP Administrator or the head of the executive agency approves the agency's written justification. Statutory certifications remain in effect.

Congress eliminated the statutory certification requirements of the Drug Free Workplace Act, 41 U.S.C. 701. According to § 4301 the contractor no longer certifies, but agrees to the requirements of that act.

Agencies now have much greater flexibility in authorizing agency employees to make "micro-purchases." An "employee of the executive agency" in addition to a "contracting officer" may make these purchases. § 4311.

#### • **Amendments to the Procurement Integrity Act:**

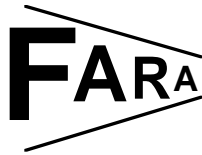
The Procurement Integrity Act, 41 U.S.C. § 423, is changed from a certification statute to an enforcement statute. Procurement officials and contractors no longer certify that they have complied with the rules on procurement integrity. However, the rules have not gone away and sound familiar. The prohibitions, violations, and penalties are still in force.

Present or former federal employees cannot knowingly obtain or disclose contractor bid or proposal information before award of a contract, except as provided by law. A federal employee cannot accept anything of value for information that allows anyone to have a competitive advantage in the award of a contract. Violations can result in criminal, as well as civil and administrative, penalties.

Section 4304 sets uniform standards to replace the current agency-specific recusal (41 U.S.C. § 423(c)) and post-employment restrictions (41 U.S.C. § 423(f)). The uniform recusal requirements apply to employees who are participating personally and substantially in procurement activities such as: the drafting, review or approval of a specification; the preparation or issuance of a solicitation; the evaluation of bids or proposals; the selection of sources; the conduct of negotiations; the review and approval of the award, modification or extension of a contract; any other procurement actions specified in implementing regulations. Both federal employees and contractors who knowingly violate these provisions are subject to the criminal, civil and administrative penalties.

Under the uniform standards, if a federal employee involved in a procurement (generally over \$100,000) discusses possible future employment with a bidder/offeror, § 4304(a) directs the employee to immediately contact, in writing, his or her supervisor and the agency ethics official. In addition, the employee shall reject the proposed offer of employment or disqualify himself or herself from any further personal involvement in the procurement activity until authorized to resume involvement. Failure to comply with these procedures could result in civil penalties and administrative actions against the employee and the bidder/offeror who knowingly engages in these discussions.

Post-employment restrictions apply only to those employees involved in procurements greater than \$10 million. The uniform standards apply to employees who served as program managers, deputy program managers, or authorizing contract officials. These employees are barred





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for one year from working for the contractor that holds the affected contract. The employee could work for a subsidiary or affiliate of the contractor, as long as the subsidiary has no involvement with the contract.

### • Career Enhancement for Employees involved in Federal Procurement:

Congress has finally realized that a better-educated (and happier) workforce will result in better procurement. The management of the acquisition workforce policies and procedures for this wise investment are established in § 4307 (a)(1). The senior procurement executive is responsible for this management. The agency, in consultation with OFPP, will establish ways for employees to obtain advancement, education, training, and career development. Each agency shall also establish separate funding levels for acquisition workforce education and training, and may implement tuition reimbursement programs for personnel serving in acquisition positions.

### • Greater Role of OFPP:

OFPP will have more influence in developing agency-wide procurement policy. Section 4305 redefines the purpose of OFPP as being to provide overall direction of government-wide procurement policies, regulations, procedures, and forms and to promote economy efficiency, and effectiveness in procurement. The previous language (41 U.S.C. § 405) provided only for OFPP to provide overall direction in policies and leadership in the development of procurement systems.

### • FACNET:

In FASA, Congress authorized the OFPP Administrator to conduct a test of alternative procurement procedures but required that the six agencies participating in the test have full FACNET capabilities. Section 4302 removes the contingency that the agency have implemented full FACNET procedures. However, as an incentive (or a threat), the provision also amends 41 U.S.C. § 427 to require an agency to deploy full FACNET capability by December 31, 1999, or revert back to a simplified acquisition threshold of

\$50,000.

Amendments to the OFPP Act require federal agencies to establish and maintain cost-effective value-engineering procedures and processes. Value-engineering, defined in § 4306(b), is "an analysis of the functions of an agency program performed by qualified agency or contractor personnel, directed at improving performance, reliability, quality, safety, and life cycle costs."

### Summary

Congress has made radical changes to the Federal procurement system in this ambitious legislation. Agencies are given more freedom and discretion to find easier methods to purchase the goods and services they need. Congress encourages agencies to be creative in this process, though such encouragement is not without hazards. To avoid pitfalls, communication between agencies and contractors is crucial. Through FARA, Congress also tries to ease the administrative burden on contractors. These changes all support the FARA goal to achieve more efficient and economical means to fulfill the government's requirements.

**FARA**