



PUBLIC
CONTRACTING
INSTITUTE

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 2 Agenda

- Basics and Procedures of Commercial Products and Services Contracting
 - Preference for Commercial Items
 - Notable Cases
 - Procurement Methods
- Commercial Item Determinations (CIDs)
 - Documenting Commerciality
 - Market Research
 - Technical Evaluation
 - What is a CID?
 - Responsibility for Making Commercial Item Determinations

Course Instructors:

- Liz Bair, Baker Tilly
- Connor Farrell, Miller & Chevalier

Polling Question

Acquisition of Commercial Products and Services

- FAR 10.001(a)(2) – The head of an agency shall conduct market research appropriate to the circumstances-
 - Before developing new specifications for a procurement by that agency;
 - Before soliciting bids or proposals for a contract in excess of the simplified acquisition threshold; and
 - Before awarding a task order or delivery order in excess of the simplified acquisition threshold.
- FAR 10.001(a)(3) – The head of an agency shall use the results of market research to determine whether there are commercial products or commercial services or, to the extent that commercial products suitable to meet the agency’s needs are not available, nondevelopmental items other than commercial products that are available that-
 - Meet the agency’s requirements;
 - Could be modified to meet the agency’s requirements; or
 - Could meet the agency’s requirements if those requirements were modified to a reasonable extent.
- FAR 11.002(a)(2) – “To the maximum extent practicable, ensure that acquisition officials-”
 - State requirements with respect to an acquisition of supplies or services in terms of:
 - Functions to be performed;
 - Performance required; or
 - Essential physical characteristics
 - Define requirements in terms that enable and encourage offerors to supply commercial products or commercial services, or, to the extent that commercial products suitable to meet the agency’s needs are not available, nondevelopmental items, in response to the agency solicitations;
 - Provide offerors of commercial products, commercial services, and nondevelopmental items an opportunity to compete in any acquisition to fill such requirements;

FAR Part 12 – Acquisition of Commercial Products and Commercial Services

- FAR 12.102(a) – “shall be used for the acquisition of supplies or services that meet the definitions of commercial product or commercial service.”
- FAR 12.203 – contracting officers “shall use the policies unique to the acquisition of commercial products and commercial services prescribed in this part in conjunction” with the process for “solicitation, evaluation and award” described in FAR Part 13, Part 14, or Part 15.
- FAR 12.204 – contracting officer “shall use the Standard Form 1449” if:
 - The acquisition is expected to exceed the acquisition threshold
 - A paper solicitation or contract is being issued
 - Procedures at 12.603 are not being used
- “Consistent with the requirement at 5.203(a) and (h), the contracting officer may allow fewer than 15 days before issuance of the solicitation.”

FAR Part 12 – Acquisition of Commercial Products and Commercial Services

- FAR 12.205 – Offers – “where technical information is necessary for evaluation of offers, agencies should, as part of market research, review existing product literature generally available in the industry to determine its adequacy for purposes of evaluation.”
 - “Contracting officers should allow offerors to propose multiple offers that will meet a Government need in response to solicitations for commercial products or commercial services.”
 - The contracting officer “may allow fewer than 30 days response time for receipt of offers for commercial products or commercial services” with the exception of contracts covered by the WTO Government Procurement Agreement or Free Trade Agreement.
- FAR 12.206 – “Past performance should be an important element of every evaluation and contract award for commercial products or commercial services.”
- FAR 12.207 – Contract Type – “agencies shall use firm-fixed-price contracts or fixed-price contracts with economic price adjustment for the acquisition of commercial products or commercial services,” except for certain scenarios.

FAR Part 12 – Acquisition of Commercial Products and Commercial Services

- FAR 12.301(a) – “contracts for the acquisition of commercial products or commercial services shall, to the maximum extent practicable, include only those clauses” required by law or “[d]etermined to be consistent with customary commercial practice.”
- FAR 12.302(c) – “shall not... include any additional terms or conditions in a solicitation or contract for commercial products or commercial services in a manner that is inconsistent with customary commercial practice for the item being acquired unless a waiver is approved in accordance with agency procedures.”

Notable Cases – Acquisition of Commercial Products and Commercial Services

- Palantir USG, Inc., v. United States, No. 2017-1465 (Sept. 13, 2018)
 - Army sought to modernize the DCGS-A and after market research, it determined that it could not be procured as a commercial product
 - Palantir filed a pre-award protest – claimed that it could meet the solicitation requirements with its products that qualified as commercial items
 - Fed Circuit explained that the record included multiple instances where the Army had notice of a commercial item to satisfy the upgrade.
 - “the Army’s procurement efforts were focused on a developmental approach,” rather than the feasibility of Palantir’s products.

United States Court of Appeals for the Federal Circuit

PALANTIR USG, INC.,
Plaintiff-Appellee

v.

UNITED STATES,
Defendant-Appellant

2017-1465

Appeal from the United States Court of Federal
Claims in No. 1:16-cv-00784-MBH, Judge Marian Blank
Horn.

Decided: September 7, 2018
SEALED OPINION ISSUED: September 7, 2018
PUBLIC OPINION ISSUED: September 13, 2018*

Notable Cases – Acquisition of Commercial Products and Commercial Services

- CGI Federal, Inc., v. United States, No. 2014-5143 (March 10, 2015).
 - Whether FAR 12.302(c) prohibits the tailoring of solicitations for commercial items in a manner inconsistent with customary commercial practice.
 - Pertained to existing FSS (services) contracts
 - Fed Circuit explained that FAR Part 12 applied to solicitation because it provides that “it shall be used for the acquisition” of commercial items.
 - Concluded that purchasing the services at issue qualified as such an acquisition
 - CGI recognized that terms in RFQs under FSS program must be consistent with FAR Part 12.

United States Court of Appeals for the Federal Circuit

CGI FEDERAL INC.,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2014-5143

Appeal from the United States Court of Federal Claims in No. 1:14-cv-00355-MCW, Judge Mary Ellen Coster Williams.

Decided: March 10, 2015

Other Procurement Methods

- Micro-purchases (FAR subpart 13.2)
- Simplified Acquisition (FAR part 13)
- Task Orders and Delivery Orders under Indefinite-Delivery Contracts (FAR subpart 16.5)
- Subcontracts under non-commercial item prime contracts
- Federal Supply Schedule Contracts (FAR subpart 8.4)
 - Will be covered in Session #4

Source: SDMP 1997

Other Procurement Methods

- Micro-purchase (FAR subpart 13.2)
 - Especially simplified procedures for very small purchases under micropurchase threshold (“MPT”)
 - No competition necessary if agency considers price fair and reasonable (generally no verification)
 - FAR clauses not required, but permitted
 - Use of purchase cards
- FAR Final Rule effective 8/31/20 - \$10,000 now listed in FAR Part 2

Source: SDMP 1997

Other Procurement Methods

- Simplified Acquisition Procedures (FAR part 13)
 - Reduces admin costs and increases efficiency
 - Applies to purchases under Simplified Acquisition Threshold (“SAT”) = \$250,000
 - For commercial products and commercial services, can be used up to \$7.5M
 - Set aside for small business by default if between MPT and SAT, unless no reasonable expectation of two competitive SB offers
- For commercial products and services:
 - Part 12 commercial item procedures apply
 - Competition “to the maximum extent practicable”
 - Sole source if “circumstances... deem only one source reasonably available”
 - Evaluation methods focus on efficiency

Source: SDMP 1997

Other Procurement Methods

- Task Orders and Delivery Orders under Indefinite-Delivery Contracts (FAR subpart 16.5)
 - Base contracts (often multiple awards) established under FAR Part 15
 - Agencies conduct mini-competitions among contract holders for task or delivery orders (if over SAT)
 - Requirements vary by \$, similar to other procurements

Source: SDMP 1997

Other Procurement Methods

- Subcontracts for Commercial Items
 - Key opportunities for some commercial item contractors are at the prime contract level
 - Many commercial items are components, sub-systems, equipment, or supplies used by prime contractors
 - Prime contractors are required to incorporate commercial items as components to the maximum extent practicable (FAR 52.244-6)
 - Subcontractors providing commercial items are subject to some mandatory flowdowns, but generally have fewer compliance burdens than non-commercial contracts

Source: SDMP 1997

Polling Question

Documenting Commerciality

Market Research

Technical Reviews

Commercial Item Determination

Market Research

- Performed to facilitate source selection and render a price reasonableness determination.
- Facilitates compliance with prime contract requirements for commercial products and commercial services, socio- economic programs/goals
- ***Market research is a continuous process for gathering data on product characteristics, suppliers' capabilities and the business practices that surround them—plus the analysis of that data to make acquisition decisions.***
- This requires one to collect and analyze information about the market that subsequently can be used to determine whether the need can be met by products or services available in the commercial market; ***whether commercial practices regarding customizing, modifying products or tailoring services are available to meet customer needs***; what are the customary terms and conditions, including warranty, ***buyer financing***, and discounts under which commercial sales are made; and whether the distribution and logistics support capabilities of potential suppliers are sufficient to meet the needs of the government.

Source: SDMP 1997

Market Research (cont'd)

- To elaborate, market research is a continuous process of gathering data on *business and industry trends*, characteristics of products and services, suppliers' capabilities, and related business practices. The data resulting from market research are analyzed and *used to make informed decisions about whether needs can be met by commercial products or services*. When making such decisions, several factors are considered:
 - Degree to which commercial practices allow the products or services to be customized or tailored to meet needs;
 - Terms and conditions, such as warranties, discounts, and customer support, under which commercial sales are made;
 - Ability of potential suppliers' distribution and logistics support systems to meet needs.
- Market research information can be used
 - to shape the acquisition strategy;
 - to determine the type and content of the product description or statement of work; and
 - to develop the support strategy, the terms and conditions included in the contract, and the evaluation factors used for source selection.

Market Research (cont'd)

- Additional Objectives of Market Research
 - Identifying market trends that affect the requirement;
 - Determining how other activities are acquiring products/services similar to the requirement;
 - *Identifying leverage you may have in the market*
 - *Determining the extent of competition and small business opportunities*
 - *Identifying whether this product/service can be obtained through commercial practices*

Market Research (cont'd)

- To determine and identify the scope and extent of additional research needed, consider the following:
 - Information already in hand, including personal knowledge of the market from prior requirements and the findings of recent research on similar requirements
 - Interviewing the customer(s) about the current contract
 - Identifying information deficiencies
 - One-on-one Meetings with industry
 - Submit a Request for Information (RFI) or Sources Sought to SAM.gov
- Plan to collect additional market information (i.e., when and how) during the acquisition planning, pre-solicitation, solicitation, and evaluation phases

Market Research (cont'd)

- Once all data is collected, analyze the information received. Categorizing the information received is recommended, i.e., past performance, requirements, competition, etc. Identify the following during the analysis:
 - How will the requirement align to the market?
 - What are the opportunities for competition and/or small business considerations?
 - Did your market research reveal any new emerging technologies?
 - What market trends (supply/demand) did the market research reveal and how can the information leverage the trend through requirements building or negotiations?
- Document analysis of the data, the findings and proposed strategy for acquiring the product or services. The amount of detail in the report is dependent upon the complexity, criticality, and size of the acquisition.

Market Research (cont'd)

- Consistent with policy in FAR 12.101, FAR 10.002 requires federal agencies to conduct market research to determine—
 - Whether the Government's needs can be met by items "of a type customarily available in the commercial marketplace," or through modification of such items;
 - "Customary practices regarding customizing, modifying or tailoring of items to meet customer needs";
 - Customary terms and conditions under which commercial sales are made.
- In fact, FAR 10.002 states that if initial market research indicates commercial or nondevelopmental items might not be available to satisfy agency needs, agencies must "reevaluate the need . . . **and determine whether the need can be restated to permit commercial products, commercial services, or nondevelopmental items** to satisfy the agency's needs."

Market Research (cont'd)

- FAR recognizes that “[t]he extent of market research will vary, depending on such factors as urgency, estimated dollar value, complexity, and past experience,” and may include:
 - Contacting knowledgeable individuals in Government and industry regarding market capabilities to meet requirements.
 - Reviewing the results of recent market research undertaken to meet similar or identical requirements.
 - Publishing formal RFIs. Database of contracts at **<https://www.contractdirectory.gov/contractdirectory/>**.
 - Obtaining source lists of similar items from other contracting activities or agencies, trade associations or other sources.
 - Reviewing catalogs and other generally available product literature.
 - Conducting interchange meetings or holding pre-solicitation conferences.
 - Querying the Government-wide.

Market Research (cont'd)

- Other sources of information to assist in market research, including—
 - Industry Days
 - Trade Shows
 - FPDS/SAM.gov
 - Schedules e-Library
 - DOD Commercial Item Handbook
 - Overview of market research process, techniques
 - Market research questionnaire, sample reports
 - Market research resources

Market Research (cont'd)

- In summary, *done early* market research makes it possible to compare requirements to the capabilities of the commercial market and to determine:
 - Availability of product/services to meet the requirement 'as is'
 - Ability of suppliers to modify their products to meet the requirements
 - If requirement is or can be made flexible to permit purchase of a commercial product, a commercial service, or nondevelopmental item
- *Done well*, market research can be used for 18 months so long as it continues to be current, accurate and relevant
- Document, Document, Document

Polling Question

Technical Evaluations

15.404-1 -- Proposal Analysis Techniques.

b) Price analysis for commercial and non-commercial items.

(2) The Government may use various price analysis techniques and procedures to ensure a fair and reasonable price. Examples of such techniques include, but are not limited to the following:

(i) Comparison of proposed prices received in response to the solicitation. Normally, adequate price competition establishes a fair and reasonable price (see **15.403-1(c)(1)(i)**).

(ii) Comparison of proposed prices to historical prices paid, whether by the Government or other than the Government, for the same or similar items. This method may be used for commercial products or commercial services including those “of a type” or requiring minor modifications.

(A) The prior price must be a valid basis for comparison. If there has been a significant time lapse between the last acquisition and the present one, if the terms and conditions of the acquisition are significantly different, or if the reasonableness of the prior price is uncertain, then the prior price may not be a valid basis for comparison.

(B) The prior price must be adjusted to account for materially differing terms and conditions, quantities and market and economic factors. For similar items, the contracting officer must also adjust the prior price to account for material differences between the similar item and the item being procured.

(C) Expert technical advice should be obtained when analyzing similar items, or commercial products or commercial services that are “of a type” or requiring minor modifications, to ascertain the magnitude of changes required and to assist in pricing the required changes.

Technical Evaluations (cont'd)

15.404-1 -- Proposal Analysis Techniques (cont'd)

(e) Technical analysis.

(1) The contracting officer **should request** that personnel having specialized knowledge, skills, experience, or capability in engineering, science, or management perform **a technical analysis** of the proposed types and quantities of materials, labor, processes, special tooling, equipment or real property, the reasonableness of scrap and spoilage, and other associated factors set forth in the proposal(s) in order to determine the need for and reasonableness of the proposed resources, assuming reasonable economy and efficiency.

(2) At a minimum, the technical analysis should examine the types and quantities of material proposed and the need for the types and quantities of labor hours and the labor mix. Any other data that may be pertinent to an assessment of the offeror's ability to accomplish the technical requirements or to the cost or price analysis of the service or product being proposed should also be included in the analysis.

(3) The contracting officer **should request technical assistance** in evaluating pricing related to items that are "similar to" items being purchased, or commercial products or commercial services that are "of a type" or requiring minor modification, to ascertain the magnitude of changes required and to assist in pricing the required changes.

Technical Evaluations (cont'd)

- PGI 215.404-1 Proposal analysis techniques.
 - (e) **Technical analysis.**
 - Requesting technical assistance is particularly important when evaluating pricing related to items that are “similar to” items being purchased or commercial items that are “of a type” or require “minor modifications.”
 - Technical analysis can assist in pricing these types of items by identifying any differences between the item being acquired and the “similar to” item.
 - In particular, the technical review can assist in evaluating the changes that are required to get from the “similar to” item, to the item being solicited, so the contracting officer can determine sufficient price/cost analysis techniques when evaluating that the price for the item being solicited is fair and reasonable.

Technical Evaluations (cont'd)

- 252.215-7009 Proposal Adequacy Checklist.
 - EXCEPTIONS TO CERTIFIED COST OR PRICING DATA
- 18. Has the offeror submitted an exception to the submission of certified cost or pricing data for commercial items proposed either at the prime or subcontractor level, in accordance with provision 52.215-20?
 - a. Has the offeror specifically identified the type of commercial item claim (FAR 2.101 commercial item definition, paragraphs (1) through (8)), and the basis on which the item meets the definition?
 - b. For *modified commercial items* (FAR 2.101 commercial item definition paragraph (3)); did the offeror classify the modification(s) as either—
 - i. A modification of a type customarily available in the commercial marketplace (paragraph (3)(i)); or
 - ii. A minor modification (paragraph (3)(ii)) of a type not customarily available in the commercial marketplace made to meet Federal Government requirements not exceeding the thresholds in FAR 15.403-1(c)(3)(iii)(B)?
 - c. For proposed commercial items “of a type”, or “evolved” or modified (FAR 2.101 commercial item definition paragraphs (1) through (3)), **did the contractor provide a technical description of the differences between the proposed item and the comparison item(s)?**

Technical Evaluations (cont'd)

Practical Example No. 3: Subparagraph 3 Preliminary market research is inconclusive as to commerciality

- Objective: When preliminary market research is inconclusive as to commerciality, it is incumbent on the offeror to provide substantiation for a commercial item determination.
- Background: The contracting officer with the assistance of technical staff members and DCMA CIG industrial engineers reviewed the product specification sheet, and determines there are modifications between the Government's requirements and commercially available products to make the part withstand severe vibrations. The contracting officer cannot determine whether the modifications are minor, as defined in FAR 2.101(3)(ii).
- Bottom Line
 - Get written input from the "Experts"
 - Document conclusion of the "Decision-maker"

Commercial Item Determinations (CID)

“Is it commercial?”

Commercial Item Determinations (CIDs)

- **Why CIDs?**
 - Statutory and Policy preference for commercial products and commercial services - 41 U.S.C. 3307
 - To the maximum extent practicable, procurement of supplies or services should be stated in terms of
 - functions to be performed;
 - performance required; or
 - essential physical characteristics;
 - Requirements should be defined so that commercial products or commercial services are procured, or if not available, nondevelopmental items
 - Offerors of commercial products, commercial services, and nondevelopmental items are provided an opportunity to compete in any procurement to fill those requirements

Commercial Item Determinations (CIDs)

- **Why CIDs? Regulation**
 - DFARS 212.102(a)(iii) Commercial Item Determination
 - When using FAR part 12 procedures for acquisitions exceeding the simplified acquisition threshold, the contracting officer shall
 - Determine in writing that the acquisition meets the commercial product or commercial service definition in FAR 2.101
 - Include the written determination in the contract file
 - FAR 15.403-1(c)(3)
 - The contracting officer determines if an item meets the commercial product or commercial service definition in FAR 2.101

Commercial Item Determinations (CIDs)

- **Why CIDs? Regulation**
 - DFARS Subpart 244.4 Subcontracts for Commercial Items
 - DFARS 244.402 Policy Requirements
 - Contractors shall determine whether a particular subcontract item meets the definition of a commercial item. This requirement does not affect the contracting officer's responsibilities or determinations regarding exceptions from certified cost or pricing data requirements made under FAR 15.403-1(c)(3).
 - Contractors are expected to exercise reasonable business judgment in making such determinations, consistent with the guidelines for conducting market research in FAR part 10.
 - A CPSR review criterion

Commercial Item Determinations (CIDs)

- **What is a CID?** Full and adequate documentation of the market research and rationale supporting a conclusion that the commercial product or commercial service definition in FAR 2.101 has been satisfied.
- CID is the first part of a two-step process for evaluating commercial products or services, and it is the foundation for effective commercial pricing. (DoD CIG Handbook January 2018)
- Both Government agencies and primes use forms/templates for documenting the CID
- After the CID is completed, the next step is to answer the question: **“Is the price fair and reasonable?”**

Commercial Item Determinations (CIDs)

- Commercial Item Determination (cont'd)
 - **SUBPART 212.1—ACQUISITION OF COMMERCIAL ITEMS – GENERAL** (*Revised October 1, 2020*)
 - 212.102 Applicability.
 - (a)(i) When using FAR part 12 procedures for acquisitions exceeding the simplified acquisition threshold, except for acquisitions of cyber, nuclear, biological, chemical, or radiological attack made pursuant to FAR 12.102(f)(1), the contracting officer shall—
 - (A) *Determine in writing that the acquisition meets the commercial product or commercial service definition in FAR 2.101;*
 - (B) *Include the written determination in the contract file; and*
 - (C) *Obtain approval at one level above the contracting officer when a commercial item determination relies on subsections (1)(ii), (3), (4), or (6) of the “commercial product” definition or paragraph (2) of the “commercial service” definition at FAR 2.101.*
 - (D) Follow the procedures at [PGI 212.102](#)(a)(iii).

Commercial Item Determinations (CIDs)

PGI 212.102 Acquisition of Commercial Items - Applicability.

(a)(iii)(A) Commercial Item Determination

(1) Contracting officers shall *ensure that contract files fully and adequately document the market research and rationale supporting a conclusion that the commercial product or commercial service definition in FAR 2.101 has been satisfied.*

(2) Particular care must be taken to document determinations involving “modifications of a type customarily available in the marketplace,” and items only “offered for sale, lease, or license to the general public,” but not yet actually sold, leased, or licensed. In these situations, the documentation must clearly detail the particulars of the modifications and sales offers. When such items lack sufficient market pricing histories, additional diligence must be given to determinations that prices are fair and reasonable as required by FAR Subpart 15.4.

(a)(iii)(D) Prior Commercial Item Determination

(1) If a prior DoD commercial item determination for the same item is made by a military department, defense agency, or another component of DoD, contracting officers may presume that the prior commercial item determination shall serve as a determination for subsequent procurements of such item, unless the process is followed to overturn the prior determination

Commercial Item Determinations (CIDs)

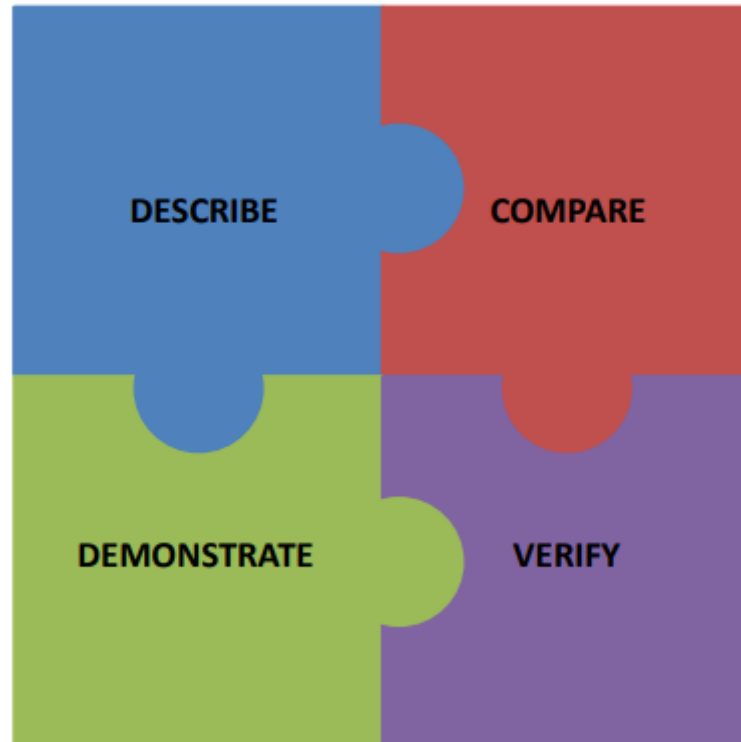
DFARS Case 2020-D033

- Contract for an item using FAR Part 12 Procedures may serve as prior CID
- Additional changes/clarifications
 - \$1M CID threshold is removed – now required above SAT (\$250k)
 - Section DFARS part 212.70 (HCA overturning procedures) is removed, however this language is still incorporated into DFARS part 212.102.
 - Exception: FAR part 12 contracts that used FAR part 12 procedures for items that were only “treated as commercial items” cannot be relied upon as a prior CID.
 - Defense against cyber, nuclear, biological, chemical or radiological attack
 - Nontraditional defense contractors (NTDC)

Source: DCMA April 2023

Commercial Item Determinations (CIDs)

Source: DCMA April 2023



Commercial Item Determinations (CIDs)

- PGI 212.102(v)
 - See the Department of Defense Guidebook for Acquiring Commercial Items, [Part A: Commercial Item Determination](#), for detailed guidance and practical examples on improving the consistency and timeliness of commercial item determinations to include a template for new commercial item determinations and information about how to obtain advisory assistance from the DoD cadre of experts in the Defense Contract Management Agency (DCMA) Commercial Item Group (CIG) via email at commercial@dcma.mil or at <http://www.dcma.mil/commercial-item-group/>

- DCMA CPSR Guidebook
 - When reviewing the contractor's policies and procedures the CPSR Analyst should ensure that the contractor's policy, at a minimum, requires:
 - A written commercial item determination for both commercial supplies and services;
 - Market research that fully supports the exercise of reasonable business judgement in the determination whether a particular item or service meets the definition of a commercial item, and whether use of commercial item is appropriate in accordance with FAR 10.002(c) and (d);
 - Flow downs

Commercial Item Determinations (CIDs)

- **15.408 Solicitation provisions and contract clauses.**

(l) *Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data.* Considering the hierarchy at [15.402](#), the contracting officer shall insert the provision at [52.215-20](#), Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, in solicitations if it is reasonably certain that certified cost or pricing data or data other than certified cost or pricing data will be required. This provision also provides instructions to offerors on how to request an exception from the requirement to submit certified cost or pricing data.

- **52.215-20 -- Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data (Nov 2021)**

(a) *Exceptions from certified cost or pricing data.*

(2) The offeror grants the Contracting Officer or an authorized representative the right to examine, at any time before award, books, records, documents, or other directly pertinent records to verify any request for an exception under this provision, and the reasonableness of price. For items priced using catalog or market prices, or law or regulation, access does not extend to cost or profit information or other data relevant solely to the offeror's determination of the prices to be offered in the catalog or marketplace.

Commercial Item Determinations (CIDs)

- **52.215-20 -- Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data (Oct 2010)**

(a) Exceptions from certified cost or pricing data.

(1) In lieu of submitting certified cost or pricing data, offerors may submit a written request for exception by submitting the information described in the following paragraphs. The Contracting Officer may require additional supporting information, but only to the extent necessary to determine whether an exception should be granted, and whether the price is fair and reasonable...

(ii) Commercial product and commercial service exception. For a commercial product or commercial service exception, the offeror shall submit, at a minimum, information on prices at which the same item or similar items have previously been sold in the commercial market that is adequate for evaluating the reasonableness of the price for this acquisition. May include --

(A) **For catalog items**, a copy of or identification of the catalog and its date, or the appropriate pages for the offered items, or a statement that the catalog is on file in the buying office to which the proposal is being submitted. Provide a copy or describe current discount policies and price lists (published or unpublished), *e.g.*, wholesale, original equipment manufacturer, or reseller. Also explain the basis of each offered price and its relationship to the established catalog price, including how the proposed price relates to the price of recent sales in quantities similar to the proposed quantities;

(B) **For market-priced items**, the source and date or period of the market quotation or other basis for market price, the base amount, and applicable discounts. In addition, describe the nature of the market;

(C) For items included on an active Federal Supply Service Multiple Award Schedule contract, proof that an exception has been granted for the schedule item.

Commercial Item Determinations (CIDs)

- **52.215-21 -- Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data -- Modifications (Nov 2021)**
- (B) For a commercial product and commercial service exception, the Contractor shall provide, at a minimum, information on prices at which the same item or similar items have previously been sold that is adequate for evaluating the reasonableness of the price of the modification. Such information may include --
 - (1) **For catalog items**, a copy of or identification of the catalog and its date, or the appropriate pages for the offered items, or a statement that the catalog is on file in the buying office to which the proposal is being submitted. Provide a copy or describe current discount policies and price lists (published or unpublished), e.g., wholesale, original equipment manufacturer, or reseller. Also explain the basis of each offered price and its relationship to the established catalog price, including how the proposed price relates to the price of recent sales in quantities similar to the proposed quantities.
 - (2) **For market-priced items**, the source and date or period of the market quotation or other basis for market price, the base amount, and applicable discounts. In addition, describe the nature of the market.
 - (3) For items included on an active Federal Supply Service Multiple Award Schedule contract, proof that an exception has been granted for the schedule item.
- **Applies the same criteria for initial awards to modifications**

Commercial Item Determinations (CIDs)

- Services of a Type - FAR 2.101

- 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.

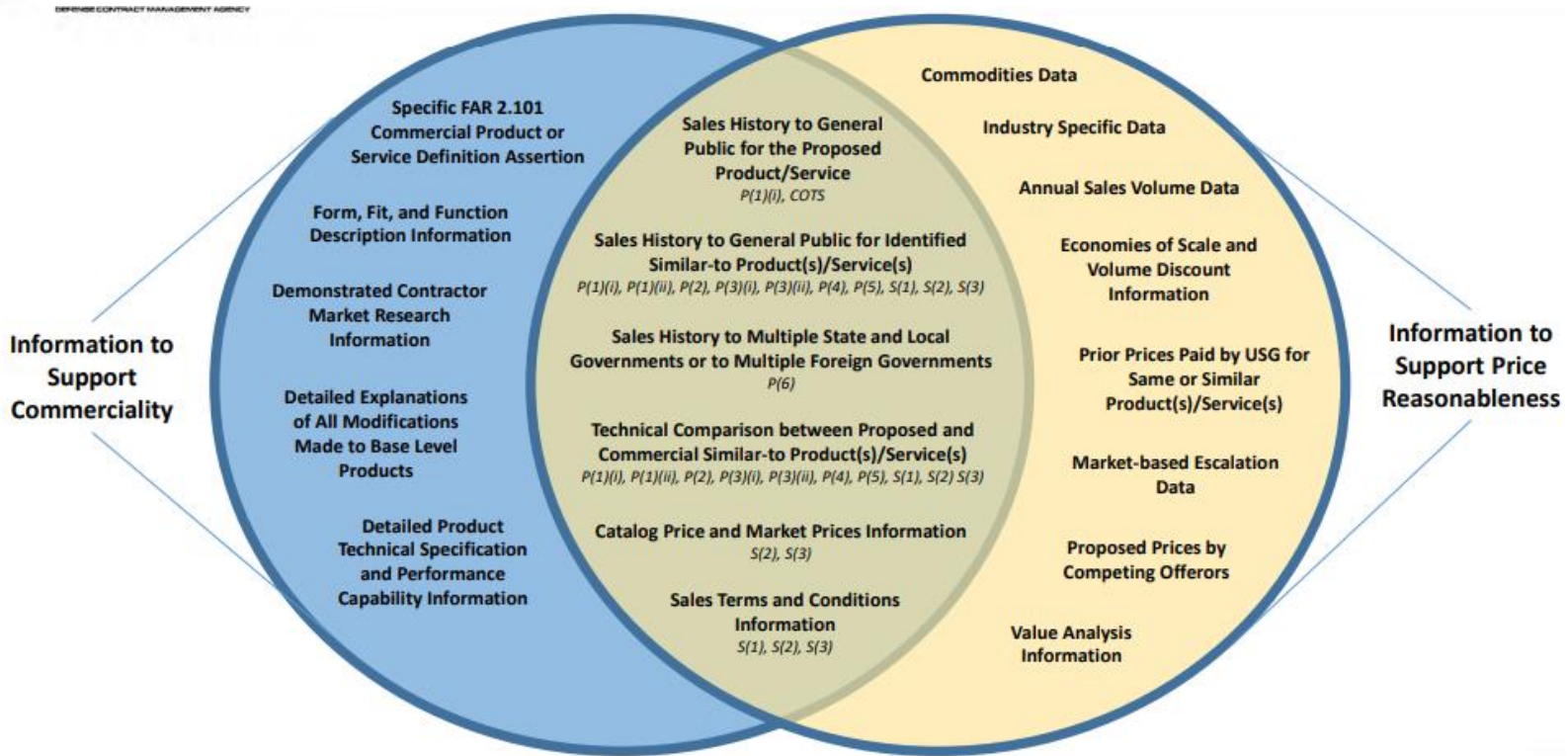
Commercial Item Determinations (CIDs)

- Most critical element of this definition of commercial services is that the **service must be offered and sold competitively, in substantial quantities, in the commercial marketplace.**
 - 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.
 - The mere fact that a service appears in a catalog does not make it commercial.
- **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 item.
 - This is permitted IF AND ONLY IF the contracting officer determines in writing that the offeror has submitted sufficient information to evaluate the reasonableness of the price of such services using price analysis.
 - Contracting officers are not required to treat “of a type” services as commercial unless the item is sold competitively in the market place.

Related CID Guidance

- **DCAA Audit Guidance** (PSP 730.4.A.2/2006-001, Sept. 29, 2011)
 - “An adequate CID clearly identifies and supports how the item meets the commercial item definition in FAR 2.101. Generally, support for a CID would include market analysis and sales history. . . . [A]udit teams should avoid excessive reliance on past conclusions as conditions may have changed (e.g., the item may have been substantially modified). Technical assistance should also be requested, if necessary, to support the review of the prime contractor’s analysis for aspects such as items that are ‘of a type,’ ‘evolved,’ or ‘modifications.’”
 - “If either the CID or cost/price analysis is not complete or is inadequate, the proposed amount, less any questioned costs, should be classified as unsupported.”
- **Documentation Pertaining to Commercial Item Determinations** (10 U.S.C. § 3456)
 - In making a determination, a DoD CO may “request support from the Director of the Defense Contract Management Agency, the Director of the Defense Contract Audit Agency, or other appropriate experts in the Department to make a determination whether a product or service is a commercial product or commercial service; and consider the views of appropriate public and private sector entities.”

Commerciality and Price Reasonableness



– Source: DCMA April 2023

Polling Question

Responsibility for Making Commercial Item Determinations

Prime Contracts

- Contracting Officers have broad discretion to determine commerciality.

Subcontracts

- Responsibility for determining commerciality generally rests with the prime contractor. (DFARS 244.402)

Responsibility for Making Commercial Item Determinations

- Major Weapons Systems (DFARS 234.7002) (*Revised June 5, 2020*)
 - “Major weapon system” means a weapon system acquired pursuant to a major defense acquisition program
 - A major weapons system may be acquired as a commercial item only if the Secretary of Defense determines that—
 - The major weapon system is a commercial item as defined in FAR 2.101;
 - Such treatment is necessary for national security; and,
 - The congressional defense committees are notified at least 30 days before such treatment or acquisition occurs.
 - The authority of the Secretary of Defense to make a determination may not be delegated below the level of the Deputy Secretary of Defense.

Responsibility for Making Commercial Item Determinations

- Major Weapons Systems (DFARS 234.7002)
 - *Subsystems*
 - A subsystem of a major weapon system (other than a commercially available off-the-shelf item) shall be treated as a commercial item if—
 - The subsystem is intended for a major weapon system that is being acquired, or has been acquired, under procedures established for the acquisition of commercial items in accordance with paragraph (a) of this section; or
 - The contracting officer determines in writing that the subsystem is a commercial item.

Responsibility for Making Commercial Item Determinations

- Major Weapons Systems (DFARS 234.7002)
 - *Components and spare parts*
 - A component or spare part for a major weapon system (other than a commercially available off-the-shelf item) may be treated as a commercial item only if—
 - The component or spare part is intended for a major weapon system or a subsystem that is being acquired as a commercial item; or
 - The contracting officer determines in writing that the component or spare part is a commercial item.
 - This written determination only applies to components and spares acquired by DoD—
 - “Through a prime contract or a modification to a prime contract,” or
 - “Through a subcontract under a prime contract on which the prime contractor adds no, or negligible, value.”

Discussion/Questions?

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