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A Lawyer's View of FASA - Disputes

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Assistant General Counsel for Finance & Litigation

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"Streamlining?"

by Kenneth A. Lechter

An overall review of Federal Acquisition Streamlining Act (FASA), and of the articles that have preceded mine, have lent credence to the argument that the "S" in FASA may have been a misnomer. The changes in the area of disputes procedures found in the Act at Sections 2351, 2352, 2353, and 2354, attempt to be consistent with the concept of "streamlining," and could prove beneficial to one portion of the contracting community. However, the "S" is still a misnomer when it applies to the Government.

Section 2351—Improvements

I recall a conversation about three years ago, when I first began working with the office. I had just taken my first look at the Contract Disputes Act (CDA)[1] and the Federal Acquisition Regulation (FAR). I went to one of my experienced colleagues with the pithy question: "Have I missed something, or is there no Statute of Limitations for submitting claims." You haven't missed anything," came the response. "That's crazy; are you saying that a contractor can sit on a potential claim as long as it wants, and we have to keep the file open?" "Uh huh," was the answer; this time with a wry smile on his face, knowing how ridiculous that would have sounded to me. He was right. Subparagraph (a) of this section of FASA corrects this 15 year old problem by adding a sentence to Section 6 of the Act to require contractors (and the Government) to file claims within six (6)[2] years of their accrual.[3]

Subparagraphs (b)(c) and (d) of this Section follow the general trend found throughout FASA of increasing dollar thresholds for the use of existing "simplified" procedures. Subparagraph (b) increases from $50,000 to $100,000 the threshold for certifying claims. Subparagraph (c) increases the maximum dollar dispute for accelerated procedures from $50,000 to $100,000, and subparagraph (d) increases the maximum dollar dispute threshold for small claims from $10,000 to $50,000.[4]

Presently, the CDA allows a contractor that believes a contracting officer has unduly delayed making a decision on its claim, to request that the agency Board of Contract Appeals direct the contracting officer to make a decision within a specified time determined by the Board, and a failure by the contracting officer to do so will [be considered a "deemed" denial], and will allow the contractor to file an appeal to the Board, or file suit [in the Court of Federal Claims]. Subparagraph (e) of Section 2351 strikes the reference to the "agency board of contract appeals" and substitutes the term "tribunal concerned." As there is no further expansion of, or change to, the concurrent jurisdiction of the Boards of Contract Appeals and the U.S. Court of Federal Claims, it appears that a contractor may now, if it has determined in advance to litigate in the Claims Court (as opposed to the Board), any unresolved claims, that it can make its request for Contracting Officer direction to the Court instead of the Board.[5]

Section 2352—Alternative Dispute Resolution

Covering a subject close to my own heart, subparagraph (a) of this section provides for an extension of the authority granted in Section 6 (e) of the CDA, encouraging the use of alternative dispute resolution (ADR) in contract disputes from October 1, 1995, to October 1, 1999.[6]

Subparagraph (b) of this section is interesting and curious. It attempts to "put teeth" into the worthwhile goal of promoting the use of ADR by requiring a party to go to the trouble of justifying, in writing, why it won't agree, if requested by the other party, to enter into some type of ADR process.[7] However, it provides no sanctions for the Government's or the contractor's failure

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to either provide the justification or enter into the process. It couldn't, and it shouldn't. The last thing that anyone who favors ADR wants is for there to be litigation over whether one has properly justified its failure to enter into ADR. The overall policy directive of the ADRA is that entering into alternative dispute resolution mechanisms must and should be voluntary. Additionally, although litigation expenses probably are more onerous to the small business, there seems to be no logical reason why this provision, to the extent that it would have a beneficial effect, should not be equally applicable to large businesses.[8]

Section 2353—Expedited Resolution

Subparagraph (A) of this section offers the noble goal of having the contracting officer respond to all "written requests" within thirty days, and provides, in subparagraph (B), that if the contracting officer can not reply within that time period, the contracting officer must specify a date when he will reply. The section *requires* that the Federal Acquisition Regulation include these provisions. Again, as in the previous section, these new rules apply only to small businesses. To the extent that these provisions are worthwhile, they should apply to all contractors. A concern, however, which has been echoed by some of my colleagues, is that it places, under the banner of streamlining, more administrative burden on what is going to be, within present policy guidelines, a continually overworked and shrinking procurement community. This is especially true if this innocent "written request" happens to be a request for an equitable adjustment, possibly involving millions of dollars, with complex factual and legal issues attached. What is most distressing however, is subparagraph (b), "Rules of Construction." It states that "nothing in this section shall be construed as creating any rights under the Contract Disputes Act." What the authors have done, therefore, is to create a requirement which places a heavy administrative burden, without benefit to the (small business) contracting community for the failure of the Government to comply. Additionally, without subparagraph (b), regulations could have been fashioned around this section to act as a fix for the gray area which has been the subject of much litigation; *ie.*, defining the point in time when a dispute, which can be the subject of a formal claim, arises. Now that litigation will continue.

Section 2354—District Courts

In a rules change which applies to suits in the U.S. District Courts which involve an issue which could be the subject of a contracting officer's decision, the District Court which recognizes that it doesn't have expertise in this area, may request advisory opinions on Government contract law from the appropriate Board of Contract Appeals.[9]

CONCLUSION

It is clear that FASA's "spin" has been directed to the small business community. The small business community should be a major beneficiary of acquisition reform. However, all of the players; the Government, the Boards, the Courts, the small business community, and the large business community can and should benefit from reform in the handling of contract disputes. When legislation presumes the preeminence of one player, in a game with many players, the effort may cause more problems than it solves.

Notes

1. 41 U.S.C. 605 *et. seq.*

2. This, probably not coincidentally, is the statute of limitations for filing suits based upon monetary claims against the United States in the United States Court of Federal Claims. However, this change is subject to an additional provision which exempts from the operation of this section, contracts in existence on the date of the passage of the Act. (Section 2351 (a)(2)).

3. I would predict that the interpretation of this word, as innocuous as it may sound, will be the subject of substantial litigation in the future. The question of when an action "accrues" for statute of limitation purposes lends itself to arguments over interpretation, and may require a legislative fix.

4. Subparagraphs (c) and (d) of Section 2351 are the subject of proposed rules in the General Services Administration Board of Contract Appeals. It is proposed that these FASA provisions will be applicable to all cases filed on or after a date to be specified in

the final rules (See Vol. 59, No. 231, Federal Register, December 2, 1994). Once this rule becomes final, contracting officers should remember to change the standardized clause they place at the end of final contracting officers decisions.

5. Is there a problem now if a request for direction comes from the Board, and the contractor uses that "deemed denial" to file suit in the Court of Federal Claims?

6. See also FAR 33.201 and 33.204. The original change to the CDA came about as a result of the passage of the Administrative Dispute Resolution Act (ADRA) of 1991, which promotes the use of ADR in all administrative disputes. The significance of October 1, 1995, is that this is the sunset date for the ADRA. Ironically, the extension of the ADRA, itself, is not presently assured.

7. As it applies to the Government, this justification must be in writing and cite one of the statutorily "suggested" justifications found in U.S.C. Title 5 Section 572(b), one of the areas where the Administrative Dispute Resolution Act was codified.

8. I am confident that the concept of ADR and its use will be expanded and be a more universally accepted method for resolving disputes in the future. This will only be done when the mind-set of litigants accept the premise that there need not always be a "winner" and a "loser." However litigation will continue; sometimes for the right reasons, and some times for the wrong ones. When litigation continues for the wrong reasons, there can be an effective "motivational" tool for promoting dispute resolution which has long been overlooked by the Board, and not, in this writers opinion, interpreted expansively enough by the federal courts.

9. This is similar to the Maryland Rule which provides for advisory opinions by the Court of Appeals of Maryland on matters of interpretation of state law when requested by the United States District Court for the District of Maryland.

SEC. 2351. CONTRACT DISPUTES ACT IMPROVEMENTS.

(a) PERIOD FOR FILING CLAIMS.--Section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) is amended in subsection (a) by inserting after the second sentence the following: "Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim. The preceding sentence does not apply to a claim by the government against a contractor that is based on a claim by the contractor involving fraud.".

(2) Notwithstanding the third sentence of section 6(a), of the Contract Disputes Act of 1978, as added by paragraph (1), if a contract in existence on the date of the enactment of this Act requires that a claim referred to in that sentence be submitted earlier than 6 years after the accrual of the claim, then the claim shall be submitted within the period required by the contract. The preceding sentence does not apply to a claim by the Federal Government against a contractor that is based on a claim by the contractor involving fraud.

(b) INCREASED THRESHOLD FOR CERTIFICATION, DECISION, AND NOTIFICATION REQUIREMENTS.--Subsection (c) of such section is amended by striking out "$50,000" each place it appears and inserting in lieu thereof "$100,000".

(c) INCREASED MAXIMUM FOR APPLICABILITY OF ACCELERATED PROCEDURES.--Section 8(f) of the Contract Disputes Act of 1978 (41 U.S.C. 607(f)) is amended by striking out "$50,000" in the first sentence and inserting in lieu thereof "$100,000".

(d) INCREASED MAXIMUM FOR APPLICABILITY OF SMALL CLAIMS PROCEDURE.--Section 9(a) of the Contract Disputes Act of 1978 (41 U.S.C. 608(a)) is amended by striking out "$10,000" in the first sentence and inserting in lieu thereof "$50,000".

(e) REQUESTS FOR ISSUANCE OF DECISIONS.--Paragraph (4) of section 6(c) of the Contract Disputes Act of 1978 (41 U.S.C. 605(c)) is amended--

(1) by striking out "agency board of contract appeals" and inserting in lieu thereof "tribunal concerned"; and

(2) by striking out "board," and inserting in lieu thereof "tribunal concerned,".

SEC. 2352. EXTENSION OF ALTERNATIVE DISPUTE RESOLUTION AUTHORITY.

(a) EXTENSION OF AUTHORITY.--Section 6(e) of the Contracts Disputes Act of 1978 (41 U.S.C. 605(e)) is amended by striking out "October 1, 1995" and inserting in lieu thereof "October 1, 1999".

(b) AVAILABILITY OF PROCEDURES TO SMALL BUSINESS GOVERNMENT CONTRACTORS.-- Section 6 (e) of such Act is amended by inserting after the first sentence the following: "In any case in which the contracting officer rejects a contractor's request for alternative dispute resolution proceedings, the contracting officer shall provide the contractor with a written explanation, citing one or more of the conditions in section 572(b) of title 5, United States Code, or such other specific reasons that alternative dispute resolution procedures are inappropriate for the resolution of the dispute. In any case in which a contractor rejects a request of an agency for alternative dispute resolution proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.".

SEC. 2353. EXPEDITED RESOLUTION OF CONTRACT ADMINISTRATION MATTERS.

(a) REGULATIONS REQUIRED.--(1) The Federal Acquisition Regulation shall include provisions that require a contracting officer--

(A) to make every reasonable effort to respond in writing within 30 days to any written request made to a contracting officer with respect to a matter relating to the administration of a contract that is received from a small business concern; and

(B) in the event that the contracting officer is unable to reply within the 30-day period, to transmit to the contractor within such period a written notification of a specific date by which the contracting officer expects to respond.

(2) The provisions shall not apply to a request for a contracting officer's decision under the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.).

(b) RULE OF CONSTRUCTION.--Nothing in this section shall be considered as creating any rights under the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.).

(c) DEFINITION.--In this section, the term "small business concern" means a business concern that meets the requirements of section 3(a) of the Small Business Act (15 U.S.C. 632(a)) and the regulations promulgated pursuant to that section.

SEC. 2354. AUTHORITY FOR DISTRICT COURTS TO OBTAIN ADVISORY OPINIONS FROM BOARDS OF CONTRACT APPEALS IN CERTAIN CASES.

Section 10 of the Contract Disputes Act of 1978 (41 U.S.C. 609) is amended by adding at the end the following new paragraph:

"(f)(1) Whenever an action involving an issue described in paragraph (2) is pending in a district court of the United States, the district court may request a board of contract appeals to provide the court with an advisory opinion on the matters of contract interpretation at issue.

"(2) An issue referred to in paragraph (1) is any issue that could be the proper subject of a final decision of a contracting officer appealable under this Act.

"(3) A district court shall direct any request under paragraph (1) to the board of contract appeals having jurisdiction under this Act to adjudicate appeals of contract claims under the contract or contracts being interpreted by the court.

"(4) After receiving a request for an advisory opinion under paragraph (1), a board of contract appeals shall provide the advisory opinion in a timely manner to the district court making the request."