



It's The Law

Office of the Assistant General Counsel for Finance and Litigation

Federal Assistance Law Division

Vol 1

February 15, 1995

Federal Acquisition Streamlining Act of 1994

by Eric Moll

The Federal Acquisition Streamlining Act of 1994 (FASA), Public Law 103-355, signed by President Clinton on October 13, 1994, contains a provision which may have an impact in the grants arena as well. Specifically, section 7203 of the FASA amends Title III of the Federal Property and Administrative Services Act (41 U.S.C. 251 *et seq.*) by adding a new section 316 at the end.

Subsection (a) of 316 provides that it is the policy of Congress that an agency should not be required by legislation to award a new grant for research, development, test, or evaluation to a non-Federal Government entity. Section 316 also states a preference for merit-based selection procedures for making awards. In addition, subsection (b) of 316 provides rules of construction for determining when a provision of law may be construed as requiring a new grant to be awarded to a specified non-Federal Government entity. First, the provision of law must specifically refer to the rules of construction contained in section 316. Second, the provision of law must specifically identify the particular non-Federal Government entity involved. Lastly, the provision of

law must specifically state that the award to the entity is required in contravention of the policy set forth in section 316. Although the legislative history is sparse on this section, it would appear that the intent of the section is to address the problem of earmarking specific amounts to particular grantees in legislation, presumably appropriation acts. The section purports to make such earmarking more difficult by mandating that the three requirements of subsection (b) be met before a particular earmark can be construed as requiring a new grant to be awarded to a specified non-Federal Government entity.

Section 316 raises several interesting issues as to its scope. First, the question arises as to whether the section would apply retroactively to existing earmarks contained in the Department's FY '95 Appropriations Act. The FASA was approved on October 13, 1994, the effective date of enactment, while the Department's Appropriations Act was approved on August 26, 1994, for the fiscal year ending September 30, 1995. In the absence of clear intent to apply a statute retroactively, the general rule is that statutes are to be applied

prospectively. See Sutherland Stat Const 41.04 (4th Ed). This general rule has been applied in a grant context. See Bennett v. New Jersey, 470 U.S. 632 (1985). Our review disclosed that there is no clear intent to apply the provisions of section 316 of the FASA retroactively. Moreover, it is clear that it would be impossible for the earmarks in the Department's FY '95 Appropriations Act to comply with the requirements of section 316 in light of the chronology of enactment of the two acts. Accordingly, the rules of construction contained in subsection (b) would not apply to earmarks contained in the Department's earlier FY '95 Appropriations Act and bureaus of the Department receiving earmarks in their FY '95 appropriations are legally bound to implement them without regard to section 316.

The primary issue raised by section 316 for future earmarks will be whether a particular earmark constitutes a grant for "research, development, test, or evaluation." This question may revolve around whether the grant must be for scientific research. (Some support for this interpretation may be found in subsection (d) of 316 which excludes grants to the National Academy of Sciences.) The bureaus of the Department most affected by such a restriction would probably be NIST and NOAA, with the latter particularly affected in its construction appropriation. In the past, MBDA and

ITA have also had earmarks included in their lump-sum appropriations. Finally, section 316 applies to "new grants", which are defined in subsection (c) as any grant unless the work provided for in the grant is a continuation of work performed by the earmarked recipient under a preceding grant. It is reasonably foreseeable that questions concerning the applicability of section 316 may include whether the grant is new or a continuation of a prior award.

Implementation of section 316 by the Department will be effected through a coordinated effort between the program officials, grants officers, and the Office of General Counsel. Future earmarks in any lump-sum appropriation will have to be analyzed to determine if the earmark meets the definition of a new grant for "research, development, test, or evaluation." If there is any doubt, grants officers or program officials should request a written opinion from the Federal Assistance Law Division.

Whether this provision will result in less earmarking of grants in the future remains to be seen, since later enacted legislation which is in conflict would supersede and prevail over section 316. Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Commission, 626 F.2d 1020 (D.C. Cir. 1980). It may depend on the proclivity of future Congresses to refrain from the practice that many describe as "pork" spending.

Cancellations Of Solicitations

by Eric Moll

Grants officers and program officials should be award of the standards for

canceling a solicitation. There is a common misconception when dealing

with discretionary grant programs that the government can cancel a solicitation at any time for any reason or no reason. Such action should not be taken lightly, because the Government could be liable for proposal preparation costs under limited circumstances.

In general, an applicant for federal assistance has a right to have its proposal fairly and adequately considered by the soliciting Federal agency.

Massachusetts Department of Correction v. Law Enforcement Assistance Administration, 605 F.2d 21 (1st Cir. 1979). A proposer may recover proposal preparation costs when the Government breaches its implied duty to honestly consider proposals. The standard for recovery of proposal expenses is whether the Government's conduct was arbitrary and capricious toward the claimant. OAo Corp. v. United States,

17 Ct.Cl.106 (1989). In a case where the Government cancels a solicitation, the courts have established an even higher standard: bad faith must be shown on the part of the Government based on the strong presumption that Government officials act properly and on the Government's right to reject uniformly all proposals without liability. Id. See also Durable Metals Products, Inc. v. United States, 27 Fed.Cl. 472 (1993).

Thus, while the likelihood that the Government will incur liability for the cancellation of a solicitation is slight, such action should still be carried out in good faith with sufficient justification. The reason(s) for the cancellation should be stated in the cancellation notice and published in the Federal Register.