Procurement Reform Continues

Just when you thought the Congress had finished reforming the federal acquisition process, new intensity entered to push the issue further. The Federal Acquisition Streamlining Act of 1994 (FASA) has been followed by major proposals for continued reform from both the Administration and the Congress. The ink wasn't yet dry on FASA before the newly elected Congress renewed its thrust to reduce the cost of acquiring products and services and assuring improved and efficient productivity—again through procurement reform. It is very likely that one major piece of reform legislation will be signed into law during the current congressional session.

H.R. 1388; S. 669 Sets the Stage for Reform in 1995

But the Congress was not alone in pursuing procurement reform. The Administration had already laid out draft measures to improve acquisition further than the small purchase focus of FASA. The Federal Acquisition Improvement Act of 1995 was introduced as H.R. 1388; S. 669. Its key elements are listed in Exhibit 1. Each is discussed below.

Exhibit 1

Provisions of H.R. 1388; S. 669

- Agency-level Protests
- Offeror Statements to Not Protest
- Protests in Federal Courts
- Protests of FACNET Procurements
- Payment of Costs for Frivolous Protests
- Suspension of Procurement
- Scope of Review

Agency-level Protests

While the Office of Management and Budget may not be motivated to abolish the General Services Administration's Board of Contract Appeals (GSBCA), it was made clear that two distinctly different bodies were superfluous and the GAO's scope of review was preferred. Nevertheless, the more the purchasing agency could do to address protest issues within its own domain, the fewer board hearings that would be required. Savings in both time and costs are expected. Further, GSBCA or GAO protest costs could be avoided if the protestor had brought its argument before the agency's protest forum.

Offeror Statements to Not Protest

Offerors were encouraged to state that they would refrain from protesting at any forum. This risky maneuver did not introduce a procedure that did not already exist. However, such offerors would be at a disadvantage to offerors that did not agree to refrain from protesting an agency action.

Protests in Federal Courts

The legislation attempted to limit the jurisdiction of the Federal District Courts from handling bid protests.

Protests of FACNET Procurements

In order to build on the simplified acquisition threshold provision of FASA, this new legislation would increase the simplified acquisition threshold to $1 million for services, and would make awards under the simplified acquisition threshold unprotestable.

Payment of Costs for Frivolous Protests

Protesters that are found to have brought a protest ruled to be frivolous by the court would be liable for costs incurred by the agency in defending against the protest.

Suspension of Procurement

This provision would eliminate the current suspension authority at GSBCA. The agency can already overcome such suspension if it can establish emergency or significant program performance degradations.

Scope of Review

Both the Congress and the Administration have recommended that the scope of review of any protest be limited to the agency record. This significant change at GSBCA would (1) essentially abolish *de novo* review and (2) remove the possibility for conducting investigation of the issues presented by the protester through the process of discovery.

The Congress Introduces a New Bill, H.R. 1670, With Improvements Over H.R. 1388

Predicated largely on reports that the existing procurement process was costing the government 18% more for what it buys than it should because of the excessively long time to award the contract, the Congress believes it can do more to improving acquisition. A new bill, Federal Acquisition Reform Act of 1995, was introduced. Its significant elements are listed in Exhibit 2 and are discussed below.

Exhibit 2

Provisions of H.R. 1670

- Competition Requirements
- Commercial Acquisition System
- Procurement Integrity
- Government Reliance on the Private Sector
- Pilot Programs
- Streamlining Disputes Resolutions

Competition Requirements

This provision is intended to replace the Competition in Contracting Act provisions for full and open competition to a new standard of "maximum practicable" competition. Essentially, vendors would compete to be placed on a preferred vendor list in order to be eligible for award of any contract to be awarded competitively. The agency reduces the number of eligible competitors to those named to the list.

Commercial Acquisition System

Commercial items obtained by the government would be excluded from government-unique requirements such as the Truth in Negotiations Act (TINA) and cost and

pricing data. Certifications have not proven to be a deterrent to prohibited conduct.

Procurement Integrity

Certain provisions of the Procurement Integrity Act dealing with unauthorized disclosure and receipt of procurement sensitive information would be replaced. It would also remove agency-implemented procedures obviated by the Ethics Reform Act (1989).

Government Reliance on the Private Sector

This provision codifies the government "outsourcing" circular (A-76). It emphasizes the government's need for commercial services.

Pilot Programs

The government will be more able to conduct pilots to test innovative procurement procedures, essentially obtaining waivers from exisiting laws and policies.

Streamlining Dispute Resolutions

Under this bill, a new administrative mechanism would be set up consolidating dispute resolution actions of the GAO and GSBCA into a single protest forum not part of any existing agency.

H.R. 1670 Has Many Appealing Aspects of Procurement Reform

The industry has long claimed that the government should be contracting the same way it does. This legislation brings the two processes closer together. Vendors should not resist this aspect of the legislation. However, the issue of establishing the initial competition to build the certified vendors list has not been defined, and the Federal Acquisition Regulations (FAR) must be carefully crafted to define the process as well as (1) to clarify how companies can appeal the initial competition, (2) to clarify how companies can dispute the removal from the list, and (3) to permit small companies to attain list status.

With the magnitude of the government's downsizing and streamlining programs and organizational structure, the reliance on the private sector for services and support increases dramatically. The provisions of a codified A-76 are necessary, if for no other reason than to improve the process by which the government decides to outsource.

Answers to questions directed toward outcomes are not easily obtained. Massive changes in process create confusion and tend to be chaotic. The government should be given every opportunity to advance itself at a controlled pace, namely through pilot processes. Every controllable effort should be granted the agencies to design and conduct pilot processes, especially when industry is partnering with them. Evaluation of these pilots becomes critical, and history is cluttered with good intended pilots that cannot be moved to larger applications due to inappropriate evaluation.

The new administrative mechanism, referred to as the United States Board of Contract Appeals (USBCA), is an effective compromise over either the GAO or the GSBCA. The use of alternative dispute resolution services will be emphasized and encouraged. This should cut down on unnecessary traffic at the Board. The scope of the Board should not be limited to "agency record." The bill allows "discovery," the consideration of ". . . all evidence that is relevant to the decision under protest." This should both limit information that would be considered and still permit relevant information to be presented. It does not support *de novo* investigations.

The threshold for any protest is $1 million. Any protest of a contract for less than this amount would be considered under simplified rules of procedure.

This is workable legislation and support should be active. However, some refinement remains.

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