



# CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

## A Lawyer's View of FASA—

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### FASA-Multiyear & Economy Act

by Lynn Patton

By now you have seen several articles in the Contract Law Division's series on procurement law changes implemented by the Federal Acquisition Streamlining Act (FASA). I considered taking the approach of other colleagues and opening with a clever joke, an allusion to the Bible, or a rehash of office discussions about certain perverse applications of procurement laws and regulations. Nothing came to mind that would make §§1072, 1073, and 1074 of FASA titillating, so let's cut to the chase.

#### §1072 Multiyear Contracts Authority

##### Prior CLD Position Confirmed

The Federal Property and Administrative Services Act (FPASA) (41 USC §251 *et seq.*) was amended to add a new §304B which now provides specific statutory authority for non-Department of Defense (DoD) executive agencies to enter into multiyear contracts. Prior to FASA, the Federal Acquisition Regulation (FAR) appeared to provide for multiyear contracting in Part 17. Despite the FAR's apparent clarity as to when a multiyear contract could be used ("when no-year or multiyear funds are available or, in the case of 1-year funds, when multiyear contracting is specifically authorized by statute" [17.102-1]), this office has opined that Part 17 of the FAR provides no substantive authority for Commerce to use multiyear contracts. CLD's opinion that specific statutory authority for multiyear contracts is required—and which the regulations at Part 17 do not provide—was based on the Anti-deficiency Act (31 USC §1341) and the Adequacy of Appropriations Act (41 USC §11), which require that all funds necessary to complete a contract effort be appropriated in the fiscal year in which the contract is awarded.

FASA's §1072 bears out CLD's prior opinions by providing the specific statutory authority for multiyear contracts previously enjoyed primarily by DoD agencies. Section 1072 authorizes the award of multiyear contracts, not to exceed 5 program years, if funds are available for either

the entire contract or for at least the first fiscal year plus the estimated costs associated with any necessary termination of the contract. Thus, it makes no difference whether no-year, annual, or multiple-year funding is available. The agency must determine that the need for the property or services is reasonably firm and continuing and that a multiyear contract will serve the best interests of the United States by encouraging either full and open competition or economy in performance of the agency's administration and operation of programs. The contract must also contain a termination clause that provides for termination of the contract if funds are not made available for its continuation in any fiscal year covered by the contract. If the anticipated cost to cancel the contract exceeds \$10,000,000, Congress must be notified. The contract cannot be awarded until at least 30 days have passed since such notification.

#### FAR Council's Proposed Rule to Implement §1072

A proposed rule seeking public comment on §1072 notes the objectives multiyear contracting is intended to achieve, among them the enhancement of standardization; substantial continuity of production or performance; broadening the competitive base with opportunities for participation by firms not otherwise willing or able to compete for lesser quantities; and providing incentives to contractors to improve productivity through investment in capital facilities, equipment, and advanced technology. (60 Federal Register 14340 - 14346) The proposed rule also encourages the use of pre-solicitation and pre-bid conferences "to ensure that all interested sources of supply are thoroughly aware of how multiyear contracting is accomplished...."

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**A Lawyer's View** is a monthly 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 FTS 202-377-1122, or via e-mail to Jerry Walz@OGCMAC@OSEC



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Much of the above probably sounds very familiar, because Part 17 of the FAR contains similar provisions. Despite this similarity, contracting officers should not initiate multiyear contract actions under the guidance currently at Part 17, as it is based on multiyear contracting authority not intended for all executive agencies. More importantly, FASA provides that §1072, as well as the majority of changes made by the Act, is not effective until the FAR Council have issued final regulations (which they have not) implementing §1072.

### §1073 Severable Service Contracts Crossing Fiscal Years

Prior to FASA, severable service contracts (services that do not produce a single, unified outcome such as janitorial services or data digitization services) which an agency was not fortunate enough to synchronize with the beginning and end of the fiscal year were administered using options for additional contract periods. While the continuing need for many services was obvious and the exercise of the options somewhat routine, the FAR still imposed requirements both for the inclusion and exercise of options that, thankfully, have been reduced. Such requirements (among them a determination and findings that the use of options is in the Government's interest and advance notification to the contractor that the Government intends to exercise its option) were imposed because of the long-standing *bona fide* needs rule (31 USC §1502[a]).



#### Severable Services and the *Bona Fide* Needs Rule

The *bona fide* needs rule is a fundamental principle of fiscal law which limits the obligation of funds only to the time for which Congress has made them available and only for expenses properly incurred during that period of availability. Generally, services are the *bona fide* need of the fiscal year in which they are performed, hence, contracts for most services cannot cross fiscal year lines because the agency would be obligating funds in advance of the next fiscal year's appropriation.

Section 1073 of the FASA now permits the head of an executive agency to enter into a con-

tract using funds limited to only one fiscal year for the procurement of severable services for a period that begins in one fiscal year and ends in the next, so long as the contract period does not exceed one year. Although the use of option periods has been used to synchronize a services contract with the fiscal year after the base period, they need no longer be used for that purpose. As with §1072, contracting officers are advised to continue with their current practices regarding service contracts until final regulations are implemented.

### §1074 Economy Act Purchases

Existing Part 17.5 of the FAR, which implements the Economy Act (31 USC §1535) for inter-agency acquisitions (IAA), will almost certainly be totally re-written to implement the significant changes made by FASA for inter-agency acquisitions. Currently, the required determination for entering into an inter-agency acquisition for the purchase of supplies or services must include only 2 findings: (1) that legal authority for the acquisition otherwise exists and (2) the action does not conflict with any other agency's authority or responsibility. (If the acquisition involves the use of a commercial or industrial activity operated by the servicing agency, an additional finding conforming to FAR 7.2 is also required.)

#### New Inter-Agency Acquisition Requirements

Once regulations for §1074 are implemented (a proposed rule has been issued by the FAR Council), an inter-agency purchase of goods or services may be made only if it is approved in advance by the contracting officer and determined that: (A) the purchase is made under a contract that the servicing agency entered into prior to receipt of the requesting agency's service order and the servicing agency must have entered into the contract to fulfill the same or similar goods or services for its own requirements; (B) the servicing agency is better qualified to enter into or administer the contract due to capabilities or expertise not available to the ordering agency; and (C) the servicing agency is specifically authorized by law or regulations to purchase the goods or services on behalf of other



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agencies. In addition, the ordering agency is prohibited from paying the servicing agency any fee that exceeds the actual costs to the servicing agency. If the actual costs are not known, the payment to the servicing agency cannot exceed the estimated costs of entering into and administering the contract. Further, if the servicing agency is not covered by both FPASA and the FAR, the acquisition is prohibited unless approved in advance by the senior procurement official responsible for the ordering agency's purchases.

### §1074 May Severely Restrict Agencies' Use of Inter-Agency Acquisitions

The requirement, noted above, that the purchasing agency has already awarded a contract effectively repeals FAR 17.504(d), which prescribed interagency acquisition procedures in the event the acquisition required the servicing agency to award a contract. All of the required findings are clearly meant to limit interagency acquisitions. A recently published proposed rule provides for a revised FAR Part 17.5. The revisions provide, *inter alia*, that the Economy Act applies when more specific statutory authority does not exist, for example, required sources of supply prescribed in FAR Part 8. In addition, the proposed rule states that the Economy Act may not be used by an agency to circumvent conditions and limitations imposed on the use of Government funds appropriated for the acquisition. (60 Federal Register 14343) This admonition appears merely to state the current law. Although the Comptroller General has determined that the Economy Act is an exception to the Competition in Contracting Act (CICA), it would appear that Congress has determined that the exception was over-used.

Section 1074 is intended to be effective for only 1 year from the date the applicable FAR regulation takes effect and a monitoring system "capable of collecting and evaluating appropriate data" on interagency acquisitions is to be administered by the Administrator for Federal Procurement Policy. My guess is there will not be much data to be evaluated. Agencies may find that, in many instances, the new restrictions on

IAAs prohibit such an acquisition or make it only marginally attractive compared to conducting their own procurements. If Congress was attempting a balancing act between the opportunities CICA provides to the private sector and the economic and administrative advantages to agencies provided by the Economy Act, it appears to have failed.

### **SEC. 1072. MULTIYEAR CONTRACTING AUTHORITY**

Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) is amended by inserting after section 304 the following new section:

#### "SEC. 304B. MULTIYEAR CONTRACTS.

"(a) AUTHORITY.—An executive agency may enter into a multiyear contract for the acquisition of property or services if—

"(1) funds are available and obligated for such contract, for the full period of the contract or for the first fiscal year in which the contract is in effect, and for the estimated costs associated with any necessary termination of such contract; and

"(2) the executive agency determines that—

"(A) the need for the property or services is reasonably firm and continuing over the period of the contract; and

"(B) a multiyear contract will serve the best interests of the United States by encouraging full and open competition or promoting economy in administration, performance, and operation of the agency's programs.

"(b) TERMINATION CLAUSE.—A multiyear contract entered into under the authority of this section shall include a clause that provides that the contract shall be terminated if funds are not made available for the continuation of such contract in any fiscal year covered by the contract. Amounts available for paying termination costs shall remain available for such purpose until the costs associated with termination of the contract are paid.

"(c) CANCELLATION CEILING NOTICE.—Before any contract described in subsection (a) that contains a clause setting forth a cancellation ceiling in excess of \$10,000,000 may be awarded, the executive agency shall give written notification of the proposed contract and of the proposed cancellation ceiling for that contract to the Congress, and such contract may not then be awarded until the end of a period of 30 days beginning on the date of such notification.

"(d) MULTIYEAR CONTRACT DEFINED.—For the purposes of this section, a multiyear contract is a contract for the purchase of property or services for more than one, but not more than five, program years. Such a contract may provide that performance under the contract during the second and subsequent years of the contract is contin-

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gent upon the appropriation of funds and (if it does so provide) may provide for a cancellation payment to be made to the contractor if such appropriations are not made.

"(e) RULE OF CONSTRUCTION.—Nothing in this section is intended to modify or affect any other provision of law that authorizes multiyear contracts."

### SEC. 1073. SEVERABLE SERVICES CONTRACTS CROSSING FISCAL YEARS

Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.), as amended by section 1054, is further amended by inserting after section 303I the following new section:

#### "SEC. 303L. SEVERABLE SERVICES CONTRACTS FOR PERIODS CROSSING FISCAL YEARS.

"(a) AUTHORITY.—The head of an executive agency may enter into a contract for procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year if (without regard to any option to extend the period of the contract) the contract period does not exceed one year.

"(b) OBLIGATION OF FUNDS.—Funds made available for a fiscal year may be obligated for the total amount of a contract entered into under the authority of subsection (a)."

### SEC. 1074. ECONOMY ACT PURCHASES

(a) REGULATIONS REQUIRED.—The Federal Acquisition Regulation shall be revised to include regulations governing the exercise of the authority under section 1535 of title 31, United States Code, for Federal agencies to purchase goods and services under contracts entered into or administered by other agencies.

(b) CONTENT OF REGULATIONS.—The regulations prescribed pursuant to subsection (a) shall—

(1) require that each purchase described in subsection (a) be approved in advance by a contracting officer of the ordering agency with authority to contract for the goods or services to be purchased or by another official in a position specifically designated by regulation to approve such purchase;

(2) provide that such a purchase of goods or services may be made only if—

(A) the purchase is appropriately made under a contract that the agency filling the purchase order entered into, before the purchase order, in order to meet the requirements of such agency for the same or similar goods or services;

(B) the agency filling the purchase order is better qualified to enter into or administer the contract for such goods or services by reason of capabilities or expertise that is not available within the ordering agency; or

(C) the agency or unit filling the order is specifically authorized by law or regulations to purchase such goods or services on behalf of other agencies;

(3) prohibit any such purchase under a contract or oth-

er agreement entered into or administered by an agency not covered by the provisions of chapter 137 of title 10, United States Code, or title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251 et seq.) and not covered by the Federal Acquisition Regulation unless the purchase is approved in advance by the senior procurement official responsible for purchasing by the ordering agency; and

(4) prohibit any payment to the agency filling a purchase order of any fee that exceeds the actual cost or, if the actual cost is not known, the estimated cost of entering into and administering the contract or other agreement under which the order is filled.

(c) MONITORING SYSTEM REQUIRED.—The Administrator for Federal Procurement Policy shall ensure that, not later than one year after the date of the enactment of this Act, systems for collecting and evaluating procurement data are capable of collecting and evaluating appropriate data on procurements conducted under the regulations prescribed pursuant to subsection (a).

(d) TERMINATION.—This section shall cease to be effective one year after the date on which final regulations prescribed pursuant to subsection (a) take effect.