



# CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

## A Lawyer's View of FASA—Solicitation, Eval. and Award

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“Tell Me More ...”

### FASA §§1061-1063 Solicitation, Evaluation, and Award

by Roxie Jamison Jones

I once heard of a training instructor who compared the Government's solicitation and evaluation process to a buyer who tells potential suppliers what it wants generally (“I want a car”) but refuses to identify the most important features (like air conditioning because it will be driven in a warm climate or deep tread tires for offroad romps). A guessing game ensues and the buyer enters into a contract with the supplier who guess falls closest to the buyer's actual requirement. Seemingly in response to this type of analogy, Congress has directed executive agencies to provide offerors with more detailed evaluation criteria than ever before. FASA Sections 1061 and 1062 require executive agencies to reveal details about agency intentions and award criteria and once an award is made, Section 1063 requires swift notice of the award decision. Openness is clearly the intent behind these new streamlining requirements.

#### List Significant Subfactors

Under FASA, agencies must now list significant subfactors along with the significant factors to be considered when evaluating sealed bids or competitive proposals. This additional requirement results in at least one level of detail below the criteria currently provided and it may be more. (Webster's New World Dictionary defines significant as important; momentous.) All types of factors should be considered for inclusion as evaluation criteria. FASA specifically mentions price as a factor in solicitations for sealed bid and, for competitive proposal, the law lists “cost or price, cost related or price related subfactors, and noncost-related or nonprice-related factors and subfactors”.

#### Add Relative Importance

Once factors and subfactors are identified, FASA requires agencies to assign relational terms of importance. This time, the new law emphasizes quality and it highlighted technical capa-

bility, management capability, prior experience, and past performance of the offeror along with the regulars: price and cost as factors to be included in the relative rankings. For an even more revealing comparison, FASA requires agencies to combine all evaluation factors other than cost and price and disclose to offerors whether those factors are (i) significantly more important than cost or price, (ii) approximately equal in importance to cost or price or (iii) significantly less important than cost or price. Congress did not define these relative terms, however it did address the likelihood that inflexible rules could result when it added that the regulations which implement this provision need not define the terms significantly more or less in terms of numeric weights that would be applied uniformly to all solicitations. It adds that agencies are free to assign and disclose such number weights on a case-by-case basis.

#### State Your Intentions

FASA also adds a requirement to include in solicitations either a statement of intent to award after discussions or a statement of intent to evaluate and award without discussion unless discussions are determined to be necessary. This may sound close to the existing boilerplate, but consider the consequences FASA adds. Before FASA, the notice that award may be made without discussion was routinely included in competitive requests for proposals and when a contractor's proposal offered the lowest overall cost to the Government (a condition for award under CICA), an agency could always award without discussion. Under FASA, the agency must now make a choice before solicitation issuance to either state that it intends to conduct discussion

**From the Editor** Roxie Jones is the Division's lead attorney for SAO procurements.

☛ **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.



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or that it intends to award without discussions (unless discussions are determined to be necessary). Once the statement of intent is in the solicitation, FASA requires the agency to abide by its own terms. Under FASA's Evaluation and Award section, agencies are authorized to award a contract without discussions only if the solicitation contains the award without discussion statement. This express, conditioned authorization to award without discussion means agencies have lost their right to avoid discussions in those unpredictable circumstances where the agency intended to conduct discussions, said so, but has found it unnecessary. On the other hand, the authorization to award without discussion has replaced the above-referenced condition for award only when it could be clearly demonstrated that award would result in the lowest overall cost to the Government. This relief means that award may now be made to any eligible offeror. (Caveat: FASA is silent on whether an agency can change its mind and switch statements during the conduct of a procurement.)



### Evaluate Priced Options

FASA limits the evaluation of priced options to instances when the procuring agency determines that there is a reasonable likelihood that the option will be exercised. To the extent that an award decision turned on an offeror's option pricing, this change in the law is significant.

### Give Swift Written or Electronic Notice

FASA replaces the requirement to promptly notify unsuccessful offerors with a statutory time period. Within three days after award is made, agencies must notify all other offerors of the rejection of their proposals. The notice of award and the notices of rejection may now be made electronically. Author notes that this notice may seem to alleviate paper but it may not, as some who have faced protest allegations that faxes were not received or that they were not issued to the correct officer within a contractor's business.

### New Requirements Summary Block

- List significant subfactors
- State intent to award without discussion
- Compare relative importance of price or cost to the combined remaining criteria
- Evaluate priced options only if exercise is likely
- Notify unsuccessful offerors within 3 days after award

### SEC. 1061. SOLICITATION, EVALUATION, AND AWARD

(a) CONTENT OF SOLICITATION.--Subsection (b) of section 303A of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253a) is amended--

(1) in paragraph (1)--

(A) by amending subparagraph (A) to read as follows:

"(A) all significant factors and significant subfactors which the executive agency reasonably expects to consider in evaluating sealed bids (including price) or competitive proposals (including cost or price, cost-related or price-related factors and subfactors, and noncost-related or nonprice-related factors and subfactors); and"; and

(B) in subparagraph (B), by inserting "and subfactors" after "factors"; and

(2) in paragraph (2)(B), by amending clause (i) to read as follows:

"(i) either a statement that the proposals are intended to be evaluated with, and award made after, discussions with the offerors, or a statement that the proposals are intended to be evaluated, and award made, without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) unless discussions are determined to be necessary; and".

(b) EVALUATION FACTORS.--Such section is further amended by adding at the end the following new subsections:

"(c)(1) In prescribing the evaluation factors to be included in each solicitation for competitive proposals, an executive agency--

"(A) shall clearly establish the relative importance assigned to the evaluation factors and subfactors, including the quality of the product or services to be provided (including technical capability, management capability, prior experience, and past performance of the offeror);

"(B) shall include cost or price to the Federal Government as an evaluation factor that must be considered in the evaluation of proposals; and

"(C) shall disclose to offerors whether all evaluation



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factors other than cost or price, when combined, are--

- "(i) significantly more important than cost or price;
- "(ii) approximately equal in importance to cost or price;
- "(iii) significantly less important than cost or price.

"(2) The regulations implementing subparagraph (C) of paragraph (1) may not define the terms 'significantly more important' and 'significantly less important' as specific numeric weights that would be applied uniformly to all solicitations or a class of solicitations.

"(d) Nothing in this section prohibits an executive agency from--

"(1) providing additional information in a solicitation, including numeric weights for all evaluation factors and subfactors on a case-by-case basis; or

"(2) stating in a solicitation that award will be made to the offeror that meets the solicitation's mandatory requirements at the lowest cost or price."

(c) EVALUATION AND AWARD.--Section 303B of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253b) is amended--

(1) in subsection (a), by inserting ", and award a contract," after "competitive proposals";

(2) in subsection (c), by inserting "in accordance with subsection (a)" in the second sentence after "shall evaluate the bids"; and

(3) in subsection (d)--

(A) by striking out paragraph (1) and inserting in lieu thereof the following:

"(1) An executive agency shall evaluate competitive proposals in accordance with subsection (a) and may award a contract--

"(A) after discussions with the offerors, provided that written or oral discussions have been conducted with all responsible offerors who submit proposals within the competitive range; or

"(B) based on the proposals received and without discussions with the offerors (other than discussions conducted for the purpose of minor clarification), if, as required by section 303A(b)(2)(B)(i), the solicitation included a statement that proposals are intended to be evaluated, and award made, without discussions, unless discussions are determined to be necessary.";

(B) by striking out paragraphs (2) and (3) and by redesignating paragraph (4) as paragraph (2); and

(C) in paragraph (2), as redesignated by subparagraph (B), by inserting "cost or" before "price" in the first sentence.

### SEC. 1062. SOLICITATION PROVISION REGARDING EVALUATION OF PURCHASE OPTIONS.

Section 303A of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253a), as amended by section 1061, is further amended by adding at the end the

following new subsection:

"(e) An executive agency, in issuing a solicitation for a contract to be awarded using sealed bid procedures, may not include in such solicitation a clause providing for the evaluation of prices for options to purchase additional property or services under the contract unless the executive agency has determined that there is a reasonable likelihood that the options will be exercised."

### SEC. 1063. PROMPT NOTICE OF AWARD.

(a) SEALED BID PROCEDURES.--Subsection (c) of section 303B of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253b) is amended--

(1) in the last sentence, by striking out "transmitting written notice" and inserting in lieu thereof "transmitting, in writing or by electronic means, notice"; and

(2) by adding at the end the following: "Within 3 days after the date of contract award, the executive agency shall notify, in writing or by electronic means, each bidder not awarded the contract that the contract has been awarded."

(b) COMPETITIVE PROPOSALS PROCEDURES.--Paragraph (2) of subsection (d) of such section, as redesignated by section 1061(c)(3)(B), is amended in the second sentence--

(1) by striking out "transmitting written notice" and inserting in lieu thereof "transmitting, in writing or by electronic means, notice"; and

(2) by striking out "shall promptly notify" and inserting in lieu thereof ", within 3 days after the date of contract award, shall notify, in writing or by electronic means,".

