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Pathways to Government Contracting 2023: Simplified Acquisition Procedures & Commercial Items

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Scope

Understanding the nature of commercial items, now called commercial products and services

Understanding the procedures used by the Federal government to acquire commercial items, including simplified acquisition procedures

Understanding the terms and conditions used in FAR Part 12 commercial item procurements

A quick look at IP under commercial item contracts

Special considerations in subcontracting for commercial items

Quick Look: Commercial Products and Services Contracting (FAR Part 12)

Statutory and Regulatory Overview

Why Commercial Item Acquisitions Matter

Determining Commerciality Under the FAR/DFARS

- “Of A Type”
- Evolved from a Product or Service
- Modified “Of A Type”
- Combinations
- Commercial Product Support Services
- Intra-contractor Transfers
- Non-Developmental Items (NDIs)

Statutory and Regulatory Overview

The Federal Acquisition Streamlining Act of 1994 (FASA) states a preference for government acquisition of commercial items

- Purchase of proven products such as commercial and non-developmental items can eliminate the need for research and development, minimize acquisition lead-time, and reduce the need for expensive product testing

Preference for Acquisition of Commercial Items, 10 U.S.C. § 2377(b), requires, in part, that:

- The head of each executive agency shall ensure procurement officials in that agency, to the maximum extent practicable:
 - Acquire commercial items or nondevelopmental items other than commercial items to meet the needs of the agency
 - Require prime contractors and subcontractors of all levels under the agency contracts to incorporate commercial items or nondevelopmental items other than commercial items as components of items supplied to the agency

Statutory and Regulatory Overview

- FAR 1.102(b)(1) (“The Federal Acquisition System will satisfy the customer in terms of cost, quality, and timeliness of the delivered product or service by, for example – (i) Maximizing the use of commercial products and services”)
- FAR 12.000 (“This [FAR] part . . . implements the Federal Government’s preference for the acquisition of commercial products and services contained in . . . 10 U.S.C. § 2375-2377 by establishing acquisition policies more closely resembling those of the commercial marketplace”)

Subsequent statutory and regulatory changes over the past few decades following passage of FASA have broadened the scope of what the Government may procure/define as a commercial product or service

- The DoD has even been rebuffed more than once when it made legislative proposals to eliminate specific categories (*e.g.*, ‘of a type’) from the FAR 2.101 definition
 - See, *e.g.*, Senate Report to the 2013 NDAA, Subtitle C, Sect. 841 (“***The committee declines to make this change [proposed by the DoD]. The Federal Acquisition Streamlining Act of 1994 . . . adopted a broad definition of commercial items to ensure that federal agencies would have ready access to products that are available in the commercial marketplace - including new products and modified products that are just becoming available. Such access remains particularly critical in fast moving commercial markets, including the markets for information technology and other advanced products.***”)

Why Commercial Item Acquisition Matters

Why it Matters to the Contractor

- Streamlines the Acquisition Process
 - Eliminates the majority of burdensome terms, conditions, and regulations in federal procurement (*e.g.*, CAS, Truthful Cost or Pricing Data (formerly “TINA”), and many other non-value add regulations do not apply)
 - Vendors do not need to first invest in non-value add compliant internal systems and processes
- Provides an easier point of entry into the government marketplace for small or inexperienced contractors
- Primes have greater flexibility to provide financing to lower-tier suppliers, encouraging participation by small / non-traditional suppliers in the government marketplace

Why Commercial Item Acquisition Matters

Why It Matters to the Federal Government

- Leverages the Commercial Marketplace
 - Technical innovation (access to cutting edge tech at speed of relevance)
 - Time efficiencies (as compared to development cycle of USG-unique items)
 - Price competition (contractor over-pricing items will be driven out of the market)
 - Economies of scale
 - Reduced acquisition costs and cycle times (time efficiencies frequently under-valued by USG)
 - Less administrative burden
 - Drastic risk reduction in terms of development, technological and manufacturing maturation

Commercial Items Now Commercial Products and Services Under FAR 2.101

Commercial Products

- (1) **Any product of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes** that has been (i) sold, leased, or licensed, or (ii) offered for sale, lease, or license to the general public;
- (2) **Any product evolved from an product described in (1) that is not yet available in the commercial marketplace** but will be in time to satisfy the delivery requirements under a government solicitation;
- (3) **Any product that would satisfy (1) or (2) but for (i) modifications of a type customarily available in the commercial marketplace, or (ii) minor modifications of a type not customarily available in the commercial marketplace;**
- (4) **Any combination of products** meeting the requirements of paragraph (1), (2), or (3) that are of a type customarily combined and sold in combination to the general public;
- (5) A product, or combination of products, referred to in paragraphs (1) through (4) of this definition, even though the product, or combination of products, is **transferred between or among separate divisions, subsidiaries, or affiliates of a contractor**
- (6) **Certain nondevelopmental items**

Commercial Items Now Commercial Products and Services Under FAR 2.101

Commercial Services

- (1) **Installation services, maintenance services, repair services, training services, and other services**
- (2) **Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved** and under standard commercial terms and conditions.
- (3) A service referred to in paragraph (1) or (2) of this definition, even though the service is **transferred between or among separate divisions, subsidiaries, or affiliates of a contractor**

“Of A Type” Commercial Items

The FAR’s “of a type” language broadens the scope of acceptable commercial items so that qualifying items do not have to be identical to those in the commercial marketplace

A contractor need only demonstrate that the products or services offered to the government are of a type offered for sale or sold to the public generally

A contractor is not required to demonstrate either:

- The identical item is offered or sold (or will be sold in the future) to the general public; or
- That the contractor itself offers or sells the item to the general public

In a commercial item determination, the government typically considers whether the product or service is “of a type” by considering:

- Form, fit and function of the item (*i.e.*, physical characteristics, interface with other systems, and the core purpose)
- Essential characteristics that define the item
- Technical specs
- What industries use the item and for which applications?
- Size of the market

Evolved From A Commercial Product

If a commercial product evolves through technical or performance advances and is not yet available in the commercial marketplace, it will meet the commercial product definition, as long as it will be available in time to satisfy the Government's requirements (*e.g.*, new version of software)

- Allows the government to access new technology quickly

Commercial products that evolve as a result of advances in technology or performance include product updates/improvements and model changes

Government evaluators examine evolution by considering:

- Is this a newer version of something that you can already buy commercially?
- Is the difference in versions other than for technology or performance improvements?
- How far along is the development process? Has there been a successful prototype?

Modified “Of A Type” Products

Any product (1) “of a type” customarily used by the public or by non-governmental entities for purposes other than governmental purposes, or (2) evolved from an “of a type” product through technology and/or performance, but for:

- Modifications of a type customarily available in the commercial marketplace; or
- Minor modifications of a type not customarily available in the commercial marketplace, made to meet Federal Government requirements

A minor modification means a modification that does not significantly alter the nongovernmental function or essential physical characteristics of an product or component, or change the purpose of a process

- A government-unique product or service can still be a commercial product so long as any modifications are consistent with the basic nature of the products or supplies, and considers:
 - The value and size of the modification;
 - Changes to the essential physical characteristics of the product; and
 - The comparative value and size of the final product
 - Dollar value and percentage may be used as guidelines, but are not solely conclusive of a minor modification

Modified “Of A Type” Products (cont.)

Government evaluators typically determine whether a modification is an “of a type” modification by considering:

- Is the modified product similar to other modified products in the commercial marketplace?
- Does the supplier perform similar modifications for nongovernmental customers?
- Do the manufacturing processes used to perform the modification differ for governmental and nongovernmental customers?

Combinations of Commercial Items

A combination of items meeting the different FAR requirements or the FAR 2.101 definition of “commercial item” may qualify in the aggregate, as a commercial item

- Example: a computer network that uses commercially-available hardware and software and a commercial help desk for users. The combination of the commercial hardware, software, and professional service components render the computer network commercial

Not every single component in an end item/service must be commercial

Non-commercial components may or may not render an item non-commercial based on factors such as the number and significance of the non-commercial components

Nondevelopmental Items/Products

Nondevelopmental items (NDIs) are separately defined under FAR 2.101 as:

- An already developed product “used exclusively for governmental purposes by a Federal agency, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement;”
- A product which meets the definition in (1) that requires minor modifications or modifications “of a type customarily available in the commercial marketplace;” or
- A product which does not meet the definition in either (1) or (2) “solely because the item is not yet in use.”

NDIs are Commercial Products if the procuring agency determines the product was (1) developed exclusively at private expense and (2) sold in substantial quantities, on a competitive basis, to multiple State and local governments or to multiple foreign governments.

Support Services

Installation services, maintenance services, repair services, or training services supporting commercial or commercial “of a type” products qualify as commercial services if:

- The services are procured for support of an item that otherwise meets the FAR definition of a commercial product (regardless of whether the services are provided by the same source or at the same time as the item); and
- The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the federal government

See also DoD Guidebook For Acquiring Commercial Items (July 2019), Part A at 26 (“Services evolve just as readily as supplies, and related services follow the evolution of supplies. This frequently applies to services under paragraph (5) of the FAR definition of a commercial item; as supplies evolve, so must the installation, maintenance, and repair of those same items (*e.g.*, maintenance of software).”)

Commercial Item Support Services (cont.)

Government evaluators typically determine whether a service is procured for support of a commercial product by considering:

- Is the product receiving the service commercial (or “of a type”)?
- Does the service support any non-commercial product(s)?

To determine whether the service being procured is also provided contemporaneously to the general public under similar terms and conditions, government evaluators consider:

- Whether the warranty terms available in the commercial marketplace are similar to those offered to the government
- Whether any government-unique liability concerns potentially affect the terms and conditions of service
- Whether the service provider has any commercial clients, and, if so, do the commercial clients receive similar services from the contractor?

Services “Of A Type”

Addresses services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions

- Catalog price means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public
- Market prices means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors

Services “Of A Type” (cont.)

Government evaluators typically determine whether services are “of a type” by considering:

- Are there similar commercial services offered and sold: (1) competitively, and (2) in substantial quantities?
- Does the contracting officer assess there are sufficient similar commercial services companies to conclude the commercial services are competitively offered and sold, resulting in market driven prices?
- Is there evidence that the item is sold in substantial quantities?

Intra-Contractor Transfers

Transfers of items (or combinations of items) or services between or among divisions, subsidiaries, or affiliates of the contractor so long as the product or service meets any of the criteria of the FAR 2.101 commercial product and service definitions

- A commercial item does not lose its status when transferred between the division of a contractor
- Interdivisional sales should not be solely relied upon to establish commerciality

Commercial-Off-The-Shelf (“COTS”) Items

COTS Items are defined as:

- a commercial item (as defined in FAR 2.101);
- sold in substantial quantities in the commercial marketplace; and
- offered to the Government under a contract or subcontract at any tier, without modification and in the same form as sold in the commercial marketplace
 - See, *e.g.*, Chant Engineering Co., Inc., B-281521, Feb. 22, 1999, 99-1 CPD ¶ 45 (“[n]ew equipment like Chant’s proposed test station, which may only become commercially available as a result of the instant procurement, clearly does not satisfy the RFP requirement for commercial-off-the-shelf (existing) equipment.”)

In effect, COTS are a subset of commercial items; as such, all policies applicable to commercial items also apply to COTS items (FAR 12.103)

DCMA Commercial Item Group

(www.dcma.mil/Commercial-Item-Group)

- Has Authority to Make Commercial Item Determinations in form of Warranted Contracting Officer's Determination
- CIG Determination Repository (CoD & Public Access)
 - Lists Prior Determinations made by DCMA CIG
 - Allows Fuzzy Search
- Commercial Item Database (DoD Access Only)
- [DoD's Guidebook for Acquiring Commercial Items](#)
- FAQs, Helpful Links, and Resources

Primary Procurement Methods for Commercial Items

Commercial Item Procurement (FAR Part 12)

Micro-purchases (FAR Subpart 13.2)

Simplified Acquisition (FAR Part 13)

Indefinite Delivery Contracts (FAR Part 16)

GSA Schedule Contracts (FAR Subpart 8.4) (not discussed)

FAR Part 12

In 1995, the FAR Council implemented the statutory preference for the acquisition of commercial items by revising FAR Part 12 to:

- Include policies and procedures solely for commercial items
- Formulate acquisition policies more conducive to the commercial marketplace
- Create exemptions and carve-outs from many federal contracting regulations for commercial item contracts

FAR Part 12 requires federal agencies to:

- Conduct market research to determine whether commercial items are available to satisfy the agency's requirements
- Purchase commercial items when such items are available to meet the agency's needs
- Requires prime and subcontractors to incorporate, to the maximum extent practicable, commercial items as components of items supplied to agencies
 - Occurs via inclusion of FAR 52.244-6 and DFARS 252.244-7000; both clauses required by the FAR and DFARS, respectively, to be included in all applicable solicitations and contracts

FAR Part 12 Applicability

FAR Part 12 shall be used to acquire products or services that meet the FAR 2.101 definition of commercial products or services (FAR 12.102(a))

CO's shall use this part in conjunction with policies and procedures for solicitation, evaluation and award prescribed by FAR Part 13 (Simplified Acquisition Procedures), FAR Part 14 (Sealed Bidding), or FAR Part 15 (Contracting by Negotiation), as appropriate for the particular acquisition (FAR 12.102(b))

Acquisitions of commercial products or services are subject to other policies in the FAR, but when policies from another part conflict with this part 12, this part shall take precedence for the acquisition of commercial products or services (FAR 12.102(c))

FAR Part 12 Applicability (cont.)

FAR Part 12 shall not apply to the acquisition of commercial products or services:

- At or below the micro-purchase threshold (\$10K/\$2.5K);
- Using the Standard Form 44 Purchase Order – Invoice – Voucher for on the spot over the counter purchase of supplies and non personal services while away from a purchasing office or at isolated activities (see FAR 13.306)
- Using the imprest fund (\$500 limit) (see FAR 13.305);
- Using the Government-wide commercial purchase card, or
- Directly from another federal agency

Micro-Purchase Acquisitions (FAR Subpart 13.2)

Subset of Simplified Acquisition Procedures (FAR Part 13)

Thresholds for Use (FAR 2.101)

- Products: \leq \$10,000
- Services: \leq \$2,500

No competition necessary if agency considers price fair and reasonable

- Similar procedures:
 - GSA Schedule orders: select any contractor that meets agency's needs
 - FAR 16.5 task order competitions: "fair opportunity" procedures not required

FAR clauses not required, but permitted

Simplified Acquisition Procedures (FAR Part 13)

Provides flexibility and reduced procedural requirements for small purchases to (1) reduce admin costs, and (2) increase efficiency

Typically applies to acquisitions not exceeding \$250,000 (*i.e.*, the Simplified Acquisition Threshold), but Simplified Procedures can be used for:

- Acquisitions not exceeding \$7.5 million if the CO reasonably expects, based on the nature of the supplies or services sought, and on market research, that offers will include only commercial products or services (FAR 13.500(a))
- Acquisitions that do not exceed \$15 million when the acquisition is for commercial products or services that, as determined by the head of the agency, are to be used in support of, *inter alia*, the defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack or to support response to an emergency or major disaster

What Are The Simplified Acquisition Procedures?

Choice of “appropriate” procedures from parts 12, 13, 14, and 15
Competition “to the maximum extent practicable”

May solicit from one source if “circumstances ... deem only one source reasonably available”

For commercial products or services above \$250,000 (up to \$7M):
Increased J&A requirements for sole-source

Oral solicitation permitted if low-dollar acquisition

Solicitations must identify basis of award (price only or price & other factors), but need not define relative weights of factors or identify subfactors

What Are The Simplified Acquisition Procedures? (cont.)

Evaluation methods focus on efficiency; formal procedures not required

- Evaluation must be on basis established in solicitation
- All offers must be considered
- Price must be fair and reasonable

Minimal documentation, but contract file must include:

- Brief description of the procedures used in awarding the contract;
- The number of offers received;
- An explanation, tailored to the size and complexity of the acquisition, of the basis for the contract award decision; and
- The approved sole-source justification (if a sole-source acquisition was conducted)

What Are The Simplified Acquisition Procedures? (cont.)

Unsuccessful offerors entitled to only “brief explanation of basis for award” if requested (and award was based on factors other than price alone)

- Compare with more robust post-award debriefing under FAR Part 15

What Are The Simplified Acquisition Procedures? (cont.)

Requirements for Sole-Source Acquisition of Commercial Products or Services (FAR 13.501(a))

- Although acquisitions conducted under SAP are exempt from the competition requirements of FAR Part 6, COs shall not conduct sole-source acquisitions, unless the need to do so is justified in writing with the appropriate level of approval indicated in FAR 13.501(a)(2)
- A written Justification & Approval (J&A) is required for brand name acquisitions of commercial products or services
 - The J&A must be based on one of the limited FAR Subpart 6.3 justifications (*e.g.*, only one responsible source, unusual and compelling urgency, national security, industrial mobilization)
 - See, *e.g.*, Core Sys., B-411060, Apr. 30, 2015, 2015 CPD ¶ 148 (denying protest and finding that the Navy properly restricted a FAR Part 12 competition to a specific brand and model of commercial computer system by reasonably determining that no other product could undergo required testing and approval in sufficient time to meet the Navy's needs)

Indefinite Delivery/Indefinite Quantity Contracts (FAR Part 16)

Base contracts typically established using FAR Part 15 procedures

- Usually multiple ID/IQ awards
 - Note: holding an ID/IQ contract does not guarantee task/delivery orders (except nominal minimum)
- Task/delivery orders need not be subject to “full and open competition” if ID/IQ order procedures used
 - *i.e.*, agencies permitted to conduct “mini” competitions for task/delivery orders among contract holders for task or delivery orders (if over SAT)

Indefinite Delivery/Indefinite Quantity Contracts (FAR Part 16) (cont.)

Task/delivery orders exceeding \$10,000

- “Fair opportunity” for each offeror to be considered (unless urgent agency need, etc.); minimum requirements and streamlined procedures

Orders exceeding the SAT (\$250k)

- Competition required (unless sole-source); “fair opportunity” for each offeror to be considered
- All contractors offering the required supplies/services must receive fair notice of intent to make purchase, description of requirement, basis of award

Orders exceeding \$6M

- Eligible offerors must receive notice of order, to include statement of requirements, significant evaluation factors/subfactors and relative importance, basis for award
- Agency must provide reasonable response period
- Opportunity for debriefing if offeror not selected

Primary Procurement Method Under FAR Part 15

Part 15 contains policies and procedures governing **competitive and noncompetitive negotiated acquisitions**

- When contracting in a competitive environment, the procedures of Part 15 are intended to minimize the complexity of the solicitation, the evaluation, and the source selection decision, while maintaining a process designed to foster an impartial and comprehensive evaluation of offerors' proposals, leading to selection of the proposal representing the best value to the Government (FAR 15.002(b))

A contract awarded using other than sealed bidding procedures is a negotiated contract

- Sealed bids shall be solicited if (1) time permits, (2) the award will be made solely on the basis of price and other price-related factors, (3) no discussions with offerors required, and (4) there is a reasonable expectation of receiving more than one sealed bid

FAR Part 15 - Sole Source Procurement

The Government **strongly** prefers full and open competition for acquisitions

However, in certain situations, an agency may conduct a sole-source acquisition under FAR Part 15, based on one of the limited bases in FAR Subpart 6.3, through a written justification and approval (J&A)

Sole source bases:

- Only one responsible source
- Unusual and compelling urgency
- National Security
- Industrial mobilization
- Engineering developmental, or research capability
- Expert services
- International agreement/treaty
- Authorized or required by statute
- Public interest

FAR Part 12 –Contract Types

Authorized Contract Types For Commercial products or services (FAR 12.207)

- Firm-fixed-price (FFP)
- Fixed price contracts with economic price adjustment (FP/EPA) (or Level of Effort (FP-LOE))
- Indefinite Delivery/Indefinite Quantity (ID/IQ)
- Time and Materials (T&M) or Labor-Hour (LH)

The use of other contract types (*e.g.*, cost-type contracts) for the acquisition of commercial products or services under FAR Part 12 is prohibited (FAR 12.207(e))

Note these restrictions are generally directed toward USG acquisition teams; in contrast, a contractor has greater flexibility to enter into contracts with suppliers for commercial products or services unless specific contract requirements dictate otherwise

FAR Part 12 – Contract Types (cont.)

Firm-Fixed-Price Contracts (Most Common)

- Provides a price not subject to any adjustment on the basis of the contractor's cost experience
- Places on the contractor "maximum risk and full responsibility for all costs and resulting profit and loss"
- Provides "maximum incentive for the contractor to control costs and perform effectively"
- Imposes "minimum administrative burden" upon the parties

FAR Part 12 – Contract Types (cont.)

Fixed-Price with Economic Price Adjustment

- Provides for upward and downward revision of prices upon the occurrence of specified contingencies:
 - Adjustments based on established prices
 - Adjustments based on actual costs of labor or material
 - Adjustments based on cost indexes of labor or material
 - May be multiple price adjustment factors
- FP-EPA is used only when there is “serious doubt” concerning stability of market or labor conditions during extended period of performance or other uncertain contingencies that would otherwise be included in the contract price
- Award fees or delivery incentives in FP/EPA contracts are permitted if based solely on factors other than price (FAR 12.207(d))

FAR Part 12 –Contract Types (cont.)

A T&M or LH contract may be used to acquire commercial services when several criteria are met, including:

- A competed contract was awarded (or a proper sole-source contract was awarded after receipt of 2+ offers)
- The CO executed a determinations and findings (D&F) document (1) certifying that no other contract type is suitable for the requirements, and (2) inclusion of a ceiling price that the contractor exceeds at its own risk
 - The ceiling price cannot be increased unless the contracting officer executes another D&F establishing that the change is in the best interest of the procuring agency (FAR 12.207(b)(1)(ii)(C))
- Note: DFARS 212.207 further limits the use of T&M/LH contracts to acquire only commercial services to services (1) in support of commercial products or services, (2) for emergency repair, or (3) otherwise described in a D&F approved by the Agency Head

FAR Part 12 –Contract Types (cont.)

Under FAR 12.207(c), ID/IQ contracts may be used when:

- The prices are established are based on (1) a FFP or FP/EPA basis; or (2) rates are established for commercial services acquired on a T&M or LH basis
 - COs shall, to the maximum extent practicable, also structure the contract to allow issuance of orders on a FFP or FP w/EPA basis
 - Each task/delivery order with T&M/LH pricing requires a D&F approved one level above the contracting officer
 - If the ID/IQ only allows for orders with T&M or LH pricing, a D&F is required to support why providing for an alternative FFP or FP w/EPA pricing structure is not practicable

Market Research In General

Market research is an essential element of building an effective strategy for the acquisition of commercial products or services and establishes the foundation for the agency description of need, the solicitation, and resulting contract

Agencies must conduct market research appropriate to the circumstances:

- Before developing new requirements documents for an acquisition by that agency;
- Before soliciting offers for acquisitions with an estimated value in excess of the SAT;
- Before soliciting offers for acquisitions with an estimated value less than the SAT when adequate information is not available and the circumstances justify its cost;
- Before soliciting offers for acquisitions that could lead to consolidation or bundling; or
- Before awarding a task or delivery order under an indefinite-delivery/indefinite-quantity (ID/IQ) contract (*e.g.*, GWACs, MACs) for a noncommercial item in excess of the SAT

Note: “Market research” is **not** equivalent to “market analysis” – a common USG misconception

- Market research is conducted to support requirements definition, solicitation type, etc. See FAR 2.101 (defining market research as “collecting and analyzing information about capabilities within the market to satisfy agency needs”)
- Market analysis is conducted to support price analysis

FAR Part 12 – Market Research

Agencies shall conduct market research to determine whether commercial products or services or non-developmental items are available that can meet the agency's requirements (FAR 10.002(b); 12.101(a))

- *See, e.g., Palantir USG, Inc. v. United States*, 904 F.3d 980 (Fed. Cir. 2018) (affirming, in the context of a pre-award protest, the lower court's determination that the U.S. Army violated FASA by failing to adequately determine (i) whether commercial items that could meet the agency's needs; (ii) whether commercial items could be modified to meet the Army's needs; or (iii) whether the Army's requirements could have been modified so that commercial items could be used)

Commercial item market research can take many different forms (*e.g.*, Google search, review of technical literature, Request for Information (RFI))

- The extent of market research will depend on various factors (*e.g.*, urgency, estimated dollar value, complexity, the item/service being acquired), but should include whether the agency's needs can be met by
 - (1) products or services of a type customarily available in the commercial marketplace;
 - (2) products or services of a type customarily available in the commercial marketplace with modifications; or
 - (3) products or services used exclusively for governmental purposes

FAR Part 12 – Market Research (cont.)

If market research indicates commercial/nondevelopmental products or services might not be available to satisfy agency needs, agencies shall reevaluate the need and determine whether the need can be restated to permit commercial /nondevelopmental items to satisfy the agency's needs (FAR 10.002(c))

If market research establishes that the agency's need may be met by a type of item/service customarily available in the commercial marketplace that would meet the definition in FAR 2.101, the CO shall solicit and award the contract under FAR Part 12 (FAR 10.002(d)(1))

- But, if market research establishes that the agency's need cannot be met by a type of item/service customarily available in the marketplace, FAR Part 12 shall not be used (FAR 10.002(d)(2))
- The description of agency need must contain sufficient detail for potential offerors of commercial items to know which commercial products or services may be suitable (FAR 12.202)
 - For commercial item acquisitions in excess of the SAT, an agency's statement of need should
 - (1) describe the type of product or service to be acquired, and
 - (2) explain how the agency intends to use the product or service in terms of function to be performed, performance requirement or essential physical characteristics

The Solicitation Process

Section Overview

- FAR Part 12
 - Standard Form 1449
 - Format
 - Required Clauses and Provisions
 - Streamlined Procedures (FAR Subpart 12.6)
 - Publicizing the Solicitation

FAR Part 12 – Standard Form 1449

The CO shall use Standard Form 1449 (SF 1449) as the solicitation format for the acquisition of commercial items under FAR Part 12, if:

- The acquisition is expected to exceed the SAT;
- A paper solicitation or contract is being issued; and
- The “streamlined” procedures in FAR Subpart 12.6 are not being used

Use of SF 1449 in commercial acquisitions under the SAT is not mandatory, but encouraged (FAR 12.204(a))

FAR Part 12 – Standard Form 1449 (cont.)

Solicitation Format

- In addition to SF 1449, the solicitation package under a FAR Part 12 acquisition shall include:
 - CLINs, a schedule for the supplies/services, accounting data
 - Mandated provisions
 - FAR 52.212-1, Instructions to Offerors-Commercial Items, by reference;
 - Any addendum to FAR 52.212-1;
 - FAR 52.212-2, Evaluation-Commercial Items (or other description of evaluation factors for award, if used); and
 - FAR 52.212-3, Offeror Representations and Certifications-Commercial Items
 - Mandated clauses
 - FAR 52.212-4, Contract Terms and Conditions-Commercial Items;
 - Any addendum to FAR 52.212-4;
 - FAR 52.212-5, Contract Terms and Conditions Required to Implement Statutes and Executive Orders; and
 - All other required clauses (see FAR 12.301(c))
 - Any contract documents, exhibits or attachments

FAR Part 12 – Standard Form 1449 (cont.)

Contracts for commercial buys shall include when practicable only clauses that (1) implement law, regulation, or Executive Order; or (2) are consistent with customary commercial practices (FAR 12.301(a))

Terms and conditions are tailored to reflect the scope and complexity of the acquisition

Clauses not customary within the industry for the commercial item/service being acquired require a FAR waiver (FAR 12.302(c))

CO authorized to develop other provisions as long as the provisions are customary for the commercial item/service being acquired

FAR Part 12 – Standard Form 1449 (cont.)

Because of the broad range of commercial items acquired by the Government, variations in commercial practices, and the relative volume of the Government's acquisitions in the specific market, a CO may tailor FAR 52.212-1 and/or FAR 52.212-4 to adapt to the market conditions for each acquisition

- Tailoring may be done if consistent with commercial practice for the item/service being acquired and not inconsistent with applicable laws, regulations, or Executive Orders
- Market research indicates scope of the tailoring
- Tailoring shall be documented in addenda to the solicitation and contract

FAR Part 12 – Streamlined Solicitation (FAR 12.603)

Subpart 12.6 provides optional procedures for (a) streamlined evaluation of offers for commercial items; and (b) streamlined solicitation of offers for commercial items for use where appropriate

- These procedures are intended to simplify the process of preparing and issuing solicitations, and evaluating offers for commercial items consistent with customary commercial practices
- When the procedures under Subpart 12.6 are employed for a commercial item acquisition, the use of SF 1449 is not permitted

This procedure combines the notice of contract action synopsis required by FAR 5.203 and the issuance of the solicitation into a single document

- The combined synopsis/solicitation must include, among other information:
 - The type of solicitation (*e.g.*, RFP, IFB, RFQ)
 - Description of items/services and requirements
 - Clauses FAR 52.212-1 through FAR 52.212-5
 - A statement regarding any additional contract requirement(s) or terms and conditions determined by the CO to be necessary for this acquisition and consistent with customary commercial practices

FAR Part 12 – Publicizing the Solicitation

Under FAR 5.203, agencies generally must publish notice (through the Government Point of Entry (“GPE”)) of upcoming solicitations at least 15 days before issuance

- But for commercial items a CO may issue a solicitation (1) less than 15 days after publishing notice, or (2) use the combined synopsis/solicitation procedure under FAR Subpart 12.6

The CO shall establish a solicitation response time—considering the circumstances of the individual acquisition, such as its complexity, commerciality, availability, and urgency—when establishing the solicitation response time that affords potential offerors a reasonable opportunity to respond to commercial item acquisitions

- A solicitation response time of less than 30 days, can be appropriate for commercial item acquisition, even in excess of the SAT
 - See, *e.g.*, *American Artisan Productions, Inc.*, B-281409, Dec. 21, 1998, 98-2 CPD ¶ 155 (finding fifteen day response period reasonable); *GIBBCO LLC*, B-401890, Dec. 14, 2009, 2009 CPD ¶255 (finding 22 day response period reasonable)

FAR Part 12 - Proposal Evaluation and Award

FAR Part 12 proposals are evaluated IAW evaluation criteria in the solicitation (included in FAR 52.212-2)

- At a minimum, proposals evaluated on technical capability, price, and past performance
- Contract award based on Best Value (stated in the solicitation) by using one two methods:
 - Tradeoff between non-price factors and price; or
 - Lowest-Price, Technically Acceptable (LPTA)

FAR Part 12 – Proposal Evaluation and Award (cont.)

Past Performance

- Past performance should be an important element of every evaluation and contract award for commercial items (FAR 12.206)
- Contracting officers should consider past performance data from a wide variety of sources both inside and outside the Government in accordance with the policies and procedures contained in FAR Subpart 15.3

FAR Part 12 – Proposal Evaluation and Award (cont.)

Pricing

- At a minimum, the CO must use price analysis to determine whether the price is fair and reasonable (FAR 15.403-3(c))
- A price in a catalog is not, necessarily, fair and reasonable.
- The CO must establish price reasonableness IAW with FAR 13.106-3 (SAP) or FAR 15.4 (Contract Pricing), as applicable (FAR 12.209)
 - Consider customary commercial T&C's when pricing CI
 - Ensure that T&C's, and prices, are commensurate with Government needs
 - Consider speed of delivery, length and extent of warranty, seller's liability, quantities ordered, length of the performance period, and specific performance requirements when evaluating pricing

FAR Part 12 – Proposal Evaluation and Award under FAR Subpart 12.6

When evaluation factors are used, the contracting officer may tailor the evaluation factors and relative importance of those factors to the acquisition

- When using Part 13 procedures in conjunction with Part 12, COs are not required to describe the relative importance of evaluation factors
- For many commercial items, proper evaluation will only require consideration of an item's technical capability (the ability of the item to meet the agency's need), price, and past performance
- Past performance shall be evaluated in accordance with the procedures in FAR 13.106 or FAR Subpart 15.3, as applicable

FAR Part 12 – Proposal Evaluation and Award under FAR Subpart 12.6 (cont.)

The CO must (1) select the offer that is most advantageous to the Government based on the factors contained in the solicitation, and (2) fully document the rationale for selection of the successful offeror including discussion of any trade-offs considered (FAR 12.602(c))

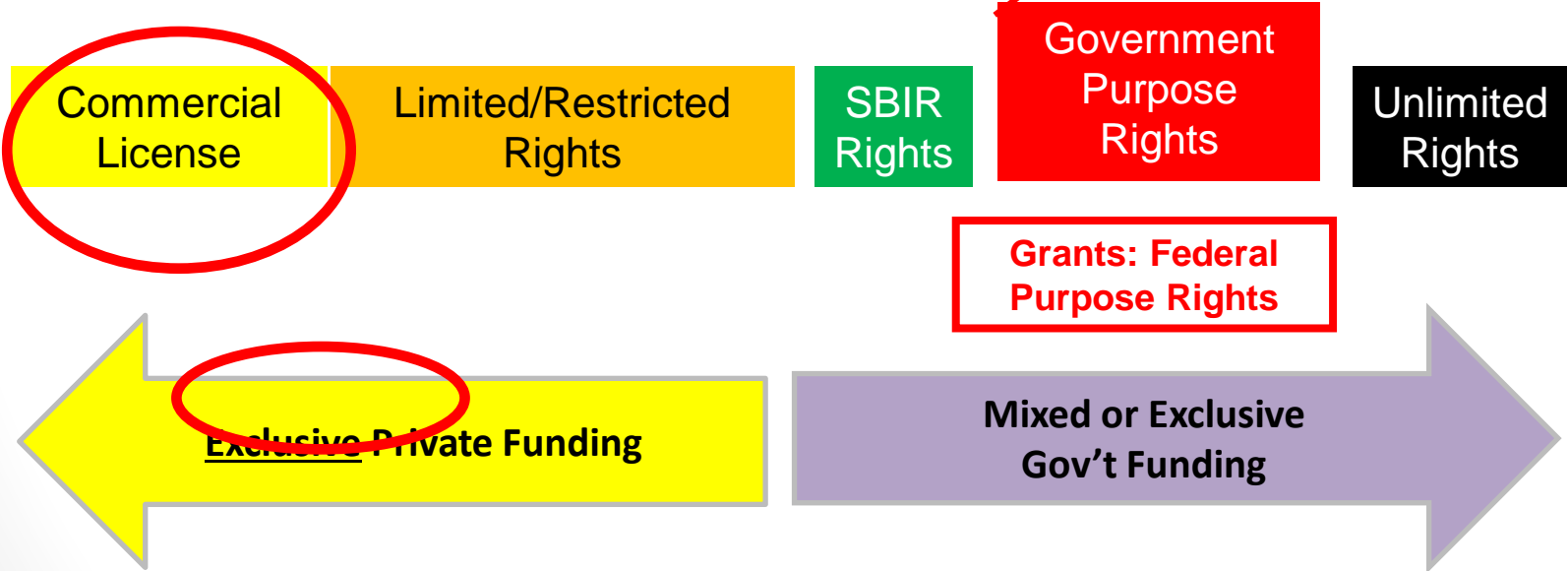
Overview of Data Rights

Contractor retains “title.” Government gets a “license.”

Scope of Gov’t license depends on extent of government funding used to develop the item

Warning: Under DFARS “GPR” transforms into “Unlimited Rights” after 5 years

Spectrum of License Rights



Overview of Data Rights

Rights in Data is a complicated topic worthy of its own in-depth presentation...the following is merely a primer on the topic

- Note also that IP valuation and licensing topics are outside the scope of this presentation

Governed by FAR Subpart 27.4 and DFARS Subparts 227.1 and 227.2

Data Rights Protection is NOT Self-Executing

Requires Timely:

- Record-Keeping regarding development funding
- Assertions of contractor rights in proposals, and
- Marking of data and software delivered to the government

Overview of Data Rights (cont.)

Two general categories of government IP issues:

- Rights in Technical Data and Computer Software Under the FAR and DFARS
- Patent Rights (not covered)

Different data rights schemes for:

- Civilian Agencies v. DoD
- Technical Data v. Computer Software
- Commercial Items v. Non-Commercial Items

Contractor gets **title**, while the Government gets a **license**

Three general categories of government license rights in technical data and computer software:

- Unlimited rights
- Limited rights (technical data)/Restricted rights (computer software)
- Government purpose rights

Commercial Item Data Rights

Policy re: Commercial Item Technical Data (FAR 12.211)

- When a contract for commercial items requires the delivery of technical data, the contracting officer shall include ***appropriate provisions and clauses*** delineating the rights in the technical data in addenda to the solicitation and contract
- The Government shall acquire only the (commercial item) technical data rights ***customarily provided to the public***
- The ***CO shall presume*** that data delivered under a contract for commercial items was developed exclusively at private expense

Commercial Item Data Rights (cont.)

Policy re: Commercial Computer Software (FAR 12.212)

- “Commercial Computer Software” means any computer software that is a commercial item (FAR 2.101)
- Commercial software shall be acquired under ***licenses customarily provided to the public*** to the extent such licenses are consistent with Federal law and ***otherwise satisfy Government’s needs***
- No requirement to furnish technical information not customarily provided to the public
- The Government ***shall only have the rights in the commercial license attached to the contract***; no requirement to relinquish ***additional data rights*** except as mutually agreed to by the parties

Commercial Item Data Rights (cont.)

Commercial Software License Agreements (FAR 12.212; 27.405-3; 52.227-19)

- Contractor may use its customary commercial license
- Contractor **incorporates or references** its standard commercial license in its proposal and it becomes an addendum to the contract
- License must address the Government's right to use, disclose, modify, distribute, and reproduce the software
- **Minimum Government rights:**
 - May be used or copied for use with the computers for which it was acquired (including a backup or replacement computer)
 - May be reproduced for archive or backup purposes
 - May be modified, adapted, or combined with other computer software, (provided that the resulting work is subject to the contractor's commercial license)
 - Disclosed and reproduced for support service contractors (subject to commercial license)

Commercial Item Data Rights (cont.)

Note that certain clauses in commercial license agreements may be ***unenforceable against the Government***

- *See, e.g., FAR 52.212-4(u)* (any EULA or TOS clause requiring Government to indemnify contractor is unenforceable against the Government)

GSA issued a Final Rule in February 2018 regarding “Unenforceable Commercial Supplier Agreement Terms” in commercial licenses for products sold through its GSA Schedule 70

- The Final Rule creates a GSA-specific clause (GSAR 552.212-4(w)) that identifies standard commercial license provisions that ***violate Federal law and declare them unenforceable against the Government***

Commercial Item Data Rights (cont.)

PRACTICAL CONSIDERATIONS

- ***Carefully review Solicitations*** for Improper Data Rights Provisions
- ***Strictly limit deliverables*** to those required by the Contract
- ***Assert*** Commercial License Rights ***in proposals***
- ***Mark deliverables*** with appropriate legends
- ***Document development*** at private expense
- ***Understand EULA “Exceptions”*** (GSAR 552.212-4(w))

Commercial Item Subcontracting

Opportunity for Commercial Item Contractors:

- Many Commercial Items are **components, sub-systems, equipment, or supplies *used by prime contractors*** in the performance of Federal contracts
- For some Commercial Item contractors, the **key business development opportunities** are at the *prime contract level*
- In the Federal marketplace, it can be just as important to **understand the subcontracting process**

Commercial Item Subcontracting (cont.)

The objective of a commercial item determination is to ensure that the product and/or service meets the commercial item definition at FAR 2.101

- **Prime contractors are responsible** for determining the commerciality of subcontracted products and services
 - See, e.g., DFARS 244.402(a) (“Contractors are required to determine whether a particular subcontract item meets the definition of a commercial item **[and] are expected to exercise reasonable business judgment in making such determinations**, consistent with . . . FAR Part 10.”)
 - Defense Procurement & Acquisition Policy Memorandum, Guidance on Commercial Item Determinations and Determination of Price Reasonableness for Commercial Items (Sept. 2, 2016) (“[P]er the Department’s policy (DFARS 244.402), **it is the prime contractor’s responsibility** to determine whether a particular subcontracted supply or service meets the [FAR 2.101] definition of a commercial item.”)
 - Defense Acquisition University, Commercial Item Determination and Pricing - Govt/Industry Perspectives; Hot Topic Training Forum (July 19, 2017) (Defense Procurement & Acquisition Policy representative states that (1) the USG should rely on prime contractor CIDs, and (2) it is the prime contractor’s responsibility to determine whether a subcontract item meets the FAR 2.101 commercial item definition)
- In addition, periodic purchasing system reviews are required to determine the adequacy of a contractor’s commercial item determination process

Commercial Item Subcontracting (cont.)

Commercial Item subcontracting is a contract between two private parties with mandatory Federal requirements flowed down from the prime contract (*see, e.g.*, FAR 52.244-6)

The prime contractor may also include a “minimal” number other clauses to satisfy its contractual obligations to the Government customer

Questions?



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Cara Wulf's practice combines both counseling and acting as an advocate on behalf of clients doing business in the government marketplace. Cara has knowledge of the government contracting process both on a federal and state level, and the specific laws, regulations, contract clauses, and dispute resolution mechanisms in this specialized area. She provides advice and guidance to clients who are in the government supply chain, either as prime contractors, subcontractors, or vendors.

