



CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation
A Lawyer's View of FARA and ITMRA

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An Overview of Federal Acquisition Reform and Information Technology Management Reform

by

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Prologue

Section 5111 of the newly enacted Defense Authorization Act, Pub Law 104-106, February 10, 1996, provides:

Section 111 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759) is repealed.

With that simple provision the General Services Administration is out of its leading role in the Information Technology business and the GSBCA loses its jurisdiction over IT protests!

Introduction

Although the balance of the new legislation is not as dramatic as the above Section 5111, there are two Divisions which are of interest to the Commerce procurement community.

Division D—Federal Acquisition Reform

Division E—Information Technology Management Reform

This issue of A Lawyer's View will attempt to provide a very brief overview of the more significant changes and will leave a more detailed discussion to future issues, which are now being drafted. The full text of the provisions are on our Web site.

Federal Acquisition Reform—FARA

Last year we had FASA, now in 1996 we have FARA, the Federal Acquisition Reform Act of 1996.

FARA consists of three major titles, XLI-Competition, XLII-Commercial Items and XLIII-Additional Reform Provisions. A final Title XLIV contains the effective date and implementing provisions.

Title XLI-Competition

§ 4101. Efficient competition

Provides that the FAR shall ensure that full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Government's requirements. Although generally viewed as allowing agencies to limit the competitive range, the Conference Report notes that the provision makes no change in the requirement for full and open competition or to the definition of full and open competition. But see § 4103.

§ 4102. Efficient approval procedures.

Ups the thresholds for acquisitions requiring higher level approval. For example, changes the level for senior procurement executive approval from \$10,000,000 to \$50,000,000.

§ 4103. Efficient competitive range determinations.

Allows CO to limit the number of proposals in the competitive range, according to criteria in the solicitation, if CO finds that number of offerors exceeds the number at which an efficient competition can be conducted.

§ 4104. Preaward debriefings.


If requested, this provision generally requires that the CO provide a debriefing prior to award if an offeror was excluded from the competitive range

§ 4105. Design-build selection procedures.

This provisions allows, if appropriate, the use of a two phase selection process for the de-



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 **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 JerryW@FinLit@OGC or jwalz@doc.gov.

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sign and construction of a public building or facility. No cost information is allowed in first phase of the two step process.

Title XLII Commercial Items

§ 4201. Commercial Item exception to Requirement for Certified Cost or Pricing data

As titled, the provision generally prohibits the requirement of certified cost and pricing data for procurement of commercial items.

§ 4202. Application of Simplified Procedures to Certain Commercial Items.

Make a \$5,000,000 buy using simplified acquisition procedures? The provision allows just that for a three year test. The CO must expect that offers would only include commercial items and must provide that all responsible offerors be allowed to submit.



§ 4203. Inapplicability of Certain Procurement Laws to Commercially Available Off-the-Shelf Items.

This provision require the Administrator of OFPP to include in the FAR a list of laws that are not applicable for procurements of commercial off-the-shelf items.

§4204. Amendment of Commercial Items Definition.

Simply adds "market" prices to the existing catalog prices in the definition.

§ 4205 Inapplicability of Cost Accounting Standards to Contracts and Subcontracts for Commercial Items.

Removes the requirement to follow CAS for contracts for commercial items.

Title XLIII—Additional Reform Provisions

§ 4301 Elimination of Certain Certification Requirements.

Removes the statutory requirement for various certifications under the Drug Free Workplace Act and the "Anti-Lobbying" act. The underlying substantive statutory requirements are not changed.

Requires the Administrator of OFPP and

the heads of each executive agency to present proposals for public comments to remove regulatory certification requirements unless required by statute or deemed necessary by the Administrator or agency head.

§ 4302 Authorities Conditioned on FAC-NET Capability.

Replaces the linkage between full FAC-NET capability and the use of simplified acquisition procedures with a requirement that agencies have full FACNET capability by December 31, 1999 or revert back to a threshold of \$50,000.

§ 4303 International Competitiveness

Allows President to waive recoupment charges on certain foreign military sales if such charges would result in the loss of the sale.

§ 4304 Procurement Integrity

This provision generally restates and clarifies the prohibitions of the Procurement Integrity Act, but removes the existing certification requirements.

§ 4305 Further Acquisition Streamlining Provisions.

Revises and clarifies certain authorities of OFPP.

§ 4306 Value Engineering for Federal Agencies.

Requires that "Each executive agency shall establish and maintain cost-effective value engineering procedures and processes."

§ 4307 Acquisition Workforce.

Establishes a series of polices and procedures for the management of the acquisition workforce in executive agencies other than the Department of Defense.

§§ 4308-4322 Miscellaneous Provisions

These sections are primarily technical amendments necessary to implement the procurement reform provisions of the Act.

Title XLIV—Effective Dates and Implementation

Although the Act is effective on the date of

enactment, February 10, 1996, implementation will not be complete until January 1, 1997, or perhaps earlier if final regulations are in place before that time. The Act requires that proposed regulations be published no later than 210 days after enactment, and final regulations be published no later than 330 days after enactment. Note that the 330 day date would be January 5, 1997.

Information Technology Management Reform Act of 1996—ITMRA

ITMRA, probably unpronounceable, consists of the following titles. LI-Responsibility for Acquisitions of Information Technology, LII-Process for Acquisitions of Information Technology, LII-Information Technology Acquisition Pilot Programs, LIV-Additional Information Resources Management Matters, LV-Procurement Protest Authority of the Comptroller General, LVI-Conforming and Clerical Amendments, and LVII-Effective Date, Savings Provisions and Rules of Construction.



Title LI—Responsibility for Acquisitions of Information Technology

§ 5101. Repeal of Central Authority of the Administrator of General Services.

As noted at the start of this issue, this provision repeals the Brooks Act and the central authority of General Services Administration (GSA), in IT matters, including the General Services Board of Contract Appeals' (GSBCA) bid protest authority.

§§ 5111-5142 OMB Authorities and other Management Provisions.

The remainder of the sections in Title LI establish the Director of OMB as the responsible official in IT matters, require budget controls, require performance based and results based management and provide for the appointment of a Level-IV SES Chief Information Officer at each agency. These sections are not discussed in greater detail here as they have only minimal

impact on procurement officials, but are very important for the other members of the IT community

Title LII—Process for Acquisitions of Information Technology.

§5201. Procurement Procedures.

This section makes everything easy. I simply quote the provision.

“The Federal Acquisition Regulatory Council shall ensure that, to the maximum extent practicable, the process for acquisition of information technology is a simplified, clear, and understandable process that specifically addresses the management of risk, incremental acquisitions, and the need to incorporate commercial information technology in a timely manner.”

§ 5202. Incremental Acquisition of Information Technology.

This provision requires that the acquisition of a “major system of information technology” be accomplished in a “modular” fashion to aid in the management of the acquisition and to be able to take advantage of advances in technology before the next module is ordered.

The provisions suggests that if the increment being procured cannot be awarded within 180 days of the date the solicitation was issued, that the increment should be canceled.

Finally, the section states that the information technology ordered should be delivered within 180 days of contact award.

Title LIII—Information Technology Acquisition Pilot Programs

This title provides the Director of OFPP with the authority to conduct various innovative pilot acquisitions. I'm sure will see more on this in the months ahead.



CONTRACT LAW DIVISION

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Page 4

Title LIV—Additional Information Resources Management Matters.

§ 5401. On-line Multiple Award Schedule Contracting.

Requires GSA to have the multiple award schedule on FACNET and other FACNET provisions relating to pilot programs.

§ 5402. Identification of Excess and Surplus Computer Equipment.

§ 5403. Access of Certain Information in In- formation Systems to the Directory Estab- lished under Section 4101 of Title 44, United States Code.

Title LV—Procurement Protest Authority of the Comptroller General.



§ 5501. Period for Processing Pro- tests.

The section shortens the time for the filing of an agency report to 30 days from 35 days, and also requires the GAO to issue a decision in 100 rather than 125 days.

§ 5502. Availability of Funds following GAO Resolution of Challenge to Contract- ing action.

This section provides that the funds available at the time of a protest will be available for 100 days following the date the decision becomes final.

Title LVI—Conforming and Clerical Amend- ments

No significant effects on procurement mat-
ters.

Title LVII—Effective Date, Savings Provisions, and Rules of Construction

The Act is effective 180 days after enact-
ment—August 8, 1996. Eleven days before my
60th birthday! No, this is not a solicitation for
gifts (except maybe chocolate chip cookies.)