



CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

A Lawyer's View of FASA—Commercial Products

February 27, 1995



Buying Commercial Products - New Rules for an Old Idea

by F. Jefferson Hughes

When I “purged” a filing cabinet in my office recently, I found OGC's comments on a 1971 government improvement initiative to buy more commercial items as part of the government contracts process. This idea has appeared in most such initiatives since then and appears in the Federal Acquisition Streamlining Act (FASA) as well. The idea is simple - why should Uncle Sam “reinvent the wheel” to buy an item that the rest of us can just pick up on our way home? While FASA does not do away with the requirements of the procurement system for commercial items, it does make it easier for commercial companies to sell such items to the Government.

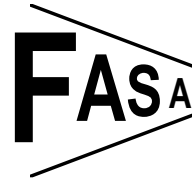
There are a number of FASA provisions that relate to commercial items. Those addressed here define commercial and non-developmental items, create a preference for their purchase, restrict the contract clauses which may be used in contracts for their purchase, and provide other guidance to agencies in such procurements.

Definitions

Among other aspects of the new provisions, “commercial item” is defined as an item used in, made available to or which will be made available to the commercial marketplace in time for delivery under a Government solicitation. The definition also covers items which would qualify as such except for routine commercial or minor custom modifications, including minor modifications to meet Government requirements. Combinations of items which meet one or more of the requirements set forth in the definition are also included. The definition also includes services associated with the commercial items such as installation, repair, maintenance, and training, if such services are offered to both the commercial and Government marketplaces under similar terms and are performed with the same workforce. Other services can be commercial items if they are offered and sold competitively in substantial quantities based on established catalog

prices for specific tasks.

A “non-developmental item” (NDI) can be a commercial item if the agency determines that the item was developed exclusively at private expense and has been sold by competitive means in substantial quantities to multiple State and local governments. “Non-developmental item” also covers commercial items and items already developed and used, or in current production prior to being used, by Federal, State, or local Governments, or by foreign governments with which the United States has a mutual defense cooperation agreement. Further, commercial items and items already in use by one of the governments noted above, which need only minor modification to meet Federal requirements, also qualify as non-developmental items.



Preference

FASA indicates that agencies should always try to obtain commercial items or non-developmental items. The statute says that agencies shall, to the maximum extent practicable, acquire commercial items and, to the extent that commercial items are not available, NDI other than commercial items and require contractors and subcontractors to incorporate such items in the end-item delivered under contracts. Before soliciting for a contract above the simplified acquisition threshold or before developing new specifications for a procurement, agencies must conduct market research to determine whether commercial items or non-developmental items other than commercial items, or modifications thereof, can meet the agency needs, or whether the agency requirements can be changed to accommodate those items. Requirements should be stated in terms

From the Editor Jeff Hughes is an attorney in the Contract Law Division who advises NIST and other clients.

A Lawyer's View is a periodic publication of the Contract Law Division designed to give practical advice to the Department's procurement officers. Comments, criticisms, and suggestions for future topics are welcome.—Call Jerry Walz at 202-482-1122, or via e-mail to Jerry Walz@FinLit@OGC or jwalz@doc.gov.



CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

A Lawyer's View of FASA—Commercial Products



Page 2

of functions to be performed, performance required, or essential physical characteristics so as to permit and encourage offers and purchases of commercial and non-developmental items.

Some Statutory Relief

The FAR will include a list of procurement-related laws that do not, and shall not, apply to commercial item buys, whether prime contracts or subcontracts. New procurement-related laws will be added to the list of inapplicable laws unless the FAR council determines that contracts for commercial items should not be exempted from their coverage. This does not apply to laws with criminal or civil penalties or those which state that, despite this provision of FASA, they apply to commercial items. If contractors or others desire, they may petition that a particular statute be added to the list of inapplicable laws.

FASA also alters some existing statutes to benefit commercial items. For example, the prohibition on limiting subcontractor direct sales to the United States is lifted with regard to commercial items as long as the U.S. is treated like any other prospective purchaser of such items. The requirement for a contract clause regarding contingent fees, for a certification or contract clause regarding water pollution or the Clean Air Act, for a certification or contract clause regarding the Contract Work Hours and Safety Standards Act, provisions relating to the Anti-Kickback Act, certification or contract clauses regarding Fly American Requirements, Drug-Free Workplace provisions, Cost Accounting Standards (to a further extent), and procurement integrity provisions are all relaxed or eliminated entirely with regard to commercial items.

Contracts For Commercial Items

FASA also directs that the FAR be modified to reduce commercial item contract clauses to the minimum possible. While the regulations have not yet been finalized, the statute directs that contracts for the procurement of commercial items should include only (to the maximum extent possible) clauses (1) required to carry out laws or executive orders that apply to commercial item purchases or (2) that are determined to

be consistent with standard commercial practice. The new regulations will also provide that a prime contractor will not have to apply any clauses beyond those described in the previous sentence to any of its divisions, subsidiaries, affiliates, subcontractors, or suppliers that are providing it with commercial items. The new FAR regulations will also provide guidance for when the clauses described above may be waived.

Further, agencies are required to revise their procurement policies, practices and procedures as far as practicable to reduce impediments to the purchase of commercial items and to provide training in the purchase of commercial items.

Additionally, the Contracting Officer will be expected to permit, to the maximum extent practicable, the contractor to use its existing quality assurance system for commercial items in the place of Government pre-acceptance inspection or testing. At the same time, the Contracting Officer is expected to take advantage of commercial warranties to obtain repair or replacement of commercial items.

Dates for submission of offers may be shortened from the minimums set forth in the FAR. The Contracting Officer may also consider past performance of products and commercial items as a factor in contract award decisions. Finally, agencies should use firm fixed-price or fixed-price with economic price adjustment clauses contracts for commercial items and will be prohibited from using cost type contracts.

Of course, with the advantages FASA grants to suppliers of commercial items or services, we can expect companies to try to qualify every item possible as a commercial or non-developmental item. Offerors may be required to show commerciality, in that the item has achieved commercial market acceptance, has been satisfactorily supplied to an executive agency under current or recent contracts for the same or similar requirements, or otherwise meets the specification or other criteria in the public notice and solicitation. In considering whether an item has achieved commercial market acceptance, the agency will have to consider its minimum needs and the state of the entire marketplace, includ-



FASA



CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

A Lawyer's View of FASA—Commercial Products



ing small businesses.

The responsibility within an agency for promoting the acquisition of commercial products and challenging burdensome requirements will fall upon the Competition Advocate. FASA also reminds us that the Brooks ADP Act and the Brooks A&E Acts are not affected by these changes, and that portions of the Small Business Act and statutory preferences for blind-made products continue in effect.

Conclusion

Congress has spoken - we should buy commercial products whenever it makes sense. The new rules should make it much easier for both the Government to buy and the private sector to sell such goods and services. Stay tuned for the specifics in the FAR.



TITLE VIII--COMMERCIAL ITEMS
 Subtitle A--Definitions and Regulations
 SEC. 8001. DEFINITIONS.

(a) DEFINITIONS.--Section 4 of the Office of Federal Procurement Policy Act (41 U.S.C. 403) is amended by adding at the end the following new paragraphs:

"(12) The term 'commercial item' means any of the following:

"(A) Any item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and that--

"(i) has been sold, leased, or licensed to the general public; or

"(ii) has been offered for sale, lease, or license to the general public.

"(B) Any item that evolved from an item described in subparagraph (A) through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Federal Government solicitation.

"(C) Any item that, but for--

"(i) modifications of a type customarily available in the commercial marketplace, or

"(ii) minor modifications made to meet Federal Government requirements,

would satisfy the criteria in subparagraph (A) or (B).

"(D) Any combination of items meeting the require-

ments of subparagraph (A), (B), (C), or (E) that are of a type customarily combined and sold in combination to the general public.

"(E) Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D) and if the source of such services--

"(i) offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and

"(ii) offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public.

"(F) Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog prices for specific tasks performed and under standard commercial terms and conditions.

"(G) Any item, combination of items, or service reparate divisions, subsidiaries, or affiliates of a contractor.

"(H) A nondevelopmental item, if the procuring agency determines, in accordance with conditions set forth in the Federal Acquisition Regulation, that the item was developed exclusively at private expense and has been sold in substantial quantities, on a competitive basis, to multiple State and local governments.

"(13) The term 'nondevelopmental item' means any of the following:

"(A) Any commercial item.

"(B) Any previously developed item of supply that is in use by a department or agency of the United States, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement.

"(C) Any item of supply described in subparagraph (A) or (B) that requires only minor modification or modification of the type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency.

"(D) Any item of supply currently being produced that does not meet the requirements of subparagraph (A), (B), or (C) solely because the item is not yet in use.

"(14) The term 'component' means any item supplied to the Federal Government as part of an end item or of another component.

"(15) The term 'commercial component' means any component that is a commercial item."

(b) STYLISTIC AMENDMENTS.--Such section is further amended--

(1) by striking out "Act--" in the matter preceding paragraph (1) and inserting in lieu thereof "Act";

(2) by capitalizing the first letter of the first word in



CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

A Lawyer's View of FASA—Commercial Products



Page 4

each of paragraphs (1) through (11);

(3) by striking out the semicolon at the end of each of paragraphs (1), (2), (3), (5), (6), (7), (8), and (9) and inserting in lieu thereof a period; and

(4) by striking out "; and" at the end of paragraphs (4) and (10) and inserting in lieu thereof a period.

SEC. 8002. REGULATIONS ON ACQUISITION OF COMMERCIAL ITEMS.

(a) **IN GENERAL.**--The Federal Acquisition Regulation shall provide regulations to implement paragraphs (12) through (15) of section 4 of the Office of Federal Procurement Policy Act, chapter 140 of title 10, United States Code, and sections 314 through 314B of the Federal Property and Administrative Services Act of 1949.

(b) **CONTRACT CLAUSES.**--(1) The regulations prescribed under subsection (a) shall contain a list of contract clauses to be included in contracts for the acquisition of commercial end items. Such list shall, to the maximum extent practicable, include only those contract clauses--

(A) that are required to implement provisions of law or executive orders applicable to acquisitions of commercial items or commercial components, as the case may be; or

(B) that are determined to be consistent with standard commercial practice.

(2) Such regulations shall provide that a prime contractor shall not be required by the Federal Government to apply to any of its divisions, subsidiaries, affiliates, subcontractors, or suppliers that are furnishing commercial items any contract clause except those--

(A) that are required to implement provisions of law or executive orders applicable to subcontractors furnishing commercial items or commercial components, as the case may be; or

(B) that are determined to be consistent with standard commercial practice.

(3) To the maximum extent practicable, only the contract clauses listed pursuant to paragraph (1) may be used in a contract, and only the contract clauses referred to in paragraph (2) may be required to be used in a subcontract, for the acquisition of commercial items or commercial components by or for an executive agency.

(4) The Federal Acquisition Regulation shall provide standards and procedures for waiving the use of contract clauses required pursuant to paragraph (1), other than those required by law, including standards for determining the cases in which a waiver is appropriate.

(5) For purposes of this subsection, the term "subcontract" includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

(c) **MARKET ACCEPTANCE.**--(1) The Federal Acquisition Regulation shall provide that under appropriate condi-

tions the head of an executive agency may require offerors to demonstrate that the items offered--

(A) have either--

(i) achieved commercial market acceptance; or

(ii) been satisfactorily supplied to an executive agency under current or recent contracts for the same or similar requirements; and

(B) otherwise meet the item description, specifications, or other criteria prescribed in the public notice and solicitation relating to the contract.

(2) The Federal Acquisition Regulation shall provide guidance to ensure that the criteria for determining commercial market acceptance include the consideration of--

(A) the minimum needs of the executive agency concerned; and

(B) the entire relevant commercial market, including small businesses.

(d) **USE OF FIRM, FIXED PRICE CONTRACTS.**--The Federal Acquisition Regulation shall include, for acquisitions of commercial items--

(1) a requirement that firm, fixed price contracts or fixed price with economic price adjustment contracts be used to the maximum extent practicable; and

(2) a prohibition on use of cost type contracts.

(e) **CONTRACT QUALITY REQUIREMENTS.**--The regulations prescribed under subsection (a) shall include provisions that--

(1) permit, to the maximum extent practicable, a contractor under a commercial items acquisition to use the existing quality assurance system of the contractor as a substitute for compliance with an otherwise applicable requirement for the Government to inspect or test the commercial items before the contractor's tender of those items for acceptance by the Government;

(2) require that, to the maximum extent practicable, the executive agency tsuch warranties for the repair and replacement of commercial items; and

(3) set forth guidance regarding the use of past performance of commercial items and sources as a factor in contract award decisions.

(f) **DEFENSE CONTRACT CLAUSES.**--(1) Section 824(b) of the National Defense Authorization Act for Fiscal Years 1990 and 1991 (Public Law 101-189; 10 U.S.C. 2325 note) shall cease to be effective on the date on which the regulations implementing this section become effective.

(2) Notwithstanding subsection (b), a contract of the Department of Defense entered into before the date on which section 824(b) ceases to be effective under paragraph (1), and a subcontract entered into before such date under such a contract, may include clauses developed pursuant to paragraphs (2) and (3) of section 824(b) of the National Defense Authorization Act for Fiscal Years 1990 and 1991





CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

A Lawyer's View of FASA—Commercial Products



Page 5

(Public Law 101-189; 10 U.S.C. 2325 note).

SEC. 8003. LIST OF INAPPLICABLE LAWS IN FEDERAL ACQUISITION REGULATION.

(a) LIST.--The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.), is amended by adding after section 33, as added by section 4101, the following new section:

"SEC. 34. LIST OF LAWS INAPPLICABLE TO PROCUREMENTS OF COMMERCIAL ITEMS IN FEDERAL ACQUISITION REGULATION.

"(a) LIST OF INAPPLICABLE PROVISIONS OF LAW.--(1) The Federal Acquisition Regulation shall include a list of provisions of law that are inapplicable to contracts for the procurement of commercial items. A provision of law that is properly included on the list pursuant to paragraph (2) may not be construed as applicable to purchases of commercial items by an executive agency. Nothing in this section shall be construed to render inapplicable to contracts for the procurement of commercial items any provision of law that is not included on such list.

"(2) A provision of law described in subsection (c) that is enacted after the date of the enactment of the Federal Acquisition Streamlining Act of 1994 shall be included on the procurement of commercial items from the applicability of the provision.

"(b) SUBCONTRACTS.--(1) The Federal Acquisition Regulation shall include a list of provisions of law that are inapplicable to subcontracts under either a contract for the procurement of commercial items or a subcontract for the procurement of commercial items. A provision of law that is properly included on the list pursuant to paragraph (2) may not be construed as applicable to such subcontracts. Nothing in this section shall be construed to render inapplicable to subcontracts under a contract for the procurement of commercial items any provision of law that is not included on such list.

"(2) A provision of law described in subsection (c) shall be included on the list of inapplicable provisions of law required by paragraph (1) unless the Federal Acquisition Regulatory Council makes a written determination that it would not be in the best interest of the Federal Government to exempt subcontracts under *3389 a contract for the procurement of commercial items from the applicability of the provision.

"(3) Nothing in this subsection shall be construed to authorize the waiver of the applicability of any provision of law with respect to any subcontract under a contract with a prime contractor reselling or distributing commercial items of another contractor without adding value.

"(4) In this subsection, the term 'subcontract' includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

"(c) COVERED LAW.--A provision of law referred to in subsections (a)(2) and (b) is any provision of law that, as determined by the Federal Acquisition Regulatory Council,

sets forth policies, procedures, requirements, or restrictions for the procurement of property or services by the Federal Government, except for a provision of law that--

"(1) provides for criminal or civil penalties; or

"(2) specifically refers to this section and provides that, notwithstanding this section, it shall be applicable to contracts for the procurement of commercial items.

"(d) PETITION.--In the event that a provision of law described in subsection (c) is not included on the list of inapplicable provisions of law as required by subsection (a) or (b), and no written determination has been made by the Federal Acquisition Regulatory Council pursuant to subsection (a)(2) or (b)(2), a person may petition the Administrator for Federal Procurement Policy to take appropriate action. The Administrator shall revise the Federal Acquisition Regulation to include the provision on the list of inapplicable provisions of law unless the Federal Acquisition Regulatory Council makes a determination pursuant to subsection (a)(2) or (b)(2) within 60 days after the date on which the petition is received."

(b) EFFECTIVE DATE OF PETITION PROVISION.--No petition may be filed under section 34(d) of the Office of Federal Procurement Policy Act, as added by subsection (a), until after the date occurring 6 months after the date of the enactment of this Act.

Subtitle C--Civilian Agency Acquisitions

SEC. 8201. RELATIONSHIP TO OTHER PROVISIONS OF LAW.

Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.), as amended by section 5051(a), is further amended by adding after section 313 the following new section:

"SEC. 314. RELATIONSHIP OF COMMERCIAL ITEM PROVISIONS TO OTHER PROVISIONS OF LAW.

"(a) APPLICABILITY OF TITLE.--Unless otherwise specifically provided, nothing in this section, section 314A, or section 314B shall be construed as providing that any other provision of this title relating to procurement is inapplicable to the procurement of commercial items.

"(b) LIST OF LAWS INAPPLICABLE TO CONTRACTS FOR THE ACQUISITION OF COMMERCIAL ITEMS.--No contract for the procurement of a commercial item entered into by the head of an executive agency shall be subject to any law properly listed in the Federal Acquisition Regulation (pursuant to section 34 of the Office of Federal Procurement Policy Act)."

SEC. 8202. DEFINITIONS.

Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.), as amended by section 8201, is further amended by adding after section 314 the following new section:

"SEC. 314A. DEFINITIONS.

"As used in this title, the terms 'commercial item', 'non-





CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

A Lawyer's View of FASA—Commercial Products



Page 6

developmental item', 'component', and 'commercial component' have the meanings provided in section 4 of the Office of Federal Procurement Policy Act."

SEC. 8203. PREFERENCE FOR ACQUISITION OF COMMERCIAL ITEMS.

Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.), as amended by section 8202, is further amended by adding after section 314A the following new section:

"SEC. 314B. PREFERENCE FOR ACQUISITION OF COMMERCIAL ITEMS.

"(a) PREFERENCE.--The head of each executive agency shall ensure that, to the maximum extent practicable--

"(1) requirements of the executive agency with respect to a procurement of supplies or services are stated in terms of--

"(A) functions to be performed;

"(B) performance required; or

"(C) essential physical characteristics;

"(2) such requirements are defined so that commercial items or, to the extent that commercial items suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial items, may be procured to fulfill such requirements; and

"(3) offerors of commercial items and nondevelopmental items other than commercial items are provided an opportunity to compete in any procurement to fill such requirements.

"(b) IMPLEMENTATION.--The head of each executive agency shall ensure that procurement officials in that executive agency, to the maximum extent practicable--

"(1) acquire commercial items or nondevelopmental items other than commercial items to meet the needs of the executive agency;

the executive agency contracts to incorporate commercial items or nondevelopmental items other than commercial items as components of items supplied to the executive agency;

"(3) modify requirements in appropriate cases to ensure that the requirements can be met by commercial items or, to the extent that commercial items suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial items;

"(4) state specifications in terms that enable and encourage bidders and offerors to supply commercial items or, to the extent that commercial items suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial items in response to the executive agency solicitations;

"(5) revise the executive agency's procurement policies, practices, and procedures not required by law to reduce any impediments in those policies, practices, and procedures to

the acquisition of commercial items; and

"(6) require training of appropriate personnel in the acquisition of commercial items.

"(c) PRELIMINARY MARKET RESEARCH.--(1) The head of an executive agency shall conduct market research appropriate to the circumstances--

"(A) before developing new specifications for a procurement by that executive agency; and

"(B) before soliciting bids or proposals for a contract in excess of the simplified acquisition threshold.

"(2) The head of an executive agency shall use the results of market research to determine whether there are commercial items or, to the extent that commercial items suitable to meet the executive agency's needs are not available, nondevelopmental items other than commercial items available that--

"(A) meet the executive agency's requirements;

"(B) could be modified to meet the executive agency's requirements; or

"(C) could meet the executive agency's requirements if those requirements were modified to a reasonable extent.

"(3) In conducting market research, the head of an executive agency should not require potential sources to submit more than the minimum information that is necessary to make the determinations required in paragraph (2)."

SEC. 8204. INAPPLICABILITY OF CERTAIN PROVISIONS OF LAW.

(a) INAPPLICABILITY OF PROHIBITION ON LIMITING SUBCONTRACTOR DIRECT SALES TO THE UNITED STATES.--Section 303G of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253g), as amended by section 4103(b), is further amended by adding at the end the following new subsection:

"(d) An agreement between the contractor in a contract for the acquisition of commercial items and a subcontractor under such contract that restricts sales by such subcontractor directly to persons other than the contractor may not be considered to unreasonably restrict sales by that subcontractor to the United States in violation of the provision included in such contract pursuant to subsection (a) if the agreement does not result in the Federal Government being treated differently with regard to the restriction than any other prospective purchaser of such commercial items from that subcontractor."

(b) INAPPLICABILITY OF REQUIREMENT FOR CONTRACT CLAUSE REGARDING CONTINGENT FEES.--Section 304(a) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254(a)), as amended by section 4103(c), is further amended by inserting before the period at the end of the sentence added by section 4103(c) the following: "or to a contract for the acquisition of commercial items".





CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

A Lawyer's View of FASA—Commercial Products



Page 7

Subtitle D--Acquisitions Generally

SEC. 8301. INAPPLICABILITY OF CERTAIN PROVISIONS OF LAW.

(a) FEDERAL WATER POLLUTION CONTROL ACT.--Section 508 of the Federal Water Pollution Control Act (33 U.S.C. 1368) is amended by adding at the end the following new subsection:

"(f)(1) No certification by a contractor, and no contract clause, may be required in the case of a contract for the acquisition of commercial items in order to implement a prohibition or requirement of this section or a prohibition or requirement issued in the implementation of this section.

"(2) In paragraph (1), the term 'commercial item' has the meaning given such term in section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12))."

(b) CONTRACT WORK HOURS AND SAFETY STANDARDS ACT.--The Contract Work Hours and Safety Standards Act (title I of the Work Hours and Safety Act of 1962 (40 U.S.C. 327 et seq.)) is amended by adding at the end the following new section:

"SEC. 108. (a) No certification by a contractor, and no contract clause, may be required in the case of a contract for the acquisition of commercial items in order to implement a prohibition or requirement in this title.

*3397 "(b) In subsection (a), the term 'commercial item' has the meaning given such term in section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12))."

(c) ANTI-KICKBACK ACT OF 1986.--(1) Section 7 of the Anti-Kickback Act of 1986 (41 U.S.C. 57), as amended by section 4104(a), is further amended by inserting before the period at the end of subsection (d) the following: "or to a prime contract for the acquisition of commercial items (as defined in section 4(12) of such Act (41 U.S.C. 403(12)))."

(2) Section 8 of such Act (41 U.S.C. 58) is amended by adding at the end the following: "This section does not apply with respect to a prime contract for the acquisition of commercial items (as defined in section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12)))."

(d) COST ACCOUNTING STANDARDS BOARD.--Section 26(f)(2) of the Office of Federal Procurement Policy Act (41 U.S.C. 422(f)(2)) is amended--

(1) by inserting "(A)" after "(2)";

(2) by striking out ", other than contracts or subcontracts" and all that follows and inserting in lieu thereof a period; and

(3) by inserting at the end the following:

"(B) Subparagraph (A) does not apply to the following contracts or subcontracts:

"(i) Contracts or subcontracts where the price negotiated is based on established catalog or market prices of commercial items sold in substantial quantities to the general public.

"(ii) Contracts or subcontracts where the price negotiated is based on prices set by law or regulation.

"(iii) Any other firm fixed-price contract or subcontract (without cost incentives) for commercial items.

"(C) In this paragraph, the term 'subcontract' includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor."

(e) CERTIFICATION REQUIREMENTS.--Subsection (e)(1)(B) of section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423) is amended by inserting after "certifies in writing to such contracting officer" the following: ", except in the case of a contract for the procurement of commercial items,".

(f) DRUG-FREE WORKPLACE ACT OF 1988.--Section 5152(a)(1) of the Drug-Free Workplace Act of 1988 (subtitle D of title V of Public Law 100-690; 41 U.S.C. 701 et seq.), as amended by section 4104(d), is further amended by inserting after the matter inserted by such section 4104(d) the following: ", other than a contract for the procurement of Federal Procurement Policy Act (41 U.S.C. 403)."

(g) CLEAN AIR ACT.--The Federal Acquisition Regulation may not contain a requirement for a certification by a contractor under a contract for the acquisition of commercial items, or a requirement that such a contract include a contract clause, in order to implement a prohibition or requirement of section 306 of the Clean Air Act (42 U.S.C. 7606) or a prohibition or requirement issued in the implementation of that section, since there is nothing in such section 306 that requires such a certification or contract clause.

(h) FLY AMERICAN REQUIREMENTS.--Section 40118 of title 49, United States Code, is amended by adding at the end the following new subsection:

"(f)(1) No certification by a contractor, and no contract clause, may be required in the case of a contract for the transportation of commercial items in order to implement a requirement in this section.

"(2) In paragraph (1), the term 'commercial item' has the meaning given such term in section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12))."

SEC. 8302. FLEXIBLE DEADLINES FOR SUBMISSION OF OFFERS OF COMMERCIAL ITEMS.

Section 18(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 416(a)), as amended by section 4201(c), is further amended by adding at the end the following new paragraph:

"(6) The Administrator shall prescribe regulations defining limited circumstances in which flexible deadlines can be used under paragraph (3) for the submission of bids or proposals for the procurement of commercial items."

xSEC. 8303. ADDITIONAL RESPONSIBILITIES FOR ADVOCATES FOR COMPETITION.

(a) RESPONSIBILITIES OF THE ADVOCATE FOR





CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

A Lawyer's View of FASA—Commercial Products



Page 8

COMPETITION.--Section 20(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 418(c)) is amended to read as follows:

"(c) The advocate for competition for eac for promoting full and open competition, promoting the acquisition of commercial items, and challenging barriers to such acquisition, including such barriers as unnecessarily restrictive statements of need, unnecessarily detailed specifications, and unnecessarily burdensome contract clauses."

(b) REPEAL OF SUPERSEDED PROVISION.--Section 28 of such Act (41 U.S.C. 424) is repealed.

SEC. 8304. PROVISIONS NOT AFFECTED.

Nothing in this title shall be construed as modifying or superseding, or as intended to impair or restrict, authorities or responsibilities under--

(1) section 2323 of title 10, United States Code, or section 7102 of the Federal Acquisition Streamlining Act of 1994;

(2) the Brooks Automatic Data Processing Act (section 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759));

(3) Brooks Architect-Engineers Act (title IX of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 541 et seq.));

(4) subsections (a) and (d) of section 8 of the Small Business Act (15 U.S.C. 637(a) and (d)); or

(5) the Javits-Wagner-O'Day Act (41 U.S.C. 46-48c).

SEC. 8305. COMPTROLLER GENERAL REVIEW OF FEDERAL GOVERNMENT USE OF MARKET RESEARCH.

(a) REPORT REQUIRED.--Not later than 2 years after the date of the enactment of this Act, the Comptroller General of the United States shall submit to the Congress a report on the use of market research by the Federal Government in support of the procurement of commercial items and nondevelopmental items.

*3399 (b) CONTENT OF REPORT.--The report shall include the following:

(1) A review of existing Federal Government market research efforts to gather data concerning commercial and other nondevelopmental items.

(2) A review of the feasibility of creating a Government-wide data base for storing, retrieving, and analyzing market data, including use of existing Federal Government resources.

(3) Any recommendations for changes in law or regulations that the Comptroller General considers appropriate.

