

POCKET GUIDE
TO THE
FEDERAL ACQUISITION STREAMLINING ACT OF 1994

By Paul J. Seidman

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On October 13, 1994, President Clinton signed into law the "Federal Acquisition Streamlining Act of 1994", P.L. 103-355. The Act constitutes the most extensive overhaul of the contracting system since the enactment of the Competition in Contracting Act, P.L. 98-369, ten years ago. The stated purpose of the Act is to streamline the federal procurement process.

A discussion of certain significant provisions of the Act and its likely practical effect is set forth below.

Federal Acquisition Streamlining Act

I. Background

- A. FY 1991 Defense Authorization Act Created Advisory Panel on Streamlining and Codifying the Acquisition Laws (the "§ 800 Panel")**
 - 1. composed of experts from the public and private sectors
 - 2. charged with reviewing all laws affecting DoD procurement "with a view toward streamlining the defense acquisition process".
- B. December 1992 - § 800 Panel Report Issued**

Major thrust of recommendations was to simplify system by:

 - 1. satisfying government needs through the acquisition of commercial products whenever possible
 - 2. providing simplified procedures for purchases under \$100,000
 - 3. repealing obsolete and duplicative statutes.
- C. October 1993 - S. 1587 Introduced by Senator John Glenn and others**
- D. Spring 1994 - Hearings Held**
- E. June 1994 - Marked Up Version of S.1587 Passed by House and Senate**
- F. October 13, 1994 - P.L. 103-355 signed into law by President Clinton**

II. Overview

The Federal Acquisition Streamlining Act, P.L. 103-355, makes significant changes to Federal acquisition. The Act:

- provides a preference for the use of commercial products and exempts commercial products from various statutory and regulatory requirements;
- raises the ceiling for the use of "simplified purchase procedures" (previously "small purchase procedures") from \$25,000 to \$100,000;
- raises the threshold for required *Commerce Business Daily* Synopsis:
 - from \$25,000 to \$50,000 without any agency action;
 - to \$100,000 when an agency can electronically solicit and receive bids and proposals; and
 - to \$250,000 after electronic contracting has been fully implemented on a Government-wide basis;
- exempts "micropurchases" (buys less than \$2,500) from virtually all statutory requirements;
- requires that the present paper based contracting system be replaced with an electronic contracting system within five years;
- modifies contract formation rules to:
 - provide additional authority to exclude a bidder in order to establish or maintain alternative sources of supply;
 - encourage agencies to use past performance as an evaluation factor;
 - require timely debriefings;
 - stabilize the dollar threshold and provide expanded exemptions for commercial items under the Truth in Negotiations Act; and
 - modify bid protest rules to permit contracting officers to withhold notice to proceed and limit the recovery of attorneys' fees;
- provides a six year statute of limitations for the submission of claims;

- extends the DoD-unique § 1207 Contracting Program for small and disadvantaged business concerns to civilian agencies; and
- authorizes OFPP, DoD, NASA and FAA to conduct several pilot programs to test additional procurement reform concepts.

III. Acquisition of Commercial Items

A. Preference for Commercial and Nondevelopmental Items, § 8104 (DoD) and § 8203 (Civilian Agencies)

Adds 10 U.S.C. § 2377 (DoD) and 41 U.S.C. § 314B (civilian agencies) to create a statutory preference for the acquisition of "commercial items". Where commercial items are not available there is a second tier preference for "Nondevelopmental items".

B. Definitions, § 8001 (Government-wide) and § 8202 (Civilian Agencies)

1. Commercial Items

a. Statutory Language

41 U.S.C. § 403(12), as amended, now defines "commercial items" to include:

- (1) products of a type customarily used by the general public that have been offered for sale in the commercial marketplace;
- (2) products that have evolved from existing commercial products through advances in technology or performance even if they are not yet available in the commercial marketplace if the product will be available in the commercial marketplace in time to satisfy the Government's delivery requirements;
- (3) commercial products with minor modifications to meet Government requirements;
- (4) commercial products with modifications of a type customarily available in the commercial marketplace;
- (5) installation, maintenance, repair, and training services if procured in support of a commercial product under terms and conditions available to the general public;

- (6) commercial services offered and sold competitively in substantial quantities based on established catalog prices for specific tasks performed under standard commercial terms and conditions; and
- (7) a nondevelopmental item if (i) the product was developed exclusively at private expense and (ii) the product was sold in substantial quantities on a competitive basis to multiple state and local governments.

b. Analysis

The definition of commercial products is extremely broad. In addition to items that have been sold commercially, it covers:

- items which might (or might not) be actually sold commercially in the future; and
- commercial services.

2. Nondevelopmental Items

a. Statutory Language

41 U.S.C. § 403(13), as amended, now defines a "nondevelopmental item" as including:

- (1) a commercial item;
- (2) a previously developed item used by a government;
- (3) an item that does not qualify as a nondevelopmental item solely because it is not yet in use.

b. Analysis

As the result of (3), a nondevelopmental item is any previously developed item, whether or not it was previously used by a government.

C. Advantages to Sellers of Commercial Products

1. Preference for Commercial Products

See III.A. supra.

2. Exemption from Regulatory Requirements

a. Exemption from Existing Statutes, § 8105 (DoD) § 8204 (Civilian Agencies) and § 8301 (Additional Government-wide Exemptions)

The new law exempts suppliers of commercial items or services from certain paperwork, recordkeeping, and certification requirements established by over 30 existing statutes. These include:

- (1) Cost Accounting Standards;
- (2) the Drug-Free Workplace Act;
- (3) Fly American requirements;
- (4) certifications under the Federal Water Pollution Control Act and the Clean Air Act;
- (5) Contract Work Hours and Safety Standards Act;
- (6) the Anti-Kickback Act;
- (7) covenant against contingent fees;
- (8) requirement to identify suppliers;
- (9) prohibition against doing business with certain offerors or contractors;
- (10) limits on employment for certain former DoD officials; and
- (11) the Contractor Inventory Accounting System Standards.

b. Future Statutes - Exemption By Regulation, § 8003

(1) The law requires the FAR to be amended to include a list of current statutory provisions inapplicable to contracts for commercial items.

(2) **Future laws**

(a) A future law will be inapplicable to commercial items when placed on the FAR list unless it either:

- provides for a civil or criminal penalty; or
- specifically refers to this provision and provides that it is applicable to the procurement of commercial items.

(b) **Petition**

Any person may petition the Administrator of OFPP to add a future law to the list.

The petition is automatically granted unless the FAR Council determines within 60 days that exempting the provision is not in the Government's best interest.

c. Applicability to Subcontractors, § 8003

• (1) Additionally, any statute not expressly required to be flowed down to a subcontractor would be inapplicable to a subcontract for commercial items if the statute is included on the FAR list of exemptions unless the statute either:

- (a) provides for a civil or criminal penalty; or
- (b) specifically refers to this provision and provides that it is applicable to the procurement of commercial items.

(2) **"Subcontract" defined**

For purposes of contracts and subcontracts for commercial items, "subcontract" includes a transfer of commercial items between divisions, subsidiaries or affiliates of a contractor or subcontractor.

(3) **Petition**

Any person may petition the Administrator of OFPP to add an **existing or future law** to the list of provisions from which subcontracts are exempted.

The petition is automatically granted unless the FAR Council determines within 60 days that exempting the provision is not in the Government's best interest.

d. **Expanded TINA Exemptions for Commercial Products**

See discussion at VLB.3. *infra*.

3. **Presumption of Data Rights Ownership, § 8106**

The Act amends 10 U.S.C. § 2320 to include a presumption that a commercial item has been developed at private expense. The presumption is rebutted if an agency can document that the item was developed in whole or in part at Government expense.

D. **Regulations on Acquisition of Commercial Items, § 8002**

1. **Contract Clauses**

a. **FAR Required to Include List**

The FAR is required to list clauses required for purchases of commercial items.

b. **Limitation on Required Clauses**

Clauses required for purchases of commercial items are to be limited to those:

- (1) required by law for commercial items; or
- (2) consistent with standard commercial practices.

2. Market Acceptance

a. Statutory Language

The new law permits the head of an agency to restrict procurements to items that have either (1) achieved market acceptance or (2) been satisfactorily supplied to an agency previously.

b. Analysis

An important question is the relationship of this provision to the Competition in Contracting Act, 10 U.S.C. § 2305, which requires that specifications and contract provisions be limited to an agency's minimum needs. A product could satisfy agency needs without prior market acceptance or sales to the Government.

3. Use of Firm, Fixed-Price Contracts

The Act requires firm, fixed-price contracts or fixed-price contracts with economic price adjustments to be used to the maximum extent practicable in purchasing commercial items. It would prohibit the use of cost-type contracts.

4. Quality Requirements

a. Use of Commercial Criteria Where Practicable

The Act requires the FAR to include provisions permitting, to the maximum extent practicable, a contractor supplying commercial items to use its existing quality assurance system as a substitute for compliance with otherwise applicable Government inspection or test requirements.

b. Commercial Warranties

The Government is required, to the maximum extent practicable, to take advantage of commercial warranties offered for repair and replacement.

c. Past Performance an Evaluation Factor

The FAR is required to include guidance regarding the use of past performance as an evaluation factor in contracts offering commercial items.

5. Flexible Deadlines, § 8302

The new law requires the administrator to prescribe regulations defining limited circumstances in which flexible deadlines may be used for submission of bids and proposals for the procurement of commercial items.

IV. Simplified Acquisition Threshold**A. Small Purchase Threshold Raised to \$100,000, §§ 4001 - 4003**

A new "simplified acquisition threshold" of \$100,000 is established to replace the current "small purchase threshold" of \$25,000.

B. Simplified Procedures, § 4201**1. The FAR is required to be revised to include:**

- special simplified procedures for acquisitions of goods and services under \$100,000; and
- a list of statutory provisions inapplicable to purchases under \$100,000.

2. Use of the simplified acquisition procedures is required to be linked to implementation of FACNET (electronic contracting) capability. See discussion of FACNET at V., infra.**C. Exemption from Statutory Requirements, §§ 4101 - 4104**

Government purchases at or below \$100,000 would be exempt from the paperwork and recordkeeping requirements currently imposed by over 15 statutes on purchases exceeding \$25,000. Among those provisions that would be made inapplicable to defense contracts under the threshold are those (1) requiring contingent fee certifications, (2) authorizing the examination of contractor books and records, (3) requiring contractors to identify suppliers and sources of supplies, (4) prohibiting contractors from doing business with certain offerors or contractors, (5) prohibiting or limiting subcontractor direct sales, (6) prohibiting contractors from employing persons convicted of defense-related felonies, and (7) requiring contractors to comply with contractor inventory accounting system standards. Similar exceptions will apply to civilian contracts.

In addition, all government contracts under \$100,000 would be exempt from the procedural requirements of the Contract Work Hours and Safety Standards Act, the Drug-Free Workplace Act of 1988, the Anti-Kickback Act, and the certification requirements of the Solid Waste Disposal Act.

D. Presolicitation Synopsis Requirements Limited, § 4202

1. Under existing law, agencies are required to synopsise requirements above \$25,000 in the *Commerce Business Daily* at least 15 days before a solicitation was issued.
2. The Act would raise the pre-solicitation synopsis requirement threshold to:
 - \$50,000 without any agency action;
 - \$100,000 as soon as an agency achieved interim FACNET capability; (See V.C.1. below, infra.)
 - \$250,000 if the procurement is made through a system with full FACNET capability and Government-wide full FACNET capability has been implemented. (See V.C.2. below, infra.)
3. The pre-solicitation synopsis requirement would remain in effect for purchases above the thresholds set forth above.

E. 30 Day Response Time Eliminated for Solicitations Below SAT, § 4202

1. Under existing law, agencies are required to keep solicitations open for bids or proposals for at least 30 days.
2. The Act would repeal this rule for purchases at or below \$100,000. It would instead require (a) the FAR be amended to include minimum response times and (b) each solicitation must state specific procurement response times.
3. The 30-day minimum response time requirement would remain in effect for purchases over \$100,000.

F. Other Simplified Procedures, § 4201

The Act requires the FAR to be amended to include special simplified procedures governing the acquisition of property and services whose value is not expected to exceed the new simplified acquisition threshold. It requires that competition be promoted to the maximum extent possible and prohibits proposed purchases for amounts above the simplified acquisition threshold from being divided into several purchases of lesser amounts in order to use the simplified procedures.

G. Phase In Requirements, § 4201

1. Use of the special simplified procedures would be phased in.
2. Initially limited to contracts of \$50,000 or less until the agency has interim FACNET capability.
3. Once interim FACNET capability is established, dollar limit raised to \$100,000.
4. If an agency does not implement full FACNET capability by December 31, 1999, the agency's threshold for the use of these "other simplified procedures" reverts to \$50,000 until full FACNET capability is established.

H. Small Business Reservation, § 4004

1. Raised From \$25,000 to \$100,000

The law would increase the small business reservation threshold by reserving contracts above \$2,500 but under \$100,000 for small businesses "unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive with regard to the quality and delivery of the goods or services being purchased." Under existing law, the small business reserve applies to contracts at or below \$25,000.

2. The Nonmanufacturer Rule

- a. Under the nonmanufacturer rule, 13 C.F.R. § 121.907(d), which is currently limited to the old small purchase ceiling of \$25,000, a small business dealer can satisfy small business set-aside requirements by providing the product of a large manufacturer.
- b. The Act is silent to whether the nonmanufacturer rule ceiling will be raised.

I. Micropurchases, § 4301

Purchases not greater than \$2,500 could be made without obtaining competitive quotations if the Contracting Officer determines that the price offered is reasonable.

Purchases must, however, be equitably distributed among qualified suppliers. Micropurchases would also be exempt from the Buy American Act, the small business reservation, and most paperwork requirements applicable to other purchases below \$100,000.

This provision became effective upon enactment.

V. Electronic Commerce, §§ 9001 - 9004**A. The Federal Acquisition Computer Network (FACNET)**

The law requires the Government to transform the acquisition process from one that is paperwork-driven to one based upon electronic data interchange. This is to be accomplished through the establishment of a Federal Acquisition Network (FACNET), a computer-based source of information readily accessible to Government and the private sector.

B. FACNET Uses

FACNET will be used to:

1. inform the public about contracting opportunities;
2. set forth the details of solicitations;
3. permit the electronic submission of bids and proposals;
4. respond to questions about solicitations; and
5. enhance the quality of data available about the acquisition process.

C. Two Stage Implementation**1. Phase I - "Interim Phase"**

- a. involves development of capability to electronically provide notice of contracting opportunities and to receive bids and proposals
- b. already underway

2. Phase II - "Full Phase"

- a. involves the development of a capability to electronically process orders, respond to questions about solicitations, and compile data in connection with 75% of all suitable agency acquisitions above \$2,500 and below \$100,000
- b. required by January 1, 2000

- c. if "full phase" implementation not achieved by January 1, 2000, threshold for government-wide use of "other simplified procedures" reverts to \$50,000

VL Contract Formation

A. Competition Requirements

1. Alternative Sources of Supply, § 1002 (DoD) and § 1052 (Civilian Agencies)

a. Existing Law

Under 10 U.S.C. § 2304(b)(1) and 41 U.S.C. § 253(b)(1), DoD and civilian agencies using competitive procedures can exclude a particular source to establish or maintain alternative sources of supply to facilitate competition or for mobilization purposes.

b. Act Expands Justifications

The Act adds three additional justifications for excluding a particular source:

- (1) to ensure a continuous flow of supplies or services;
- (2) to satisfy a critical need for health, safety, or other emergency supplies; or
- (3) to satisfy projected needs resulting from high demand.

2. Source Selection Factors, § 1011 (DoD) and § 1061 (Civilian Agencies)

a. The New Statutory Language

The Act would require the Government to disclose in a solicitation for competitive proposals: (1) the factors and subfactors to be used in evaluating bids and proposals and (2) whether proposals are intended to be evaluated with discussions or without discussions unless discussions are deemed necessary.

In prescribing evaluation factors, the agency head would be required to establish the relative importance assigned to each evaluation factor and subfactor including the quality of the product or services to be provided (i.e., technical capability, management capability, prior experience, and past performance of the offeror). The agency head would also be required to include cost or price to the Government as an evaluation factor and disclose whether all evaluation factors, other than cost or price when combined, are (1) significantly more important than cost or price, (2) approximately equal in importance to cost or price, or (3) significantly less important than cost or price.

b. Analysis

The requirements appear to be substantially identical to those in existing law. However, according to the Conference Report, the Act "clarifies" Competition in Contracting Act solicitation provisions requiring the disclosure of evaluation factors and subfactors and authorizing award without discussions.

3. Task and Delivery Order Contracts, § 1004

- a. a "task order contract" is an indefinite quantity contract for services
- b. a "delivery order contract" is an indefinite quantity contract for supplies
- c. The Act sets forth special procedures for and limitations on the use of task and delivery order contracts.

4. Evaluation of Purchase Options, § 1012 (DoD) and § 1062 (Civilian Agencies)

The Act prohibits an agency from including an option evaluation clause in a solicitation using sealed bid procedures unless there is a reasonable likelihood that the option will be exercised.

5. Contractor Past Performance, § 1091

The Act:

- a. encourages the executive branch to use contractor past performance as an evaluation factor in negotiated procurements; and
- b. requires OFPP to prescribe guidance for executive agencies regarding consideration of the past performance of offerors in awarding contracts. Such guidance is required to include
 - (1) standards for evaluating past performance with respect to cost, schedule, and specification compliance;
 - (2) information collection and maintenance policies; and
 - (3) policies for ensuring that offerors are provided opportunities to submit past performance information.

6. Prompt Notice of Award, § 1013 (DoD) and § 1063 (Civilian Agencies)

The Act requires an agency to notify each unsuccessful bidder or offeror (in writing or by electronic means) within three days after contract award that the contract has been awarded and of the right to a debriefing.

7. Post-Award Debriefings, § 1014 (DoD) and § 1064 (Civilian Agencies)

a. Timing

Written requests for debriefings would be required to be made within three days after receipt of notice of an award. An agency would be required to conduct a debriefing, to the maximum extent practicable, within five days of receipt of a request.

b. Content

(1) Required Content

The debriefing is required to include as a minimum:

- (a) the agency's evaluation of the significant weak or deficient factors in the offeror's proposal;
- (b) the overall evaluated cost and technical rating of the successful offeror and debriefed offeror;
- (c) the overall ranking of offerors;
- (d) a summary of the rationale for award;
- (e) for commercial items, the make(s) and model(s) offered by the awardee; and
- (f) reasonable responses to questions as to whether the agency complied with source selection procedures set forth in the solicitation or required by law.

(2) Prohibited Content

The debriefing may not:

- include a point-by-point comparison of the debriefed offeror's offer with other offers; or
- disclose information exempt from required disclosure under the Freedom of Information Act.

(3) Analysis

These provisions materially increase the information available to unsuccessful offerors.

c. **Protest Clock May be Stayed by Debriefing**

(1) **Timeliness v. Statutory Stay - Existing Law**

- (a) Under existing law, a contracting officer is required to suspend performance if notice of a protest is received from GAO within ten calendar days of award.
- (b) Under existing GAO regulations, protests other than those relating to defects in solicitations must be made within ten working days after a protestor knew or should have known the grounds for protest.

(2) **FASA Debriefing Provisions Extend the Period for Statutory Stay, § 1402**

FASA requires a contracting officer to suspend performance if notice of a GAO protest is received within "the date that is five days after the debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required" 31 U.S.C. § 3553 (d)(4) as amended.

A debriefing is required if the unsuccessful offeror requests it within three days of receipt of notice of award.

(3) **FASA Does Not Change GAO Timeliness Requirements**

FASA does not change GAO rules requiring a protest, other than those concerning a solicitation defect, to be submitted within ten working days of when a protestor knew or should have known of the grounds for protest. GAO could however amend its timeliness rules in its implementation of the FASA.

d. **Debriefings Following Protests**

If, within one year after the date of an award and as a result of a successful procurement protest, an agency seeks to fulfill its requirements under the protested contract either on the basis of a new solicitation or on the basis of new best and final offers, the agency must make available to all offerors:

- (1) the information provided in the debriefing regarding the offer of the contractor awarded the original contract; and

- (2) the same information that would have been provided to the original offerors.

8. Protest File, § 1015 (DoD) and § 1065 (Civilian Agencies)

If a protest is filed against an award or proposed award, the law generally requires the agency to create a protest file and release it to actual or prospective offerors upon request. (Information exempt from disclosure under the FOIA may be redacted.)

B. Truth in Negotiations Act, §§ 1201 - 1210 (DoD) and §§ 1251 - 1252 (Civilian Agencies)

1. In General

The Truth in Negotiations Act (TINA) has no parallel in the commercial marketplace. It has been cited as deterring commercial producers from selling to the Government. It has also led Government contractors to establish duplicative parallel operations for their commercial divisions so their private sector operations and sales will not be burdened with TINA requirements.

The Act would revise TINA to address the paperwork burdens that currently serve as a deterrent to the sale of commercial products to the Government. These burdens include the obligation to verify and certify that the cost or pricing data provided in connection with a negotiated contract is current, accurate, and complete.

2. Stabilization of Dollar Threshold

a. \$500,000 Threshold for DoD and Civilian Agencies

The law replaces the current \$100,000 TINA threshold applicable to civilian agencies and the temporary \$500,000 threshold applicable to the Department of Defense with a permanent \$500,000 threshold applicable to all nonexempt agency contracts government wide.

b. Periodic Inflation Adjustments

The \$500,000 threshold would be adjusted for inflation every five years. The adjustment is to take place in years divisible by five with the dollar threshold rounded to the nearest \$50,000.

3. Exemptions

a. Exemptions Under Current Law

- (1) adequate price competition;
- (2) established catalog or market prices of commercial items sold in substantial quantities to the general public;
- (3) price set by law or regulation;
- (4) waiver by the agency head.

b. New Law Provides Expanded Exemptions for Commercial Items, §§ 1202 and 1204 (DoD), § 1251 (Civilian Agencies)

(1) Modifications of Commercial Products, §§ 1202 and 1251

The Act would preclude cost or pricing data requirements for modifications to exempt contracts or subcontracts for commercial items if the modification does not change the item to a noncommercial item.

(2) Services Sold at Catalog or Market Price, §§ 1202 and 1251

The Act also extends the exemption to cover services sold at catalog or market prices if such services fall within the definition of a commercial item.

(3) Adequate Price Competition, §§ 1204 and 1251

(a) New Statutory Language

The new exemption would provide that when a commercial item is procured competitively on the basis of adequate price competition, the head of the contracting activity "shall not" require the submission of certified cost or pricing data. The law would apply its new expanded definition of commercial products to TINA.

(b) **Impact**

This new exemption for adequate price competition is of little import. Under existing law, there is a statutory exemption for adequate price competition and contracting officers are precluded by FAR § 15.804-3 and DFARS § 215.804-3 from requiring submission of cost or pricing data under such circumstances. Having this prohibition in FASA may solidify the exemption's future in the regulations.

c. **Authority to Waive Cost or Pricing Data for Noncompetitive Purchase of Commercial Items, §§ 1204 and 1251**

In those situations where it is not practicable to conduct a competitive procurement for a commercial item, the Act requires the CO to seek information on the price at which the item has been sold in the commercial market. This information could be obtained from the offeror and, when not available, from another source. If the CO is able to obtain price information adequate to evaluate price reasonableness, the CO must exempt the contractor from TINA. If the CO makes a written determination that it could not obtain adequate information to evaluate price reasonableness, the submission of cost or pricing data in accordance with TINA would be required.

d. **Restrictions on Authority to Require Cost or Pricing Data, §§ 1203 and 1251**

(1) **New Statutory Language**

The Act prohibits a contracting officer from requiring submission of certified cost or pricing data where one of the statutory exemptions applies. However, a contracting officer could require the submission of additional information, without certification, if necessary to determine the reasonableness of price.

(2) **Impact**

This provision is of little import. Under present law, there is a statutory exemption for adequate price competition and contracting officers are precluded by FAR § 15.804-3 and DFARS § 215.804-3 from requiring submission of cost or pricing data where it is not required.

C. GAO Bid Protests, §§ 1401 - 1404

1. Protest Defined, § 1401

31 U.S.C. § 3551 is amended to make clear that protests include challenges to solicitations, cancellation of solicitations, awards or proposed awards and cancellations of awards based on alleged improprieties in the procurement process.

2. Review of Protests and Effect on Contracts Pending Decision, § 1402

a. Contracting Officer May Withhold Notice to Proceed Where Protest Expected

The Act revises the rules governing the suspension of contract performance. Contract performance could be commenced unless the CO withholds authorization to proceed within 10 days after the date of the contract award or within 5 days after the debriefing date offered. The CO could withhold authorization upon a determination that (1) a protest was likely to be filed, and (2) the immediate performance of the contract was not in the best interests of the United States.

b. Statutory Stay

(1) When Required

If authorization was not withheld before receipt of the protest, the CO would be required immediately to suspend performance if it receives notice of protest either within:

(a) ten calendar days of award; or

(b) "the date that is five days after the debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required" 31 U.S.C. § 3553 (d)(4) as amended

- as discussed at VLA.7.c., *supra*, existing GAO rules require that protests other than those of defects in a solicitation be filed within ten working days of when a contractor knew or should have known the grounds for protest. The FASA provisions concerning statutory stays have not modified this rule, although GAO may do so by regulation.

(2) **Override**

The *head of the procuring activity* could, however, authorize performance notwithstanding a protest (a) upon a written finding that (i) performance is in the best interests of the Government or (ii) urgent and compelling circumstances that significantly affect Government interests preclude waiting for a decision of the Comptroller General and (b) after the Comptroller General is notified of that finding.

3. **Decisions on Protests, § 1403**

a. **\$150 Per Hour Cap Except for Small Businesses**

The Act caps the costs for consultant and expert witness fees at the highest rate paid by the Government for such services and caps attorneys' fees at \$150 per hour unless the Comptroller General determined on a case by case basis that higher attorneys' fees were justified. Small businesses are not subject to these caps and could recover "reasonable attorneys' fees and consultant and expert witness fees" in appropriate cases.

b. **Protective Orders**

(1) **New Statutory Language**

The Act provides statutory authorization for GAO to issue protective orders establishing the terms, conditions, and restrictions governing the disclosure of procurement sensitive information, trade secrets, or other proprietary or confidential research, development, or commercial information.

(2) **Impact**

There is no real impact since GAO bid protest rules provide for protective orders.

4. **Protest Files, § 1015 (DoD) and § 1065 (Civilian Agencies)**

VII. Contract Administration**A. Contract Payment****1. Contract Financing, § 2001 (DoD) and § 2051 (Civilian Agencies)****a. Progress Payments Based on Measurable Performance Rather Than Costs Incurred**

Under existing law, progress payments are generally based on costs incurred. The Act provides for progress payments based on performance (rather than costs incurred) wherever practicable and payments using commercial terms and conditions when in the best interest of the United States.

b. Payments for Commercial Items

Payment for commercial items would be made under such terms and conditions as the agency head determines are appropriate or customary in the commercial marketplace and are in the Government's best interest. Adequate security would be required for such payments, and where it takes the form of a lien, such lien would be paramount to all other liens and effective immediately upon the first payment without filing, notice, or other Government action.

Advance payments for commercial items, made before any performance under the contract, could not exceed 15% of the contract price.

B. Cost Principles**1. Covered Contracts, § 2101 (DoD) and § 2151 (Civilian Agencies)**

- a. *dollar threshold* for contracts *statutorily "covered"* by cost principles is raised from \$100,000 to \$500,000 to be adjusted in future for inflation.

Analysis

This provision does not preclude the application of cost principles below \$500,000. All it does is statutorily require agencies to apply cost principles above \$500,000.

b. **Exemptions from Cost Principles**

- fixed price contracts other than those with cost incentives; and
- fixed price contracts for commercial items

2. **Travel Expenses of Government Contractors, § 2191**

The Act repeals 41 U.S.C. § 420 which limits allowable contractor travel costs to Government per diems. The provision does not preclude agencies from imposing a limitation on travel costs by regulation.

3. **Revision of Cost Principles Relating to Entertainment, Gift and Recreation Costs for Contractor Employees, § 2192**

The Act provides:

- a. Entertainment costs not allowable under the entertainment cost principle are not allowable under other cost principles; and
- b. Costs for employee gifts or certain recreation expenses are unallowable.

C. **Claims and Disputes**

1. **DoD Unique Certification Requirements Limited, § 2301**

10 U.S.C. § 2410 authorizes DoD to propose, for inclusion in the FAR, certification requirements duplicative of those set forth in the Contract Disputes Act.

The Act makes clear that these requirements are limited to requests for equitable adjustment and requests for extra-contractual relief under P.L. 85-804.

2. **Contract Disputes Act Improvements, § 2351**

a. **Period for Filing Claims**

The Contract Disputes Act is amended to establish a statute of limitations for the submission of contractor and Government claims. These claims (except those involving fraud) would be required to be submitted within six years after the "accrual" of the claim.

b. **Increased Threshold for Certification, Decision and Notice Requirements**

The Contract Disputes Act is amended to increase from \$50,000 to \$100,000 the threshold for contractor claim certification.

c. **Increased Ceiling for Use of Small Claims and Accelerated Procedures Before Boards of Contract Appeals**

The ceiling for *small claims procedures* before boards of contract appeals is increased from \$10,000 to \$50,000.

The ceiling for *accelerated procedures* before the boards of contract appeals is increased from \$50,000 to \$100,000.

d. **Requests for Issuance of Final Decisions**

The CDA is amended to make clear that the Court of Federal Claims can grant a Contractor's request to direct a contracting officer to issue a final decision within a specified period of time in the event of a contracting officer's undue delay. Only Boards of Contract Appeals presently have this authority.

3. **Extension of Alternative Dispute Resolution Authority, § 2352**

The Act extends from October 1, 1995, until October 1, 1999, the authority to use alternative dispute resolution procedures under the CDA.

If a contractor requests use of Alternative Dispute Resolution (ADR), but the government refuses, the government must justify its refusal in writing. If the government requests ADR and contractor refuses, the contractor must justify the refusal in writing.

4. Expedited Resolution of Contract Administration Matters, § 2353

The Act requires contracting officers to make reasonable efforts to respond in writing within 30 days of any written inquiry from a small business or advise in writing when a response will be forthcoming.

5. Authority of District Courts to Obtain Advisory Opinions from Boards of Contract Appeals, § 2354

The Act authorizes federal district courts to obtain advisory opinions from the appropriate agency board of contract appeals on contract matters at issue in a district court proceeding.

D. Suspension and Debarment, § 2455

The Act provides that agency suspension and debarment actions have Government-wide effect with limited exceptions. This provision is applicable to both procurement and non-procurement actions.

E. Miscellaneous -- Quality Control of Critical Aircraft and Ship Spare Parts, § 2401

1. Current Law

- a. 10 U.S.C. § 2383 requires that alternate sources for such parts meet the qualification requirements, if available, used *by the OEM* for the original production part unless the Secretary "determines in writing that any or all such requirements are unnecessary."
- b. DoD has never promulgated implementing regulations and this provision has been largely ignored by the military services, in part because DoD did not have OEM qualification requirements.

2. § 800 Panel Recommends Repeal

3. Senate bill recommended repeal; House bill recommended amendment

4. FASA

- a. Requires use of the DoD qualification requirements used to qualify the original production part.
- b. Provides a new exception for instances when there are similar requirements that should be used instead.

VIII. Small Business Provisions, §§ 7101 - 7108**A. Extension of § 1207 Program to Civilian Agencies, § 7102**

The Act authorizes civilian agencies to use special procedures to facilitate award to small disadvantaged businesses (SDBs). It authorizes (1) SDB set asides and (2) a 10% evaluation preference for SDBs on unrestricted solicitations. Previously, only DoD had the authority to use these procedures under its § 1207 program.

B. Contract Goals for Small Disadvantaged Businesses, § 7105

The Act establishes for *DoD, NASA and Coast Guard* a 5% goal for the participation of small business concerns owned-and-controlled by socially and economically disadvantaged persons.

C. Contract Goals for Woman Owned Small Business Concerns, § 7106

The Act codifies a Government-wide 5% goal for participation by small business concerns owned-and-controlled by women in each agency's contract and subcontract awards.

IX. Pilot Programs, §§ 5061 - 5064

The law authorizes several pilot programs to test additional acquisition/procurement reform concepts.

The Office of Federal Procurement Policy is authorized to conduct six programs to test additional alternative and innovative procurement procedures including waiving 15 specified laws concerning matters such as timing and content of notice of contracting opportunities and prescreening of eligible sources.

The Department of Defense is authorized to test innovative acquisition procedures on five programs under its existing statutory pilot program authority. These programs include (a) Fire Support Combined Arms Tactical Trainer, (b) Joint Direct Attack Munition, (c) Commercial-Derivative Aircraft, (d) Commercial-Derivative Engine, and (e) Joint Primary Aircraft Training System. For each of the pilot programs, DoD could apply any of the acquisition reforms made by the Act prior to the effective date that would otherwise apply in the Act and could test through these programs the application to noncommercial products any of the commercial product reforms made by the Act.

The National Aeronautics and Space Administration is authorized to conduct a test of alternative procedures for notice and publication of contracting opportunities by waiving specified provisions of law. Acquisitions eligible for test would be limited to a total annual obligation of \$500,000 or less and the total estimated life cycle cost of all acquisitions under the test could not exceed \$100 million.

The Federal Aviation Administration is authorized to test innovative acquisition procedures for one of the modernization programs under the Airway Capital Investment Plan.

X. Effective Dates and Implementation

A. Effective Dates and Applicability, § 10001

1. some sections, such as procedures applicable to micropurchases, by their terms became effective upon enactment
2. all others become effective on the date provided in final implementing regulations or October 1, 1995, whichever is earlier

B. Implementing Regulations, § 10002

1. proposed rules - due within 210 days of enactment (May 11, 1995)
2. public comment period - not less than 60 days
3. final rules - due within 330 days of enactment (September 8, 1995)
4. modifications without consideration - regulations may provide for agencies to modify existing contracts to parallel the dollar thresholds established under the Act without consideration upon request of the contractor

XL. Practical Effect of Procurement Reforms

The foregoing procurement reform measures have a number of practical implications.

First, to the extent a company can satisfy the Government's requirements with commercial products (as the term is newly defined), its contracts would be exempt from many existing and burdensome statutes.

To take advantage of the changes to the law, a company should strive to structure its proposals to furnish commercial items to the maximum extent possible. Additionally, to the extent commercial items are sold to the Government, a company would likely be able to reduce its quality control costs by using its existing commercial quality assurance system instead of complying with special Government inspection and test procedures.

Second, to the extent any of a company's contracts fall below the simplified acquisition threshold of \$100,000, they will be reserved for small business. If the nonmanufacturer rule is raised from \$25,000 to \$100,000, a small business could qualify for such a set-aside even if offering the product of a large business.

Third, new opportunities may be available to a company as a result of the three additional justifications set forth in the law for maintaining alternative sources.

Fourth, with respect to contract formation:

- a company would likely benefit from the new debriefing procedures;
- a company should be aware that past contract performance will be considered as an evaluation factor;
- a company should take notice of the new time frames for seeking debriefings.

Fifth, a company should note carefully the revised certification requirements under TINA.

Sixth, given the Government's intent to computerize its procurement process, a company must insure that it is able to access the FACNET system.

NOTES