HIGHLIGHTS OF THE FEDERAL ACQUISITION STREAMLINING ACT OF 1994

Lowering Government's Cost of Doing Business

Joseph A. Drelicharz

The U.S. Government spends approximately $200 billion a year on the procurement of goods and services. Yet the acquisition system is huge, complex and confusing. The system is burdened with an outmoded and fragmented statutory foundation, regulatory and procedural proliferation beyond comprehension, a workforce that is in many cases underdeveloped, and an absence of accountability.

The intent of P.L. 103-355, commonly referred to as the Federal Acquisition Streamlining Act of 1994,[1] is to develop a more equitable balance between government-unique requirements and the need to lower the government's cost of doing business.

The Act addresses these objectives through an emphasis on increasing government-wide reliance on the use of commercial practices, goods and services; streamlining the rules and regulations that govern high-volume contracting activities, which represent an overall low-dollar expenditure; and increasing the selling opportunities for small businesses.

The passage of the bill ends four years of integrated cooperative bipartisan effort, which started with the Department of Defense (DoD) Acquisition Law Advisory Panel, commonly known as the Section 800 Panel. It represents the combined efforts of the House and Senate Armed Services Committees, the Senate Government Affairs Committee and the House Government Operations Committee, along with a tremendous contribution of information, ideas and opinions from the Office of Federal Procurement Policy (OFPP), the DoD and industry.

Several messages in this legislation should not be overlooked. The Act consists of almost 400 pages that serve to enable or reinforce existing authorities and expunge obsolete and redundant statutes to recoup a less than four-percent cost saving. The existing rules and regulations, if streamlined and thoughtfully executed, could increase that savings to as high as 60 percent. The Act, however, is a start. It is a scratch in the patina of this bar of gold. The real cost savings and real streamlining can be accomplished only by the hands-on people in the agencies.

Simplified Acquisition Threshold

Currently, purchases of $25,000 or less can be made with simplified acquisition procedures. As a result, these small purchases can be completed

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relatively expeditiously. Raising this threshold to $100,000 and redefining it as the "simplified acquisition threshold," expands the streamlined process of making small purchases and reduces the administrative overhead needed for such purchases, resulting in substantial savings for the government. This action would allow use of simplified procedures for an additional 45,000 procurement actions that have an aggregate value of approximately $3 billion per year.

In no way should this be interpreted as a lack of control in the procurement process. For example, procurement integrity statutes and the Competition in Contracting Act (CICA) still apply. Notice requirements must still be published in the *Commerce Business Daily* 15 days prior to the issuance of a solicitation for any procurement over $25,000, and this will continue. Such notice, however, would be phased out as electronic commerce procedures and systems come into being.

Contracts for more than $2,500, but less than the simplified acquisition threshold, are reserved for small businesses, and the Act specifically authorizes the continued use of set-asides. A new micropurchase threshold of $2,500 enables agency officials to make simplified purchases and credit card purchases of up to $20,000 per year, per official with a few restrictions.

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President Clinton signs Public Law 103-355, commonly referred to as the Federal Acquisition Streamlining Act of 1994, 13 October 1994. From left: Senator Patrick Leahy (D-VT); Senator Strom Thurmond (R-SC); Representative Patricia Schroeder (D-CO); Representative Jane Harman (D-CA); Representative John Conyers, Jr. (D-MI); Senator William Cohen (R-ME); Vice President Al Gore; Senator Robert Smith (R-NH); Representative Ronald Dellums (D-CA); Senator John Glenn (D-OH); Senator Carl Levin (D-MI).

Commercial Items

One of the more important aspects of the Federal Streamlining Act of 1994 is that it enables the government to buy commercial items on commercial terms. Commercial companies find it difficult and costly to do business with the government. They have to comply with unique terms and conditions, grant blanket financial audit rights, and provide cost information to name a few. To further complicate doing business with the government, many of these requirements flow downward to the subcontractors as well. Commercial companies often are unaware of, or are incapable of complying with, the practices that are alien in the commercial marketplace.

The Federal Streamlining Act exempts such procurement from a number of statutory requirements, especially those that require certification of compliance, such as contingent fees certification or the Drug-Free Workplace Act of 1988.

Indeed, the Act prescribes a clear preference for the purchase and use of commercial items first, and then non-developmental items (NDI). Only if neither of these is available should the government consider the acquisition of specially designed government-unique items.

Since a definition of "commercial item" was required and DoD could not develop one suited for the government, the Act is devoted to providing a definition. The definition is what one would expect — anything other than real property sold to the general public. However, the definition goes beyond this simple statement to include services that are sold in substantial quantities in the commercial market. It also includes items that are based on evolving technology and are not available in the marketplace, but will be in time to satisfy government requirements. The definition also includes items that are leased or involve intracompany transfers. Modification of the type customarily available in the market or minor modifications are permitted. In addition, NDI, if they have been developed at private expense and sold in substantial quantities on a competitive basis to multiple state and local governments, also are included in the definition.

Further, if in the best interests of the government, the contracting officer may use commercial financing practices consistent for the product

Photo by Joseph A. Dielchanz

Congresswoman Elizabeth Furse (D-OR) discusses acquisition reform with Michael Mitton, President of Chemical Biosensors Inc., a Portland-based environmental technology company. Mitton hopes to do business with the federal government now that the Federal Acquisition Streamlining Act of 1994 has been signed into law by President Clinton.

category being purchased. As much as 15 percent of the contract price may be paid in advance of any contract performance.

If a commercial item is purchased on the basis of adequate price competition, the purchase is exempt from cost or pricing data requirements. If for all practical purposes the commercial item cannot be competitively acquired, the contracting officer then seeks pricing information through market analysis. If the information is such that price reasonableness is demonstrated, the acquisition is exempt from cost and pricing data requirements. If neither of the above criteria is met, the contracting officer may make a written determination to the fact, and only then may pricing data be required. To further protect the government, agencies retain the authority to audit any commercial contract for up to two years after the date of award.

Truth In Negotiations Act

Apart from the Truth in Negotiations Act (TINA),[2] as applicable to commercial items, several provisions in the Act exist that apply across the board. One provision prohibits contracting officers from requiring certified cost or pricing data where there is adequate price competition, or catalog or market pricing, or prices set by law. However, a contracting officer may require submission of other, uncertified information, if it's necessary to determine price reasonableness. With a written determination by the head of the procuring activity, a contracting officer may obtain certified cost and pricing information in below-threshold procurement. The agency may obtain that information unless there is adequate price competition or catalog or market pricing available. The TINA is uniformly applied to all federal agencies.

Uniform Procurement System

A common complaint, and in some cases a barrier to doing business with a specific agency, is the variation in the procurement processes from one agency to another, especially between the DoD and civilian agencies. The Act amends existing statutes, such as the Federal Property and Administrative Services Act, to promote uniformity wherever practicable, right down to the forms used in the process.

It establishes contract cost principles for civilian agencies (already applicable to DoD). Contract cost principles provide that certain types of costs — such as entertainment costs, lobbying expenses, advertising costs, and so-called "golden parachute" payments — should not be paid by the taxpayers and are not "allowable" on federal contracts. The threshold for application of the contract cost principles is raised to $500,000 (for both DoD and civilian agencies), and cost certification procedures and penalties identical to those that have long been applicable in DoD procurement are established across the board.

The Act also consolidates audit provisions for both the DoD and civilian agencies. A plus for civilian agencies is that it provides multi-year contracting authority, which is already provided to DoD for the acquisition of property.

Furthermore, regulations governing payment protection for first-tier subcontractors and suppliers are required under most government contracts. Similar protection is already provided to DoD subcontractors.

Bid Protests — Notice and Debriefings

A widespread consensus is that the volume of protests is attributable, in part, to the fact that disappointed offerors protest defensively because they lack clear information on why their offers were not accepted.

The Act requires contractor debriefings on request in the hope that, armed with good information, the number of protests should be reduced as offerors either find their concerns are without merit, or simply confirm that the award process was fair. Additionally, the assumption is that given good information on the

shortcomings of their offers, bids and proposals will improve and inspire offerors to continue doing business with the government.

The Act requires greater detail be made available with respect to evaluation factors and significant subfactors. It establishes an accelerated notice, debriefing and protest schedule that requires the following actions: notice of award must be given to all offerors within three days after the contract is awarded; requests by offerors for debriefings must be made within three days after notice of the award; and the debriefing must take place within five days of receipt of a request and contain basic information about the award decision. Protests must be filed within 10 days after contract award or five days after the debriefing, whichever is later.

Protest Adjudication

The Act addresses frivolous or bad faith protests to the General Services Board of Contract Appeals (GSBCA) by authorizing the GSBCA to dismiss a protest that is frivolous, brought in bad faith, or does not state on its face a valid basis for protest. In addition, it authorizes the GSBCA to invoke procedural sanctions where a person brings a frivolous or bad-faith protest, or willfully abuses the Board's process.

The Act also changes existing provisions clarifying the General Services Administration's authority to revoke delegated authority after the award of a contract if there has been violation of statute or regulation in the award of a contract. It also clarifies GSBCA's authority to review contract decisions under similar conditions or conditions of delegated procurement authority. Further, it includes two other important provisions: (1) provides for the public disclosure of any settlement agreement regarding the dismissal of a protest and involving the direct or indirect expenditure of appropriated funds; and (2) provides the General Accounting Office (GAO) with protective order authority in protest cases.

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Representative William Clinger, Jr. (R-PA), Ranking Minority Member of the Government Operations Committee of the House of Representatives.

"I am pleased to be a co-author of a bipartisan bill that, from my perspective, recreates the procurement system into a better, simpler, and more efficient process."

Finally, the Act authorizes the payment of consultant and expert witness fees, and attorney fees (subject to some caps) in protests to the GAO and the GSBCA, and amends the Comptroller General's authority to recommend the payment of attorney fees in bid protest cases, rather than directing agencies to pay such fees.

Federal Acquisition Computer Network

The Act establishes a requirement for a Federal Acquisition Computer Network (FACNET), which would be a paperless, electronic method designed to dramatically streamline the federal purchasing process and increase competition among small and disadvantaged businesses. The FACNET is consistent with the President's October 1993 memorandum to implement a government-wide Electronic Commerce/Electronic Data Interface (EC/EDI) System.[5]

An interagency team, established by that memorandum, has been developing a government-wide electronic commerce standard that should be fully compatible with the FACNET architecture established by this Act. Indeed, the DoD found that by the end of 1994, 220 of their purchasing activities should be capable of utilizing an EC/EDI system. At the end of the two-year implementation period (1997), 249 purchasing sites, responsible for 80 percent of DoD small purchases, should be capable of utilizing an EC/EDI system.

As FACNET is fully implemented, small businesses will be able to perform the following actions: access tens of thousands of small-purchase solicitation opportunities daily; electronically select specific solicitations and submit quotes on those of interest; and electronically receive purchase orders if they are the successful offeror or access award information if they are not. The FACNET also should improve agency compliance with the Prompt Payment Act because it will be able to make electronic funds transfers. Moreover, FACNET should significantly reduce paperwork burdens for small firms.

A key element of FACNET is the requirement that it provide a uniform interface to industry. Government contractors, particularly small businesses, should have only a single point of entry to access every federal agency's FACNET system. Agencies are required to implement a FACNET capability within five years. Upon achieving a full FACNET capability, the agency's threshold regarding noti-

fication, or lack thereof will jump to $250,000.

Test Programs

The Act authorizes the Administrator of the OFPP to conduct tests of alternative and innovative procurement procedures in nine specific areas for a period of four years by waiving certain provisions of law and regulations. A singular constraint to this authority is that participating agencies be certified to have a full FACNET capability prior to entering into the test program. The concept will enable OFPP to collect empirical data necessary to support further reforms to the procurement system, particularly reforms ensuring that agency contracting officials have the flexibility to take maximum advantage of competitive forces.

A specific provision of the Act authorizes one test program at the Federal Aviation Administration. This test allows the Secretary of Transportation to test alternative and innovative procedures in carrying out acquisitions for one of the modernization programs under the Airway Capital Investment Plan.

Five pilot programs are designated within DoD to test commercial-type acquisition procedures within the military system. These programs are as follows: (1) Fire Support Combined Arms Tactical Trainer (FSCATT); (2) Joint Direct Attack Munitions (JDAM I); (3) Joint Primary Aircraft Training System (JPATS); (4) Commercial-Derivative Aircraft; and (5) Commercial-Derivative Engine.

Miscellaneous Provisions

Several provisions in the Act outside the categories presented above are worthy of mention. They include, but are not restricted to, the following:

• Amending DoD-unique requirements for the certification of contract claims. The Contract Disputes Act of 1978[4] established government-wide requirements for the certification of claims. These requirements remain in effect for all claims, including those at the DoD.

White House Photo

The success or failure of this Act will rest with how vigorously it is implemented in the various agencies of government. This Act provides a vast array of tools for government officials to cut back outdated and counter-productive rules and regulations. Representative Floyd Spence (R-SC), Ranking Minority Member of the Armed Services Committee of the House of Representatives.

• Streamlining and consolidating a number of DoD reporting requirements related to weapons systems acquisition. This action also provides an enhanced capability to fulfill current operational testing requirements.

• Providing tools to civilian agencies necessary to improve contracting with small disadvantaged businesses, similar to those currently applicable to DoD. A new five-percent goal has been established for women-owned businesses. The Act would also establish education and training programs for critical acquisition personnel aimed at increasing the participation of small disadvantaged businesses, women and other minorities in government contracting.

• Increasing the time period for shipbuilding claims to six years, while maintaining the 18-month limit for contracts entered into after December 7, 1983, but before date of enactment.

• Improving acquisition management through vendor and employee excellence awards and workforce incentive programs, including pay for performance.

Epilogue

"Enable or reinforce existing authorities and expunge obsolete and redundant statutes," are powerful words. I have spoken to "a more equitable balance between the government-unique requirements and the need to lower the government's cost of doing business." Certainly, other compromises are possible in the complex business of acquisition. The act of balancing gouging-out, government-unique requirements, yet protecting the public good, is a delicate one. The balance, for DoD, is keeping the "edge on the bayonet," yet ensuring there are sufficient plowshares to feed the corps. Interestingly, in this battle the warriors may be wearing green eye shades and garters. The question is whether or not the corps will come out from behind the mountains of paper that protect them to do battle. Pogo found the enemy!

You, the squires of the acquisition community, have fumbled your way to the tournament field, confronted the knights, and negotiated rules to your favor. They have thrown their gloves at your feet. What will you do now?

Endnotes

1. Federal Acquisition Streamlining Act of 1994, P.L. 103-355.
2. The Truth in Negotiations Act, 10 U.S.C., Chapter 137, §2306a.
3. "Streamlining Procurement Through Electronic Commerce," White House Memorandum, 28 October 1993.
4. The Contract Disputes Act of 1978, 41 U.S.C., Chapter 9, §601.