



# CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

## A Lawyer's View of FASA - Task Order Contracts

December 13, 1994



### Task Order Contracts-New FASA Provisions

by Mark Langstein

If CICA is the Ten Commandments, perhaps FASA (or FASTA to some) the Federal Acquisition Streamlining Act of 1994, is the Gospel According to Johns—John Glenn and John Conyers, that is. Since I've been with the Department, one of the fastest growth areas in contracting has been task order Indefinite Quantity/Indefinite Delivery contracts for services. Well, apparently the Department is far from the only agency in Government using contracts of this type in order to maximize contract flexibility while easing administrative burdens, because Congress has come along and placed some new, albeit not overly onerous, restrictions on these contracting vehicles. Before delving into the intricate murkiness of FASA §§ 1051–55, we need to understand the problems that Congress thought needed attention and the general outlines of the scheme enacted to cure it.

#### Two classes

Congress divided these contracts into two families. The first is the “garden variety” task order contract for services or delivery order contract for supplies. The second species of contracts—a subset of the first—consists of task order contracts for “advisory and assistance services.” Although Congress expressed a preference that agencies make multiple awards when entering into contracts of either type, it is in the area of large advisory and assistance contracts that FASA makes major changes. Recognizing that these “contracts serve a useful purpose” Congress cautioned that they “must be structured carefully to ensure that they are not abused to avoid competition and funnel money to favored contractors.” Let's take a quick tour through the FASA provisions to see how they will affect your job on a day-to-day basis.

#### Related Changes

Given Congress' concern over the use of these contracts, it is hardly surprising that the FASA sections dealing with this issue, §§ 1052–55, are found under the broad heading of “Competition Requirements.” Section 1052 adds additional grounds for establishing and maintaining additional sources of supply under which agencies can exclude particular vendors from a competition in order to accomplish these goals. Although strictly speaking not relevant to our inquiry, I mention this section because the proposed FAR revisions implementing the FASA Competition Requirements seemingly confuse the finding re-

quired to exclude sources from a competition (see FAR § 6.202) and applies that finding requirement when an agency seeks to award certain indefinite quantity/indefinite delivery contracts. Hopefully, the final version of the FAR will correct this error. Section 1053 is a clerical amendment to clear up an ambiguity as to whose signature is required on Justifications for Other Than Full-and-Open Competition in high-value procurements.

#### Section 1054

Section 1054 is the real stop on our tour. The section adds several new Sections to the Federal Property and Administrative Services Act (FPASA) (41 U.S.C. § 251 et. seq.) The new statute begins, in § 303H(a) by authorizing agencies to enter into task or delivery order contracts. § 303H(b) sets forth elements which must be included in the solicitation for task and delivery order purchases. The section requires the RFP to state the contract term and the number and duration of any extension options as well as the maximum quantity or dollar amount of the contracted-for services or property. Because agencies were using very vague statements of work so as to be able to issue task orders for a broad array of services without having to follow competitive procedures, § 303H(b)(3) provides that the solicitation must also include the “a statement of work, specifications or other description that reasonably describes the general scope complexity and purposes” of the services or property to be acquired.

The Section goes on to declare that the agency may make single or, if the solicitation provides, multiple awards for contracts of this type. But, § 303H(d)(3) goes on to require the FAR implementing regulations to provide for a preference for multiple awards and to establish criteria as to when multiple awards would not be in the Government's interest. Section 303H(e) restates what, at least most of us, thought was already the law—namely that a task or delivery order may not change the contract scope, pe-

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riod or maximum dollar value of the contract—such changes can only be done via a formal contract modification.

### 5 Year Term

Because of the Congressional concern over perceived agency abuse of advisory and assistance contracts, new FPASA § 303I gives agencies far less latitude when contracting for these types of services. The first thing that § 303I does is limit the term of advisory and assistance contracts to 5 years unless a statute pertaining to the requirement under contract specifically authorizes a longer period. Section 303I(c) goes on to require that synopses of advisory and assistance services contracts “shall reasonably and fairly describe the general scope, magnitude and duration of the proposed task order contract in a manner that would reasonably enable a potential offeror to decide whether to request the solicitation and consider submitting an offer.” Although I had naively thought that that was what agencies were supposed to be doing all along, I guess that I was mistaken. Naturally, the statute requires that solicitations for advisory and assistance services must also contain the same § 303H(b) information as solicitations for garden variety task and delivery order requirements.

Section 303I(e) sets forth the second major distinction between task order contracts for advisory and assistance services and those for garden variety services. That section, like § 303H provides that the agency may make single, or if permitted by the RFP, multiple awards, but if the contract is to exceed three years and the estimated amount is over \$10 million, the agency shall be required to make multiple awards. There are two exceptions to this requirement: (1) the head of the agency determines in writing that only one of the actual offerors is capable of providing the services at the required quality level, or (2) the agency head has determined in writing that “because the services required under the contract are unique or highly specialized, it is not practicable to award more than one contract.”

### Modifications

As would be expected, the statute has a prohibition against tinkering with the basic contract terms and conditions in a task order as opposed to a formal modification. However, § 303I(f) mandates that any such modification be done using competitive procedures unless one of the above two exceptions to making multiple awards applies. The modification seemingly will have to be competed regardless of the scope of the change. Because you are “competing” the modi-

fication, you will, of course, also have to synopsize it. The only other exception to this competition requirement is a § 303I(g) one-shot six-month extension available if award of a follow-on contract has been delayed due to circumstances not reasonably foreseeable at the time the initial contract was awarded. Finally, Section 303I(h) states that all the § 303I requirements do not apply to procurements where the advisory and assistance services are “necessarily incident to and not a significant component” of the contract.

### Orders and Exceptions

The last major part of § 1054 sets out a new § 303J which gives agencies guidance as to procedures to be followed when issuing orders under a multiple award task or delivery order contract. First, § 303J(a) tells agencies that they need not synopsize separate order requirements and, unless competition for the task or delivery order will not be open to all multiple awardees, need not document any limitation on competition for the order which also applied to the competition for the master contract. Next, § 303J(b) requires that all multiple awardees be afforded an opportunity to compete for any orders exceeding \$2,500. Of course, § 303J(b) also establishes circumstances, precisely four in number, when task orders need not be competed. These are when the agency’s need is of such “unusual urgency” that competing the order would result in unacceptable delay; that only one contractor can provide the service at the quality needed because the services are unique or highly specialized; that because the task order is a logical follow-on task, in the interest of economy and efficiency it should not be competed; or because it is necessary to place the order with a particular contractor to meet a minimum guarantee.

### Other Provisions

The rest of 303J(b) consists of miscellaneous sections. Section 303J(c) establishes the unsurprising requirement that a task order include a statement of work clearly telling the contractor what needs to be done. Thankfully, 303J(d) specifies that contractors can’t protest the issue of a task or delivery order except if it increases the contract scope, period or dollar maximum of the underlying contract. Finally, just as if we really needed it, § 303J(e) establishes a “Task and Delivery Order Ombudsman” to review contractor complaints.

Next, a new § 303K is promulgated defining “task order” and “delivery order” respectively, as orders for services or goods entered into under an indefinite

**FASA**



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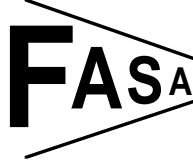


quantity/indefinite delivery contract.

Last, but not least, FASA § 1055, also under the rubric of Competition Requirements, provides a new sole-source exception to acquire expert services in connection with any litigation or dispute.

### Summary

Let's summarize what Congress has wrought in this area. Aside from a moderately weak preference for multiple awards, it has left "garden variety" and small dollar advisory and assistance indefinite quantity/indefinite delivery contracting pretty much alone. However, in the area of large contracts for advisory and assistance services, it has imposed new, and fairly onerous competition requirements which will surely have some impact on the overly light contract administration workloads of the Department's procurement staff. It has increased, but not dramatically, opportunities for offerors to protest and it has established a new, informal ombudsman to deal with what, in reality, are agency protests against the issuance of a task or delivery order. But, finally, to help you deal with the increased protest litigation, you will not have to conduct a competition to secure your expert witness to help defend you against these frustrated bidders.




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## TITLE I--CONTRACT FORMATION

### Subtitle A--Competition Statutes

#### PART II--CIVILIAN AGENCY ACQUISITIONS

##### Subpart A--Competition Requirements

#### SEC. 1051. REFERENCES TO FEDERAL ACQUISITION REGULATION.

Section 303 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253) is amended--

(1) in subsection (a)(1)(A), by striking out "modifications" and all that follows through "of 1984" and inserting in lieu thereof "Federal Acquisition Regulation"; and

(2) in subsection (g)(1), by striking out "regulations modified" and all that follows through "of 1984," and inserting in lieu thereof "Federal Acquisition Regulation".

#### SEC. 1052. ESTABLISHMENT OR MAINTENANCE OF ALTERNATIVE SOURCES OF SUPPLY.

(a) ADDITIONAL JUSTIFICATION FOR ESTABLISHING OR MAINTAINING ALTERNATIVE SOURCES.--Section 303(b)(1) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(b)(1)) is amended--

(1) by striking out "or" at the end of subparagraph (B);

(2) by striking out the period at the end of subpara-

graph (C) and inserting in lieu thereof a semicolon; and

(3) by adding at the end the following new subparagraphs:

"(D) would ensure the continuous availability of a reliable source of supply of such property or service;

\*3261 "(E) would satisfy projected needs for such property or service determined on the basis of a history of high demand for the property or service; or

"(F) in the case of medical supplies, safety supplies, or emergency supplies, would satisfy a critical need for such supplies."

(b) PROHIBITION ON USE OF CLASSES OF PURCHASES OR CONTRACTS.--Section 303(b) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(b)) is amended by adding at the end the following:

"(4) A determination under paragraph (1) may not be made for a class of purchases or contracts."

#### SEC. 1053. CLARIFICATION OF APPROVAL AUTHORITY FOR USE OF PROCEDURES OTHER THAN FULL AND OPEN COMPETITION.

Section 303(f)(1)(B)(i) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(f)(1)(B)(i)) is amended by inserting before the semicolon at the end the following: "or by an official referred to in clause (ii), (iii), or (iv)".

#### SEC. 1054. TASK AND DELIVERY ORDER CONTRACTS.

(a) 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 303G the following new sections:

##### "SEC. 303H. TASK AND DELIVERY ORDER CONTRACTS: GENERAL AUTHORITY.

"(a) AUTHORITY TO AWARD.--Subject to the requirements of this section, section 303J, and other applicable law, the head of an executive agency may enter into a task or delivery order contract (as defined in section 303K) for procurement of services or property.

"(b) SOLICITATION.--The solicitation for a task or delivery order contract shall include the following:

"(1) The period of the contract, including the number of options to extend the contract and the period for which the contract may be extended under each option, if any.

"(2) The maximum quantity or dollar value of the services or property to be procured under the contract.

"(3) A statement of work, specifications, or other description that reasonably describes the general scope, nature, complexity, and purposes of the services or property to be procured under the contract.

"(c) APPLICABILITY OF RESTRICTION ON USE OF NONCOMPETITIVE PROCEDURES.--The head of an executive agency may use procedures other than competitive procedures to enter into a task or delivery order contract under this section only if an exception in subsection (c) of section 303 applies to the contract and the use of such pro-



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cedures is approved in accordance with subsection (f) of such section.

"(d) SINGLE AND MULTIPLE CONTRACT AWARDS.--(1) The head of an executive agency may exercise the authority provided in this section--

"(A) to award a single task or delivery order contract; or

"(B) if the solicitation states that the head of the executive agency has the option to do so, to award separate task or \*3262 delivery order contracts for the same or similar services or property to two or more sources.

"(2) No determination under section 303(b) is required for an award of multiple task or delivery order contracts under paragraph (1)(B).

"(3) The regulations implementing this subsection shall--

"(A) establish a preference for awarding, to the maximum extent practicable, multiple task or delivery order contracts for the same or similar services or property under the authority of paragraph (1)(B); and

"(B) establish criteria for determining when award of multiple task or delivery order contracts would not be in the best interest of the Federal Government.

"(e) CONTRACT MODIFICATIONS.--A task or delivery order may not increase the scope, period, or maximum value of the task or delivery order contract under which the order is issued. The scope, period, or maximum value of the contract may be increased only by modification of the contract.

"(f) INAPPLICABILITY TO CONTRACTS FOR ADVISORY AND ASSISTANCE SERVICES.-- Except as otherwise specifically provided in section 303I, this section does not apply to a task or delivery order contract for the acquisition of advisory and assistance services (as defined in section 1105(g) of title 31, United States Code).

"(g) RELATIONSHIP TO OTHER CONTRACTING AUTHORITY.--Nothing in this section may be construed to limit or expand any authority of the head of an executive agency or the Administrator of General Services to enter into schedule, multiple award, or task or delivery order contracts under any other provision of law.

"SEC. 303I. TASK ORDER CONTRACTS: ADVISORY AND ASSISTANCE SERVICES.

"(a) AUTHORITY TO AWARD.--(1) Subject to the requirements of this section, section 303J, and other applicable law, the head of an executive agency may enter into a task order contract (as defined in section 303K) for procurement of advisory and assistance services.

"(2) The head of an executive agency may enter into a task order contract for advisory and assistance services only under the authority of this section.

"(b) LIMITATION ON CONTRACT PERIOD.--The period of a task order contract entered into under this section, including all periods of extensions of the contract under options, modifications, or otherwise, may not exceed five

years unless a longer period is specifically authorized in a law that is applicable to such contract.

"(c) CONTENT OF NOTICE.--The notice required by section 18 of the Office of Federal Procurement Policy Act (41 U.S.C. 416) and section 8(e) of the Small Business Act (15 U.S.C. 637(e)) shall reasonably and fairly describe the general scope, magnitude, and duration of the proposed task order contract in a manner that would reasonably enable a potential offeror to decide whether to request the solicitation and consider submitting an offer.

"(d) REQUIRED CONTENT OF SOLICITATION AND CONTRACT.--(1) The solicitation shall include the information (regarding services) described in section 303H(b).

"(2) A task order contract entered into under this section shall contain the same information that is required by paragraph (1) to be included in the solicitation of offers for that contract.

\*3263 "(e) MULTIPLE AWARDS.--(1) The head of an executive agency may, on the basis of one solicitation, award separate task order contracts under this section for the same or similar services to two or more sources if the solicitation states that the head of the executive agency has the option to do so.

"(2) If, in the case of a task order contract for advisory and assistance services to be entered into under the authority of this section, the contract period is to exceed three years and the contract amount is estimated to exceed \$10,000,000 (including all options), the solicitation shall--

"(A) provide for a multiple award authorized under paragraph (1); and

"(B) include a statement that the head of the executive agency may also elect to award only one task order contract if the head of the executive agency determines in writing that only one of the offerers is capable of providing the services required at the level of quality required.

"(3) Paragraph (2) does not apply in the case of a solicitation for which the head of the executive agency concerned determines in writing that, because the services required under the contract are unique or highly specialized, it is not practicable to award more than one contract.

"(f) CONTRACT MODIFICATIONS.--(1) A task order may not increase the scope, period, or maximum value of the task order contract under which the order is issued. The scope, period, or maximum value of the contract may be increased only by modification of the contract.

"(2) Unless use of procedures other than competitive procedures is authorized by an exception in subsection (c) of section 303 and approved in accordance with subsection (f) of such section, competitive procedures shall be used for making such a modification.

"(3) Notice regarding the modification shall be provided in accordance with section 18 of the Office of Federal Procurement Policy Act (41 U.S.C. 416) and section 8(e) of the Small Business Act (15 U.S.C. 637(e)).

"(g) CONTRACT EXTENSIONS.--(1) Notwithstanding the limitation on the contract period set forth in subsection



(b) or in a solicitation or contract pursuant to subsection (e), a contract entered into by the head of an executive agency under this section may be extended on a sole-source basis for a period not exceeding six months if the head of such executive agency determines that--

"(A) the award of a follow-on contract has been delayed by circumstances that were not reasonably foreseeable at the time the initial contract was entered into; and

"(B) the extension is necessary in order to ensure continuity of the receipt of services pending the award of, and commencement of performance under, the follow-on contract.

"(2) A task order contract may be extended under the authority of paragraph (1) only once and only in accordance with the limitations and requirements of this subsection.

"(h) **INAPPLICABILITY TO CERTAIN CONTRACTS.**--This section does not apply to a contract for the acquisition of property or services that includes acquisition of advisory and assistance services if the head of the executive agency entering into such contract determines that, under the contract, advisory and assistance services are necessarily incident to, and not a significant component of, the contract.

\*3264 "(i) **ADVISORY AND ASSISTANCE SERVICES DEFINED.**--In this section, the term 'advisory and assistance services' has the meaning given such term in section 1105(g) of title 31, United States Code.

**"SEC. 303J. TASK AND DELIVERY ORDER CONTRACTS: ORDERS.**

"(a) **ISSUANCE OF ORDERS.**--The following actions are not required for issuance of a task or delivery order under a task or delivery order contract:

"(1) A separate notice for such order under section 18 of the Office of Federal Procurement Policy Act (41 U.S.C. 416) or section 8(e) of the Small Business Act (15 U.S.C. 637(e)).

"(2) Except as provided in subsection (b), a competition (or a waiver of competition approved in accordance with section 303(f)) that is separate from that used for entering into the contract.

"(b) **MULTIPLE AWARD CONTRACTS.**--When multiple contracts are awarded under section 303H(d)(1)(B) or 303I(e), all contractors awarded such contracts shall be provided a fair opportunity to be considered, pursuant to procedures set forth in the contracts, for each task or delivery order in excess of \$2,500 that is to be issued under any of the contracts unless--

"(1) the executive agency's need for the services or property ordered is of such unusual urgency that providing such opportunity to all such contractors would result in unacceptable delays in fulfilling that need;

"(2) only one such contractor is capable of providing the services or property required at the level of quality required because the services or property ordered are unique or highly specialized;

"(3) the task or delivery order should be issued on a

sole-source basis in the interest of economy and efficiency because it is a logical follow-on to a task or delivery order already issued on a competitive basis; or

"(4) it is necessary to place the order with a particular contractor in order to satisfy a minimum guarantee.

"(c) **STATEMENT OF WORK.**--A task or delivery order shall include a statement of work that clearly specifies all tasks to be performed or property to be delivered under the order.

"(d) **PROTESTS.**--A protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued.

"(e) **TASK AND DELIVERY ORDER OMBUDSMAN.**--The head of each executive agency who awards multiple task or delivery order contracts pursuant to section 303H(d)(1)(B) or 303I(e) shall appoint or designate a task and delivery order ombudsman who shall be responsible for reviewing complaints from the contractors on such contracts and ensuring that all of the contractors are afforded a fair opportunity to be considered for task or delivery orders when required under subsection (b). The task and delivery order ombudsman shall be a senior agency official who is independent of the contracting officer for the contracts and may be the executive agency's competition advocate.

"(f) **APPLICABILITY.**--This section applies to task and delivery order contracts entered into under sections 303H and 303I.

\*3265 **"SEC. 303K. TASK AND DELIVERY ORDER CONTRACTS: DEFINITIONS.**

"In sections 303H, 303I, and 303J:

"(1) The term 'task order contract' means a contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.

"(2) The term 'delivery order contract' means a contract for property that does not procure or specify a firm quantity of property (other than a minimum or maximum quantity) and that provides for the issuance of orders for the delivery of property during the period of the contract."

(b) **PROVISIONS NOT AFFECTED.**--Nothing in section 303H, 303I, 303J, or 303K of the Federal Property and Administrative Services Act of 1949, as added by subsection (a), shall be construed as modifying or superseding, or as intended to impair or restrict, authorities or responsibilities under--

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

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





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### SEC. 1055. ACQUISITION OF EXPERT SERVICES.

(a) EXCEPTION TO REQUIREMENT FOR USE OF COMPETITIVE PROCEDURES.--Section 303(c)(3) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(c)) is amended--

(1) by striking out "or (B)" and inserting in lieu thereof "(B)"; and

(2) by inserting before the semicolon at the end the following: ", or (C) to procure the services of an expert for use, in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government, in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, or in any part of an alternative dispute resolution process, whether or not the expert is expected to testify".

(b) PROCUREMENT NOTICE.--(1) Section 18(c)(1) of the Office of Federal Procurement Policy Act (41 U.S.C. 416(c)) is amended--

(A) by striking out "or" at the end of subparagraph (D);

(B) by striking out the period at the end of subparagraph (E) and inserting in lieu thereof "; or"; and

(C) by adding at the end the following:

"(F) the procurement is for the services of an expert for use in any litigation or dispute (including any reasonably foreseeable litigation or dispute) involving the Federal Government in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, or in any part of an alternative dispute resolution process, whether or not the expert is expected to testify.".



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(2) Section 8(g)(1) of the Small Business Act (15 U.S.C. 637(c)) is amended--

(A) by striking out "or" at the end of subparagraph (D);

(B) by striking out the period at the end of subparagraph (E) and inserting in lieu thereof "; or"; and

(C) by adding at the end the following:

\*3266 "(F) the procurement is for the services of an expert for use in any litigation or dispute (including preparation for any foreseeable litigation or dispute) that involves or could involve the Federal Government in any trial, hearing, or proceeding before any court, administrative tribunal, or agency, or in any part of an alternative dispute resolution process, whether or not the expert is expected to testify.".

(c) REPEAL OF AMENDMENTS TO UNCODIFIED TITLE.--The following provisions of law are repealed:

(1) Section 532 of Public Law 101-509 (104 Stat. 1470) and the provision of law set out in quotes in that section.

(2) Section 529 of Public Law 102-393 (106 Stat. 1761) and the matters inserted and added by that section.