

Commercial Products and Services Contracting

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Overall Agenda

Session 1

- Overview of Commercial Products and Services
- FAR 2.101 Definitions of Commercial Products and Services

Session 2

- Basics and Procedures of Commercial Products and Services Contracting
- Commercial Item Determinations (CIDs)

Session 3

- Commercial Terms and Conditions
- Supporting Price Reasonableness

Session 4

- Other Commercial Products and Services Contracting Issues

Session 1 Agenda

- Overview of Commercial Products and Services
 - Goals of Commercial Item Acquisition
 - FAR Part 12
 - Advantages of Commercial Items
- FAR 2.101 Definitions of Commercial Products and Services
 - General Principles
 - Specific Criteria for Products and Services
 - Evolution of the Definitions

Course Instructors:

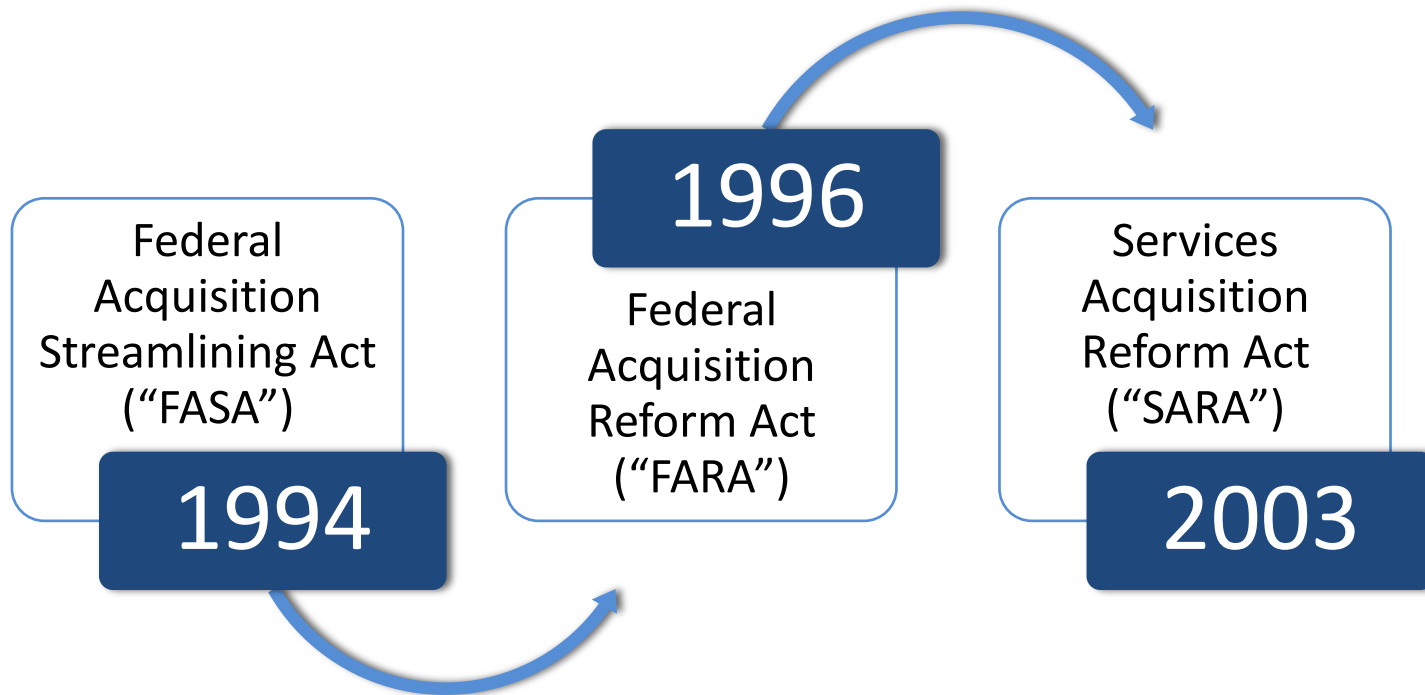
- Jason Workmaster, Miller & Chevalier
- Liz Bair, Baker Tilly

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Overview of Commercial Products and Services

Overview of Commercial Products and Services

Major Historical Procurement Reform Initiatives



Commercial Contracting—Why?

- Before Congress passed FASA in 1994, many contractors did not conduct business with the U.S. government due to demanding terms and conditions and additional costs or risks associated with government specifications.
- Potential benefits of commercial contracting
 - Innovative technologies
 - Larger selection of products
 - Faster acquisitions
 - Lower prices
 - Increased reliability and lower life-cycle costs
 - Accomplishment of related policy goals

Commercial Contracting – How?

- Preference for the acquisition of commercial items is codified at 10 U.S.C. § 3453 (DoD, DHS, and NASA) and 41 U.S.C. § 3307 (all other executive agencies).
 - “The head of an agency shall ensure that, to the maximum extent practicable ... requirements are defined so that commercial services or commercial products... may be procured to fulfill such requirements; and offerors of [commercial services and products] are provided an opportunity to compete in any procurement to fill such requirements.”
- FAR Part 12 is the primary regulation that implements these mandates, though the preference for commercial contracting is embedded throughout the FAR.
Examples:
 - FAR 6.502: “Agency and procuring activity advocates for competition are responsible for **promoting the acquisition of commercial products and commercial services...** and challenging barriers to the acquisition of commercial products and commercial services.”
 - FAR 7.102: “Agencies shall perform acquisition planning and conduct market research for all acquisitions in order to **promote and provide for acquisition of commercial products or commercial services... to the maximum extent practicable.**”
 - FAR 10.001: “Agencies shall... **use the results of market research to determine if commercial products or commercial services... are available that (A) Meet the agency’s requirements;** (B) Could be modified to meet the agency’s requirements; or (C) Could meet the agency’s requirements if those requirements were modified to a reasonable extent.”

FAR Part 12 Overview and Policy

- FAR Part 12 prescribes policies and procedures unique to the acquisition of commercial products and services
 - Implements the statutory preferences for the acquisition of commercial products and commercial services
 - Establishes acquisition policies more closely resembling those of the commercial marketplace
- FAR 12.101 Policy. Agencies shall:
 - a) Conduct market research** to determine whether commercial products, commercial services, or nondevelopmental items are available that could meet the agency's requirements;
 - b) Acquire commercial products, commercial services, or nondevelopmental items when they are available** to meet the needs of the agency; and
 - c) Require prime contractors and subcontractors at all tiers to incorporate, to the maximum extent practicable, commercial products, commercial services,** or nondevelopmental items as components of items supplied to the agency.

FAR Part 12 Highlights

- **Special procedures for solicitation, evaluation, and award (12.203)**
 - As part of evaluation, COs shall use past performance data from a wide variety of sources both inside and outside the Federal Government (12.206)
- **Required contract type:** Firm-fixed-price or fixed-price contracts with economic price adjustment except in limited circumstances (12.207)
- **Data Delivery and License Rights:** Generally, the government shall acquire only the technical data, and license rights in data, computer software, and computer software documentation, that is customarily provided to the public with a commercial item or process (12.211)
- **Limited universe of FAR provisions and clauses that are required in commercial contracts,** as well as the subset of these that may be tailored (12.3)
- **Laws that are inapplicable to, or have been modified as applicable to, commercial contracts (12.503), e.g.:**
 - Drug-Free Workplace (41 U.S.C. chapter 81)
 - Truthful Cost or Pricing Data (41 U.S.C. chapter 35 and 10 U.S.C. Chapter 271)
 - Cost Accounting Standards (41 U.S.C. chapter 15)

Commercial Products and Commercial Services Definitions

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Commercial Products Definition

Commercial Products – FAR 2.101(1): “A product, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, *and—*

- i. Has been sold**, leased, or licensed to the general public; or,
 - ii. Has been offered for sale**, lease, or license to the general public”
- **Broad definition**, does not require that item be identical to products sold commercially:
 - “There is usually no bright-line for making a CID in of a type scenarios. The comparison between the Government’s requirements and available commercial items must account for differences in the functions to be performed, performance required, and essential physical characteristics.”

DOD CI Handbook Part A

Commercial Products Definition

Evolved Products – FAR 2.101(2)

“A product that evolved from an item described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation. . . .”

- **Key Concepts** (DOD CI Handbook Part A):
 - Presumed commercial: Absent compelling evidence to the contrary, items evolving from a commercial item will be presumed to be commercial
 - The classified nature of an item does not in and of itself restrict meeting the evolved commercial product definition

Commercial Products Definition

Modified Products of a Type – FAR 2.101(3)

“A product that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, except 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.”

Commercial Products Definition

Are the modified items “of a type” customarily available in the commercial marketplace?

- How similar is the modified item to other modified items sold in the commercial marketplace?
 - If there are no similarities, the modification is likely not of a type
- Does the supplier perform similar modifications for non-government customers?
 - If not, the modification is likely not of a type
- Are there differences in the manufacturing processes used to perform the modification for the federal government and non-government customers?

Commercial Products Definition

Are the modifications “minor”?

- Modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. FAR 2.101(3)
- Consider the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages are guideposts—not conclusive. FAR 2.101(3)

Commercial Products Definition

Combination of Products – FAR 2.101(4)

- “Any combination of products meeting the requirements of paragraphs (1), (2), (3) of this definition that are of a type customarily combined and sold in combination to the general public”

Intracompany Transfers – FAR 2.101(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.”

Commercial Products Definition

Nondevelopmental Items – FAR 2.101

1. Any previously developed item of supply 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;
2. Any item described in paragraph (1) of this definition that requires only minor modification or modifications of a type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency; or
3. Any item of supply being produced that does not meet the requirements of paragraph (1) or (2) solely because the item is not yet in use.

Commercial Products Definition

Nondevelopmental Item within Commercial Product– FAR 2.101(6)

- “If the procuring agency determines the product as developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State & local governments or to multiple foreign governments.”
- Defined as:
 - Any previously developed item of supply
 - item was developed exclusively at private expense
 - and sold in substantial quantities
 - on a competitive basis
 - to multiple state and local governments or multiple foreign governments
 - Updated in 2019 based on Sec. 847 of 2018 NDAA
 - Note: sales to the federal government do not count.

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Commercial Services Definition

Ancillary Services – FAR 2.101(1)

- “Installation services, maintenance services, repair services, training services, and other services if–
 - i. Such services are procured for support of a commercial product as defined in this section, regardless of whether such services are provided by the same source or at the same time as the commercial product; and
 - ii. 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”

Commercial Services Definition

Stand-Alone Services – FAR 2.101(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.”
- Broad definition, does not require that service be identical to services sold commercially
 - “[W]e note that the FAR definition of commercial item speaks in terms of services of a ‘type’ offered and sold in the commercial marketplace under standard commercial terms and conditions; it does not require that the services be identical to what offerors provide their commercial customers.”
Crescent Helicopters, B-284734 (May 30, 2000)

Commercial Services Definition

Stand Alone Services

- “‘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.”

Commercial Services Definition

Stand Alone Services

- Services not included in a formal pricelist or catalog may be treated as commercial services if prices can be substantiated through other means.
 - *Aalco Forwarding, Inc., et al., B-277241 (“market price” for international shipments existed where rates for specific tasks could be substantiated through contracts and invoices)*
- But, “the fact that a price is included in a catalog does not make it fair and reasonable.”
- When making a determination based on commercial catalog pricing, **it is necessary to verify the services are being offered and sold competitively in the commercial marketplace to the general public in substantial quantities.** (DOD CI Handbook)

Commercial Services Definition

Stand Alone Services

- When purchasing services that are **not offered and sold competitively in substantial quantities in the commercial marketplace**, but are **of a type** of commercial services offered and sold competitively in substantial quantities in the commercial marketplace, the services may be purchased as a commercial service
 - This is permitted IF AND ONLY IF the contracting officer determines in writing “that the offeror has submitted sufficient information to evaluate...price reasonableness,” including prices paid under other government and commercial contracts. (FAR 15.403-1(c)(3)(ii))
 - Contracting officers **are not required** to treat **of a type** services as commercial unless the services are sold competitively in the marketplace.

Commercial Services Definition

Stand Alone Services

- When evaluating services, consider the following:
 - Are there similar commercial services offered and sold: (1) competitively, and (2) in substantial quantities?
 - Competition: 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 services are sold in substantial quantities?
 - The sales for similar commercial services must be based on an established catalog price or market prices.
 - DOD CI Handbook

Commercial Services Definition

Intracompany Transfers – FAR 2.101(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.”

Polling Question

Commercial Products and Commercial Services Definition

NBCR Defenses (FAR 12.102(f))

- “(1) Contracting officers may treat any acquisition of supplies or services that, as determined by the head of the agency, are to be used to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack, as an acquisition of commercial products or commercial services.
- (2) A contract in an amount greater than \$20 million, that is awarded on a sole source basis for a product or service treated as a commercial product or commercial service under paragraph (f)(1) of this section but does not meet the definition of a commercial product or commercial service as defined at FAR 2.101 shall not be exempt from—
 - i. Cost accounting standards; or
 - ii. Certified cost or pricing data requirements.”
 - Incorporates Class Deviation 2018-00018, effective August 31, 2018

Commercial Products and Commercial Services Definition

Commercially-Available-Off-The-Shelf Items – FAR 2.101

- COTS means “any item of supply (including construction material) that is—
 - i. A commercial product . . . ;
 - ii. Sold in substantial quantities in the commercial marketplace; and
 - iii. Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace. . . .”

Commercial Products and Commercial Services Definition– Key Concepts and Recent Developments

- Various interpretations for “of a type” terminology
- Final Rule, 86 FR 61017 (effective December 6, 2021)
 - Implements 2019 NDAA Section 836
 - Amends the FAR to replace “Commercial Items” with separate definitions for “Commercial Product” and “Commercial Service”
 - Changes references from “commercial items” to “commercial products or services” or only “commercial products” where appropriate
 - “Does not expand or shrink the universe of products or services the Government may procure using FAR Part 12” and does not have effect terms and conditions of FAR Part 12 procurements
- Final Rule, 87 FR 25141 (effective April 28, 2022)
 - Revises DFARS 212.102 to make it easier for DoD contracting officers to rely on past commercial sales to the government as a prior commercial item determination for a particular item
 - Updates DFARS 212.102(a)(iii) to clarify that commercial item determinations are only required for acquisitions that exceed the simplified acquisition threshold
- Overall trend towards streamlined contracting

Discussion/Questions?

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