



# FORVIS

## **GovCon101 - Commercial product and service determination**

# Government Commercial Item Objectives

- The US Government has always expressed a strong preference for acquisition of commercial items (includes products and services per FAR Part 2.101 definitions)
- Vast majority of USG acquisition actions are commercial (\$ are a different story)
- FASA/FARA reforms of 1994-95 reemphasized USG preference for commercial items
- Renewed emphasis on acquiring commercial items was legislated in 2013 NDAA
  - Further reinforcement came from DoD leadership and Congressional interest
  - Caveats – Perceived pricing horror stories undercut that support

# Access to Commercial Markets and Technology

- While FAR definition of commercial items remains unchanged since FARA/FASA, there was a strong impetus from Congress and DoD leadership to buy commercial products and services and apply a wide aperture interpretation
- Renewed emphasis on Government (particularly DoD) access to commercial markets and technology is considered essential to national security
  - Cutting edge technology now arises from market demands rather than DoD driving
  - Enables access to the same technology asymmetric competitors have
  - Necessary to counter rapidly rising near peer competitors
  - Eliminates/reduces lengthy technology development process
- Evolution of Government focus and methodology
  - DoD, in particular, has wrestled with issues of commercial definitions for many products and services

# Why Is a Commercial Classification Important?

- Commercial products and services are exempt from many federal acquisition rules; Including these requirements:
  - Generally, but not in all cases, providing the Government or prime contractor with data on cost
  - Certifying cost or pricing data
  - When costs are transferred between company segments, costs must be transferred at incurred cost per FAR 31.205-26
- Selling products and services commercially allows companies to maintain margins achieved in their commercial marketplaces
- Using commercial acquisition procedures can accelerate contracting process

# Renewed Emphasis on Buying Commercial Items

- 2013 NDAA legislation mandated DoD establish a cadre to assist contracting officers in the sometimes difficult decisions on commercial item determinations and pricing
  - Whether or not a product or service proposed by a prime or subcontractor is commercial
  - Arriving at a fair and reasonable price
  - Assist in Contractor Purchasing System Reviews (CPSRs)
- This cadre is now well established with approximately 60 personnel
- Overwhelming portion of initial assist effort was devoted to subcontractor assertions reflected in prime contractor proposals
- Now able to make determinations if delegated by DoD customers

# Evolution of Government Focus and Methodology

- Despite substantial experience in parts of DoD, the workforce is generally trained and oriented toward cost based contracting
- Early DoD decision to train a small cadre, rather than attempt to infuse entire workforce with new ethos
  - Mixed results....authority for Commercial determinations still largely lies with PCOs
  - DCMA cadre was resistant to culture change, although over 90% of actions they reviewed resulted in commercial item determinations in first three years
- Default contracting officer posture reverts to comfort zone of requesting cost data to fulfill fundamental requirement of determining price paid fair and reasonable

# Definitional Challenges

- As previously mentioned, FAR definitions have remained unchanged for over 25 years
- The “of-a-type” language is still not well understood or applied consistently by the DoD workforce; Industry also wrestles with these issues
  - It is often interpreted “in the eye of the beholder”
  - Sales information is sometimes sensitive and not releasable pursuant to contractual agreements
  - The Government’s apprehension when making these decisions can drive quests for ever more data
  - Prime contractors are concerned with maintaining Approved Purchasing System
- Short overview of the definitional framework follows

# Commercial product means—

(1) **A product, other than real property, that is of a type customarily used by the general public or by nongovernmental 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;**

(2) A product that evolved from a product 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;

(3) A product that would satisfy a criterion expressed in paragraph (1) or (2) of this definition, except 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 made to meet Federal Government requirements. “Minor modifications” means 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. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;

(4) Any combination of products meeting the requirements of paragraph (1), (2), or (3) of this definition 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; or

(6) A nondevelopmental item, if the procuring agency determines the product was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments or to multiple foreign governments.



# Commercial service means—

## **(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;

## **(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. For purposes of these services—**

(i) 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; and

(ii) 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; or

## **(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.**

# Available Resources

- DoD Guidebooks represent the latest and best insight on DoD's thinking on the definitional framework and best practices to document
  - Guidebooks are located at DoD's Acquisition & Sustainment home page
    - + Part A addresses commercial product and services determinations
    - + Part B addresses pricing
- Workforce training to further emphasize and institutionalize preference for commercial items and definitional understandings is valuable
- Encourage practitioners to read the guidebooks
  - Offer practical guidance on how to best document and support commercial item justifications and proposed pricing
  - The guidebooks also provide foundational language for interpreting the key regulatory terms applicable to commercial items

# Guidebook Extracts

- DoD Guidebooks provide excellent references and guidance on commercial products and services
  - Commercial item procurement is more important than ever
  - Law directs a preference for commercial item procurement
  - Access to commercial items and practices brings significant benefit to DoD
  - The statutory definition for commercial items is broad
  - Requirements must be defined in terms that enable and encourage offerors to supply commercial items
  - Market research ... should not be confined either to initial efforts or to determine price reasonableness
  - Failing to refresh the results of market research may result in a lack of information and market insight that will prevent the Government from optimizing the acquisition
  - DoD should “...have a long-term view of affordability and savings rather than a short-term view based solely on immediate cost-avoidance, schedule, and funding limitations”

# When Proposing:

- As a Prime or as a Subcontractor (or Intracompany support)
  - Clearly assert that products or services being offered are commercial – cite the specific FAR 2.101 reference
  - This will exempt you from many contractual provisions
  - Also fulfills one of the key exceptions to certification of cost or pricing data
  - Allows for effort to be transferred at price rather than cost pursuant to FAR 31.205-26 requirements