



CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

A Lawyer's View of FASA—Inapplicable Laws

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Inapplicable Laws under FASA by

Terry H. Lee

Section 4104 of the Federal Acquisition Streamlining Act of 1994 (FASA)¹ amended the Office of Procurement Policy Act² by adding at the end a new section entitled "List of Laws Inapplicable to Contracts Not Greater Than The Simplified Acquisition Threshold in Federal Acquisition Regulation."³ Subsection (a) makes it mandatory that the FAR "include a list of provisions of law that are inapplicable to contracts or subcontracts in amounts not greater than the simplified acquisition threshold."⁴ Additionally, FASA states that any provision of law that is properly included on the list would be inapplicable to such contracts and that nothing in the provision would waive the applicability of any statute that is not included on the list or create any private right of action or other legal rights not expressly provided in the statute, based upon alleged inapplicability of a law not included on the list.⁵

The concept behind this amendment was to ease the regulatory burden associated with buying commercial items. The identified statutes are unique to the federal government and have no parallel in the commercial marketplace. In Congress' view, these statutes created an impediment to the purchase of commercial items because they require companies to make extensive changes in their business operations if they choose to sell to the government. 140 Cong. Rec. S6490, S6492 (daily ed. June 7, 1994) (statement of Sen. Levin). As Senator William Cohen, one of FASA's sponsors, said during debate of S. 1587:

The overly complex and cumbersome requirements of the Federal procurement system often intimidate potential vendors to the point of discouraging their participation in the procurement process. These cumbersome requirements discourage common-sense purchasing decisions, resulting in purchasing decisions that are penny-wise and pound foolish. The current procurement process has a chilling

effect on competition that ultimately translates into higher costs for taxpayers.

Id. S6500 (statement of Sen. Cohen).

With regard to civilian agency acquisitions, Congress amended section 302A of the Federal Property and Administrative Services Act of 1949⁶ by stating that no law properly listed in the FAR shall apply to a contract or subcontract not greater than the simplified acquisition threshold.⁷

FASA itself lists nine statutes (or parts thereof) made inapplicable to civilian agency acquisitions, by adding an additional amending section to these statutes. They are: (1) Prohibition on Limiting Subcontractor Direct Sales to the United States (41 U.S.C. § 253g); (2) Prohibition Against Contingent Fees (41 U.S.C. § 254(a)); (3) Water Pollution Control Act (33 U.S.C. § 1368); (4) Contract Work Hours and Safety Standards Act (40 U.S.C. § 329); (5) Drug-Free Workplace Act of 1988 (41 U.S.C. §§ 701, et seq.); (6) Anti-Kickback Act (41 U.S.C. § 57); (7) Cost Accounting Standards (41 U.S.C. § 422); (8) Miller Act (40 U.S.C. § 270a); and (9) Solid Waste Disposal Act (42 U.S.C. § 6962).

The amount of paperwork involved in businesses' compliance with contract provisions (and the statutes referenced in these provisions) was a major concern to the sponsors of FASA. Consequently, the statutes concerning the prohibition against contingent fees, contract audit requirements, as well as Anti-Kickback Act procedures, were made inapplicable to contracts at or below the simplified acquisition threshold.⁸ A question arises in the writer's mind, however, as to whether "paperwork" problems are really the issue. For example, as stated earlier, FASA makes

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From the Editor Terry Lee is a Senior attorney in the Contract Law Division. She is the lead attorney on the current NEXRAD appeal.

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inapplicable to contracts at or below the simplified acquisition threshold subsections (a) and (b) of the Anti-Kickback Act. That statute was designed to correct the improper awards of subcontracts and the corruption of judgment of officers and agents who participate in such improper awards.⁹ Section 57(a) requires each contracting agency to include in each prime contract a requirement that the contractor follow reasonable procedures designed to detect and prevent violations of section 53. Section 57(b) requires that a contractor cooperate with any federal agency investigation of a violation of section 53. One can reasonably assume that Congress believed that with respect to small dollar contracts (\$100,000), the costs of ferreting out compliance and cooperation are simply not worth it, not that the goals of the law are no longer admirable.

The same cannot be said, however, of inclusion of the Water Pollution Control Act. Section 1368(a) of Title 33, United States Code states:

No federal agency may enter into any contract with any person who has been convicted of any offense under section 1319(c)...¹⁰ for procurement of goods, materials and services if such contract is to be performed at any facility at which the violation that gave rise to such conviction occurred, and if such facility is owned, leased or supervised by such person. . . .

What onerous paperwork requirements exist in this section of the statute remain hidden from view, so the law may have been included in FASA's waiver provision because the costs of determining compliance, in relation to contract value, are prohibitive. Furthermore, it's hard to imagine water pollution being a by-product of a contract for a commercial item in the amount of \$100,000.

Finally, there is no express provision in the statutory prohibition on restricting subcontractor direct sales, 41 U.S.C. § 253g, which requires any paperwork, much less burdensome paperwork or procedures. Thus, waiver of this statute would, in the writer's view, simply not have much effect because there is probably little,

if any, subcontracting where small dollar contracts are concerned. Additionally, the costs of enforcement may be prohibitive.

While some of these changes in the procurement process appear on their face to be overall beneficial in one sense, there are concerns as to whether they will foster, or inhibit, the participation of small businesses. In a June 1994 letter to Senator Dale Bumpers, another of the bill's sponsors, the Small Business Working Group on Procurement Reform objected to the class waiver of certain laws, expressing the opinion that such waivers should be made by the legislature, not "procurement bureaucrats."¹¹ Additionally, small business advocacy groups objected to the waiver of specific laws, such as the Miller Act,¹² because the law's primary purpose is to provide payment protection to small business subcontractors and suppliers.¹³ With regard to the Miller Act, for example, FASA requires that the FAR provide alternatives to payment bonds as payment protection and gives the contracting officer authority to choose among payment protections to be set out in the FAR. Exactly what alternative payment protections will be developed remain to be seen, but satisfactory protections must be established because of the amount of money usually involved in government construction projects and the potential for exploitation of small and disadvantaged businesses.¹⁴

In sum, waiver of the named and potential laws applicable to contracts and subcontracts awarded at or below the simplified acquisition threshold evinces the statutory preference for off-the-shelf items, making it less expensive and easier for the government to purchase commercial products, but at the same time making it clear that costs of enforcement of the law, where small dollar contracts are concerned, is one of the most important factors.

¹ Pub. L. 103-355 (October 13, 1994). Section references to FASA are to Senate Bill S. 1587.

² 41 U.S.C. §§ 401, *et seq.*

³ "Simplified Acquisition Threshold" means \$100,000.00. FASA § 4001, amending section 4(11) of





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the Office of Federal Procurement Policy Act. Id. § 403(11).

⁴ This includes “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 law that provides for civil or criminal penalties or one that is made applicable to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. FASA § 4101(b)(1).

⁵ However, a person may petition the Administrator for Federal Procurement Policy to include a future-enacted or existing statute where it is not included on the list and no written determination has been made by the FAR Council. FASA § 4101(c).

⁶ 40 U.S.C. §§ 252, *et seq.*

⁷ FASA § 4103.

⁸ For example, the particular section of the Anti-Kickback Act from which certain contracts are now exempt contains requirements for establishing procedures to prevent and detect violations of improper awards of subcontracts. 41 U.S.C. § 57. However, contractors are not exempt from cooperating in investigations of Anti-Kickback Act violations.

⁹ 41 U.S.C. §§ 51 and 53.

¹⁰ 33 U.S.C. § 1311 makes it unlawful to discharge any pollutant. Section 1319 covers both negligent and knowing violations of state permits which prevent pollution. More importantly, though, section 1368(f) already gives agencies the discretion to waive certification requirements in acquisitions of commercial items.

¹¹ 140 Cong. Rec. S6502. The Small Business Working Group received its wish in the nine statutes included at passage of the bill.

¹² 40 U.S.C. § 270a-270d. The Miller Act is the federal equivalent for labor and materialmen’s right to obtain a mechanic’s lien. It requires both performance and payment bonds in construction contracts.

¹³ 140 Cong. Rec. S6503 (comments of the Small Business Administration).

¹⁴ Currently, under the Miller Act, a payment bond is required only when a performance bond is required. FAR § 28.103-3(a). FASA leaves alone the requirement for a performance bond. As far as subcontractor and supplier payment protections are concerned, section 2091 of FASA amended section 806(c) of the National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. 102-190 (Dec. 5,

1991) by requiring the FAR Council to apply government wide the requirements contained in subsection (a) relating, in part, to compliance with payment terms. This may be a guide to the FAR Council in developing alternative payment protections for small business subcontractors and suppliers.

SEC. 4101. LIST OF INAPPLICABLE LAWS IN FEDERAL ACQUISITION REGULATION.

The Office of Federal Procurement Policy Act (41 U.S.C. 401 *et seq.*) is amended by adding at the end the following new section:

"SEC. 33. LIST OF LAWS INAPPLICABLE TO CONTRACTS NOT GREATER THAN THE SIMPLIFIED ACQUISITION THRESHOLD 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 or subcontracts in amounts not greater than the simplified acquisition threshold. A provision of law that is properly included on the list pursuant to paragraph (2) may not be construed as applicable to such contracts or subcontracts (as the case may be) by an executive agency. Nothing in this section shall be construed to render inapplicable to contracts and subcontracts in amounts not greater than the simplified acquisition threshold any provision of law that is not included on such list.

"(2) A provision of law described in subsection (b) that is enacted after the date of the enactment of the Federal Acquisition Streamlining Act of 1994 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 contracts or subcontracts in amounts not greater than the simplified acquisition threshold from the applicability of the provision.

"(b) COVERED LAW.—A provision of law referred to in subsection (a)(2) 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 or subcontracts in amounts not greater than the simplified acquisition threshold.

"(k) PETITION.—In the event that a provision of law described in subsection (b) is not included on the list of inapplicable provisions of law as required by subsection (a), and no written determination has been made by the Feder-





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al Acquisition Regulatory Council pursuant to subsection (a)(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) within 60 days after the date on which the petition is received."

SEC. 4103. CIVILIAN AGENCY ACQUISITIONS.

(a) LIST OF INAPPLICABLE LAWS IN FAR.—Section 302A of the Federal Property and Administrative Services Act of 1949, as added by section 4003, is amended by adding at the end the following:

"(b) INAPPLICABLE LAWS.—No law properly listed in the Federal Acquisition Regulation pursuant to section 33 of the Office of Federal Procurement Policy Act shall apply to or with respect to a contract or subcontract that is not greater than the simplified acquisition threshold."

(b) 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) is amended by adding at the end the following new subsection:

"(c) This section does not apply to a contract for an amount that is not greater than the simplified acquisition threshold."

(c) 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)) is amended by adding at the end the following: "The preceding sentence does not apply to a contract for an amount that is not greater than the simplified acquisition threshold."

(d) AUTHORITY TO EXAMINE BOOKS AND RECORDS OF CONTRACTORS.—Section 304C of the Federal Property and Administrative Services Act of 1949, as added by section 2251(a), is amended by adding at the end of subsection (f) the following:

"(2) A contract or subcontract that is not greater than the simplified acquisition threshold."

SEC. 4104. ACQUISITIONS GENERALLY.

(a) REQUIREMENT FOR CONTRACT CLAUSE RELATING TO KICKBACKS.—Section 7 of the Anti-Kickback Act of 1986 (41 U.S.C. 57) is amended by adding at the end the following new subsections:

"(d) Subsections (a) and (b) do not apply to a prime contract that is not greater than \$100,000.

"(e) Notwithstanding subsection (d), a prime contractor shall cooperate fully with any Federal Government agency investigating a violation of section 3."

(b) MILLER ACT.—(1)(A) The Miller Act is amended by adding at the end the following new section:

"SEC. 5 not greater than \$100,000."

(B) Subsection (a) of the first section of such Act is amended by striking out ", exceeding \$25,000 in amount,".

(2)(A) The Federal Acquisition Regulation shall provide alternatives to payment bonds as payment protections for suppliers of labor and materials under contracts referred to in subparagraph (C).

(B) The contracting officer for a contract shall—

(i) select, from among the payment protections provided for in the Federal Acquisition Regulation pursuant to subparagraph (A), one or more payment protections which the offeror awarded the contract is to submit to the Federal Government for the protection of suppliers of labor and materials for such contract; and

(ii) specify in the solicitation of offers for such contract the payment protection or protections so selected.

(C) The regulations required under subparagraph (A) and the requirements of subparagraph (B) apply with respect to contracts referred to in subsection (a) of the first section of the Miller Act that are greater than \$25,000 but not greater than \$100,000.

(c) CONTRACT WORK HOURS AND SAFETY STANDARDS ACT.—(1) Section 103 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 329) is amended by adding at the end the following new subsection:

"(c) This title does not apply to a contract in an amount that is not greater than \$100,000."

(2) Section 107(a) of such Act (40 U.S.C. 333(a)) is amended by inserting after "It shall be a condition of each contract" the following: "(other than a contract referred to in section 103(c))".

(d) DRUG-FREE WORKPLACE ACT OF 1988.—Section 5152(a)(1) of the Drug-Free Workplace Act of 1988 (subtitle D of title V of the Anti-Drug Abuse Act of 1988; Public Law 100-690; 41 U.S.C. 701(a)(1)) is amended by striking out "of \$25,000 or more from any Federal agency" and inserting in lieu thereof "greater than the simplified acquisition threshold (as defined in section 4(11) of such Act (41 U.S.C. 403(11))) by any Federal agency".

(e) SOLID WASTE DISPOSAL ACT.—Paragraph (3) of section 6002(c) of the Solid Waste Disposal Act (42 U.S.C. 6962(c)) is amended—

(1) by redesignating subparagraphs (A) and (B) as clauses (i) and (ii), respectively;

(2) by inserting "(A)" after "(3)"; and

(4) by adding at the end the following new subparagraph:

"(B) Clause (ii) of subparagraph (A) applies only to a contract in an amount greater than \$100,000."

