

# 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 4 Agenda

- GSA Schedules
- Select Commercial Products and Services Contracting Issues

# Course Instructors:

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

# Polling Question

# GSA Schedules

# General Services Administration (GSA) Schedules

- Mission and Authorities
  - Procures on behalf of the U.S. Government
  - Establishes Procurement Policy
- Delegation to Operate VA Schedules
  - Pharmaceuticals
  - Medical Devices
  - Services

# Statutes, Regulations, & Policy

- Federal Property And Administrative Services Act (1949)
- Competition in Contracting Act (1984)
- Federal Acquisition Regulation (FAR)
- General Services Acquisition Regulation (GSAR)
- General Services Acquisition Manual (GSAM)



# Statutes, Regulations, & Policy

- For Pharmaceutical Companies

- Veterans Healthcare Act of 1992

- Innovator products (i.e., any prescription drug originally marketed under an original NDA (single source & innovator multiple source drugs))
    - Biological products marketed under a Biologics License Agreement
    - Certain insulin products
      - Does not include
        - generics marketed under an ANDA (i.e., noninnovator multisource drugs)
        - OTCs

# Understanding the Solicitation

- Solicitation
- SF1449 (be sure to read the instructions)
- Regulations Incorporated by Reference
- Past Performance Evaluation
- Small Business Subcontracting Plan
- Price Proposal Template
- Commercial Sales Practice Format (CSP-1)
- Letter of Supply Template
- Agent Authorization Letter
- Sample Labor Category Matrix
- SCA Wage Determination Index
- Technical Evaluation Criteria

# Regulations Incorporated

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# Essential Regulations

- General Services Acquisition Manual (GSAM)
  - Chapter 538 Federal Supply Schedule Contracting
- Federal Acquisition Regulation (FAR)
  - Part 3 Improper Business Practices and Personal Conflicts of Interest
    - 3.10 Contractor Code of Business Ethics and Conduct
  - Subpart 8.4 - Federal Supply Schedules
  - Part 12 - Acquisition of Commercial items
  - Subpart 22.10 - Service Contract Act
  - Subpart 25.4 - Trade Agreements Act
  - Subpart 42.12 - Novations and Change of Name Agreements

# Clauses

## Non-Commercial . . . But TDR

- 552.215-70 - EXAMINATION OF RECORDS BY GSA (MULTIPLE AWARD SCHEDULE) (JUN 2016)
- 552.215-72 - PRICE ADJUSTMENT--FAILURE TO PROVIDE ACCURATE INFORMATION (AUG 1997)
- 552.232-23 - ASSIGNMENT OF CLAIMS (SEP 1999)
- 552.238-80 - INDUSTRIAL FUNDING FEE AND SALES REPORTING (JUL 2020) (ALTERNATE I – MAY 2019)
- 552.238-81 - PRICE REDUCTIONS (MAY 2019) (ALTERNATE I - APR 2014)

# Transactional Data Reporting Rule

- Requires vendors to report transactional data
  - Reporting must occur within 30 days after the end of the preceding month
- Contractors subject to the rule need not comply with:
  - Commercial Sales Practices disclosures
    - Proposed rule required continued compliance with CSP reporting
  - Price Reduction Clause tracking provision
- Purpose:
  - Enable GSA and other agencies to make “smarter buying decisions.”
  - Shift from “vertical pricing” model to “horizontal pricing” model
    - Vertical Pricing – comparing contractor’s prices and T&Cs to those offered to contractor’s other customers
    - Horizontal Pricing – comparing one contractor’s prices and T&Cs to other contractors

# Transactional Data Points

- Contractors required to submit 11 standard transactional data points:
  - Contract or Blanket Purchase Agreement Number
  - Delivery/Task Order Number/Procurement Instrument Identifier
  - Non-Federal Entity
  - Description of Deliverable
  - Manufacturer Name
  - Manufacturer Part Number
  - Unit Measure (each, hour, case, lot)
  - Quantity of Item Sold
  - Universal Product Code
  - Price Paid per Unit
  - Total Price

# Applicability

- IDIQ and GWAC:
  - Applies to all new contracts
  - May be applied to existing contracts not containing other transactional data clauses
- FSS Contracts:
  - Voluntary
  - Does not apply to Department of Veterans Affairs



# May 2023 OIG Report on TDR

- OIG found GSA's own portrayal of the TDR pilot program as a success to be without support
  - "Ignores the fact that the data collected through the pilot program has never been used to analyze and negotiate contract-level pricing"
  - "GSA has amassed a collection of data that is almost entirely inaccurate, unreliable, and unusable"
  - \$12.6 billion of \$14.6 billion FY22 sales data could not be used for meaningful price analysis
- OIG made 3 recommendations to GSA
  - Cease further expansion of TDR until the problems are corrected or the pilot is terminated
  - Address the problems with the TDR data and usage as described in this report within 1 year of report issuance
  - If GSA cannot successfully complete the corrective actions outlined in Recommendation 2 within 1 year of report issuance or makes the decision not to take those corrective actions, execute the exit strategy for the TDR pilot and transition participating contractors out of the pilot

# Best Practices

- Begin preparing systems for capturing transaction data
- Carefully study bilateral modifications and its accompanying compliance obligations
  - Determine whether the modification removes requirements of CSP and PRC for all SINS under a particular schedule
- Consider the information and level of detail posted to the portal
  - Be cautious not to post any commercially sensitive information
  - Consider marking information viewed as confidential or business sensitive to the extent possible
- Continue collecting and monitoring commercial pricing and discounts
  - New rule is implemented in phases and gradually

# Polling Question

# Clauses Non-Commercial Trade Agreements Act

- Products available on Schedule must have been “substantially transformed” in an “designated country”
  - U.S., Mexico, and many others are “designated”
  - China, Malaysia, among others, are not
- “Substantial transformation” requires something more than mere assembly
- “Bundling” multiple components into a system may or may not satisfy test
- FAR 52.225-5

# Clauses

## Commercial

- 52.212-4 Contract Terms and Conditions—Commercial Products and Commercial Services
- 52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders – Commercial Products and Commercial Services

# General Services Administration Acquisition Regulation (GSAR)

- Federal Supply Schedule Contracting (Administrative)
  - PART 515—CONTRACTING BY NEGOTIATION
  - PART 538—FEDERAL SUPPLY SCHEDULE CONTRACTING
  - PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

# Helpful Websites

- [www.acquisition.gov](http://www.acquisition.gov)
- [www.gsa.gov](http://www.gsa.gov)
  - Staff Directory
  - E-library
  - GSA interact
- [www.data.gov](http://www.data.gov) - Certain Instructional Letters (ILs) now on the DATA.GOV website
- <http://www.fss.va.gov/>

# Helpful Websites

- [www.dol.gov](http://www.dol.gov)
  - Compliance Assistance
  - Elaws – Employment Law Advisories
  - Q&A – Office of Federal Contract Compliance
- [www.sba.gov](http://www.sba.gov)
- Contracting <http://www.sba.gov/category/navigation-structure/contracting>
- <http://rulings.cbp.gov/> Customs Rulings Online Search System
- [www.oge.gov](http://www.oge.gov) Office of Government Ethics



# MAS Pricing and Significant Contract Provisions

- Most Favored Customer Pricing
- Commercial Sales Practices Format
- Negotiating the Basis of Award Customer
- Price Adjustments and Price Reductions
- Audits

# MAS Pricing and Significant Contract Provisions

- Most Favored Customer (MFC)
- GSAR 538.270-1(c) - The Government will seek to obtain the offeror's best price (the best price given to the most favored customer). However, the Government recognizes that the terms and conditions of commercial sales vary and there may be legitimate reasons why the best price is not achieved.
- Part (d) – Establish negotiation objectives based on a review of relevant data and determine price reasonableness.

# Commercial Sales Practices Format

- Reveal information on commercial selling and pricing practices
  - Best customers
  - Discounts
  - Special offers, terms and conditions, concessions
- Current, accurate and complete
- Proprietary and Confidential

# Commercial Sales Practices Format

**THIS DOCUMENT IS AUTOMATED IN THE eOffer and eMod SYSTEM.**

**You are not required to complete the paper version of this document.**

**This document is provided for reference purposes only.**

**COMMERCIAL SALES PRACTICES FORMAT (CSP-1)**

Name of Offeror: \_\_\_\_\_

SIN(s): \_\_\_\_\_

Note: Please refer to clause 552.212-70, PREPARATION OF OFFER (MULTIPLE AWARD SCHEDULE), for additional information concerning your offer. Provide the following information for each SIN (or group of SINs or Sub SIN for which information is the same).

(1) Provide the dollar value of sales to the general public at or based on an established catalog or market price during the previous 12-month period or the offerors last fiscal year: \$\_\_\_\_\_. State beginning and ending of the 12 month period. Beginning\_\_\_\_\_ Ending\_\_\_\_\_. In the event that a dollar value is not an appropriate measure of the sales, provide and describe your own measure of the sales of the item(s).

# Commercial Sales Practices Format

- (3) Based on your written discounting policies (standard commercial sales practices in the event you do not have written discounting policies), are the prices (discounts, concessions, terms and conditions in any combination) which you offer the Government equal to or better than that offered to any customer acquiring the same items regardless of quantity or terms and conditions? YES \_\_\_ NO \_\_\_\_. (See definition of “concession” and “discount” in 552.212-70.)
- (c) Do any deviations from your written policies or standard commercial sales practices disclosed in the chart in paragraph 4(a) ever result in better prices than indicated? YES \_\_\_ NO \_\_\_\_ . If YES, explain deviations in accordance with the instructions at Figure 515.4-2, which is provided in this solicitation for your convenience.

# Price Adjustments Clause

- **GSAR § 552.215-72**
- Triggered if the contractor fails to:
  - Provide information required by the solicitation or otherwise requested by the government
  - Submit current, accurate and complete information
  - Update its disclosures throughout negotiations
- Government may reduce contract price after award (and seek refunds) if negotiated price was increased because Contractor did not provide current, accurate or complete data

# Price Reductions Clause

- **GSAR § 552.238-81**
- **Contractors must:**
  - Provide schedule customers with discounts provided to Basis of Award customers
  - Maintain the price or discount relationship throughout contract performance

# Price Reductions Clause

- Items that can and should be negotiated!
  - Customer that will be the Basis Of Award
  - Government's price relationship to BOA
- Avoid a broadly worded BOA (i.e., "All commercial customers")



# Price Reductions Clause

## Price reductions can be triggered if the contractor:

- Revises the commercial catalog, pricelist, schedule or other document upon which contract award was predicated to reduce prices;
- Grants more favorable discounts or terms and conditions than those contained in the commercial catalog, pricelist, schedule or other documents upon which contract award was predicated; or
- Grants special discounts to the customer (or category of customers) that formed the basis of award, and the change disturbs the price/discount relationship of the Government to the customer (or category of customers) that was the basis of award

# Price Reductions Clause

## Exceptions

- Maximum order threshold
- Federal agencies
- Sales to federal prime contractors, if qualified
- Sales to State and Local governments through the schedule contract
- An error in quotation of billing, provided the contractor provides timely notification to the CO

# Price Reductions Clause

- Develop a reasonable Basis of Award
- Document original Basis of Award calculation
- Monitor carefully and continually all discounting provided to Basis of Award customers
- Develop a reporting mechanism for deviations from the Basis of Award
- Require approval for any deviations from standard pricing policies

# Industrial Funding Fee

- **GSAR § 552.238-80, “Industrial Funding Fee and Sales Reporting”**
  - Requires that contractors remit to GSA 0.75% of sales on a quarterly basis
  - During negotiations, identify whether prices include IFF
  - Have a Policy and POC who is trained on, understands, and is responsible for collecting and accurately reporting schedule sales

# Polling Question

# Select Commercial Products and Services Contracting Issues

# Select Commercial Products and Services Issues


- **DFARS 252.215-7013 – Nontraditional Defense Contractors**
  - June 2018
  - COs have “permissive” authority, i.e., not required
  - An entity “that is not currently performing and has not performed any contract or subcontract for DoD that is subject to full coverage under the cost accounting standards...for at least the 1-year period preceding the solicitation...”
  - Supplies and services may be treated as commercial items
  - Does not require a CID or mean that supplies or services are commercial

# Select Commercial Products and Services Issues (cont'd)

- **DFARS 212.102 – Prior Commercial Item Determinations**
  - Final Rule effective April 28, 2022
  - Makes it easier for DoD contracting officers (CO) to rely on past commercial sales to the government as a prior commercial item determination for a particular item.
  - The rule also updates DFARS 212.102(a)(iii) to clarify that commercial item determinations are only required for acquisitions that exceed the simplified acquisition threshold.



# Select Commercial Products and Services Issues (cont'd)



1. Market Research

2. Recent Purchase Prices

DFARS 215.404-1 – Hierarchy for data which DoD should rely on for determining price reasonableness (in the absence of adequate price competition)

- ***If both are insufficient***, offeror should submit information on:
  - Prices paid for same or similar items sold under different terms and conditions;
  - Prices paid for similar levels of work or effort on related products or services;
  - Prices paid for alternative solutions or approaches; and
  - Other relevant information that can serve as the basis for determining the reasonableness of price, which may include cost data.

# Select Commercial Products and Services Issues (cont'd)

- **DFARS 239.101 – Acquisition of Information Technology**
  - Effective January 31, 2018
  - CO may not enter into a contract in excess of the Simplified Acquisition Threshold (SAT) for IT products or services that are NOT COMMERCIAL ITEMS unless the head of the contracting activity determines in writing that no commercial items are suitable to meet the agency's needs...

# Select Commercial Products and Services Issues (cont'd)

## - **FY19 NDAA Section 889(a)**

- Section 889 prohibits agencies from contracting with any “entity”:
  - (A) To procure any equipment, system, or service that uses covered Chinese telecommunications equipment or services, and
  - (B) That uses any equipment, system or service that uses covered Chinese telecommunications equipment or services...
    - ...as a substantial or essential component or critical technology of any system.
- Part A: in effect since August 13, 2019
- Part B: in effect since August 13, 2020
  - First Interim Rule with implementing regulations issued July 14, 2020
  - Second Interim Rule issued August 26, 2020
  - Includes narrow exceptions and multi-layer waiver process
- Report on draft final FAR rule implementing Part B due 8/2/23

# Select Commercial Products and Services Issues (cont'd)

## - **FY19 NDAA Section 889(a)**

- First Interim Rule – effective August 13, 2020
  - Applies to commercial items and micro-purchase acquisitions
  - Exceptions:
    - Entity providing a service that connects to facilities of third-party, such as backhaul, roaming, or interconnection arrangements
    - Telecom equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets.
  - Requires “reasonable inquiry” and “compliance plan” in first year
  - Implemented via FAR clauses requiring representation in SAM and, if necessary, information with contractor’s proposal
  - Waivers ended August 13, 2022
- Second Interim Rule – effective October 26, 2020
  - Offerors that determine they do not "provide covered telecommunications equipment or services to the Government in the performance of any contract" are only required to make the related representation at FAR 52.204-26(c) and FAR 52.212–3(v)(2)(i) in SAM annually rather than on an offer-by-offer basis

# Select Commercial Products and Services Issues (cont'd)

- DFARS 227.7103-13 (government right to review, verify, challenge, and validate asserted restrictions) and DFARS 252.227-7037 (validation of restrictive markings on technical data) to again be consistent with “the original Federal Acquisition Streamlining Act (FASA).”
- DoD must presume that commercial products developed exclusively at private expense when evaluating data rights assertions made by contractors and subcontractors.
- The government still has the right to challenge such assertions under DFARS 227.7103-13, beginning April 28, 2022:
  - (1) a contractor or subcontractor is no longer required to submit a justification in response to such a challenge, and
  - (2) the government can only overcome the presumption of commerciality if it can provide specific information that demonstrates the item was not deployed exclusively as private expense.
- In most cases, this type of information "may exist but be in the custody and control of the contractor" and, thus, the contractor's asserted rights likely will control.

# Select Commercial Products and Services Issues (cont'd)

- Section 809 Panel – Commercial Buying
  - Proliferation of clauses in commercial item contracts:
    - Since FASA, the number of commercial clauses which may be flowed-down has increased by **five-fold**.
      - **1995:** FAR and DFARS contained a combined total of 57 government clauses applicable to commercial items
      - **Current:** 165 clauses with 122 originating in statute, 20 in executive orders, and 23 agency-level policies

***Reduce the number of clauses which apply to commercial items and COTS***

# Select Commercial Products and Services Issues (cont'd)

- E-Commerce Portal (Section 846 of FY18 NDAA)
  - Objectives:
    - Modernize the commercial product buying experience
    - Streamline commercial product purchasing
    - Increase visibility and analysis of online spend
  - Only for acquisitions under SAT, with proof of concept focused on micro-purchases
  - Three proof of concept contracts awarded
    - Amazon Business
    - Fisher Scientific
    - Overstock.com, Inc.

# Select Commercial Products and Services Issues (cont'd)

- E-Commerce Portal (Section 846 of FY18 NDAA) – Other Questions
  - Supply chain risk management (e.g., Section 889)
  - Additional procurement requirements (e.g., AbilityOne, Berry amendment)
  - Impact to GSA Advantage and FedMall
  - Pricing implications
- Section 818 of the FY 2020 NDAA requires the head of an agency to document the results of market research related to commercial item determinations in a manner appropriate to the size and complexity of the acquisition
- Section 853 of the FY 2022 NDAA requires GSA to begin testing e-commerce portal models (other than any such model selected for the initial proof of concept)
- March 2022: RFI seeking feedback on E-Commerce Portal released in anticipation of planned follow-on acquisition
- July 2022: GSA Report on program results thus far concluded commercial online providers, regardless of specific business model, could meet or exceed the functional capability needs of the program; utilizing the individual models as a method of vendor selection going forward “inconsequential”



# Select Commercial Products and Services Issues (cont'd)

- DFARS Case 2022-D006
  - Proposed rule released January 2023
  - Draft final rule under review as of July 2023
  - Implements Section 803 of FY22 NDAA
- Modifies DFARS Part 212 to add new subpart 212.7X, Defense Commercial Solutions Opening (“CSO”)
- Authorizes DoD to use a general solicitation (aka CSO):
  - To obtain innovative solutions or potential capabilities that fulfill requirements,
  - To close capability gaps or provide potential innovative technological advancements,
  - When meaningful proposals with varying technical or scientific approaches can be reasonably anticipated
- Resulting CSO contracts would be awarded on fixed-price basis and products and services acquired would be treated as commercial products and services

# Select Commercial Products and Services Issues (cont'd)

- Section 803 of FY23 NDAA, Data Requirements for Commercial Products for Major Weapon Systems
  - Amends the data requirements involving commercial products related to subsystems, components, and spare parts of major weapons systems under 10 U.S.C § 3455
    - For subsystems, components, and spare parts proposed as a commercial item, but not previously determined to be commercial, contractors must identify comparable products sold commercially or to nongovernmental entities that will support the contractor's "of a type" assertion
    - Contractors must also provide the contracting officer with "a comparison necessary to serve as the basis of the 'of a type' assertion of the physical characteristics and functionality" between the subsystem, component, or spare part and the comparable commercial product
  - Amends the uncertified cost and pricing information that offerors must submit under 10 U.S.C § 3455(d) for the contracting officer to determine the reasonableness of the price of subsystems, components, and spare parts of major weapons systems determined to be commercial items
    - Information includes representative samples of the prices paid for the same or similar commercial products under similar terms and conditions

# Select Commercial Products and Services Issues (cont'd)

- Termination for Convenience of Commercial Item Contracts: FAR 52.212-4(I)
- The Contractor shall be paid a percentage of the contract price reflecting:
  - The percentage of work performed prior to the notice of termination, PLUS
  - Reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system [FAR 52.212-4(I)]
- *SWR, Inc.*, ASBCA No. 56708, 15-1 BCA ¶ 35,832: charges reasonably incurred in anticipation of performing a commercial items contract are recoverable under FAR 52.212-4(I)
- *ACLR, LLC v. United States*, 162 Fed. Cl. 610 (2022): contractor not entitled to recover under 52.212-4(I) because their record keeping system was not “standard” or “systematic”
  - Appealed to Federal Circuit. *ACLR, LLC v. United States*, No. 23-01190 (Fed. Cir. Nov. 29, 2022)

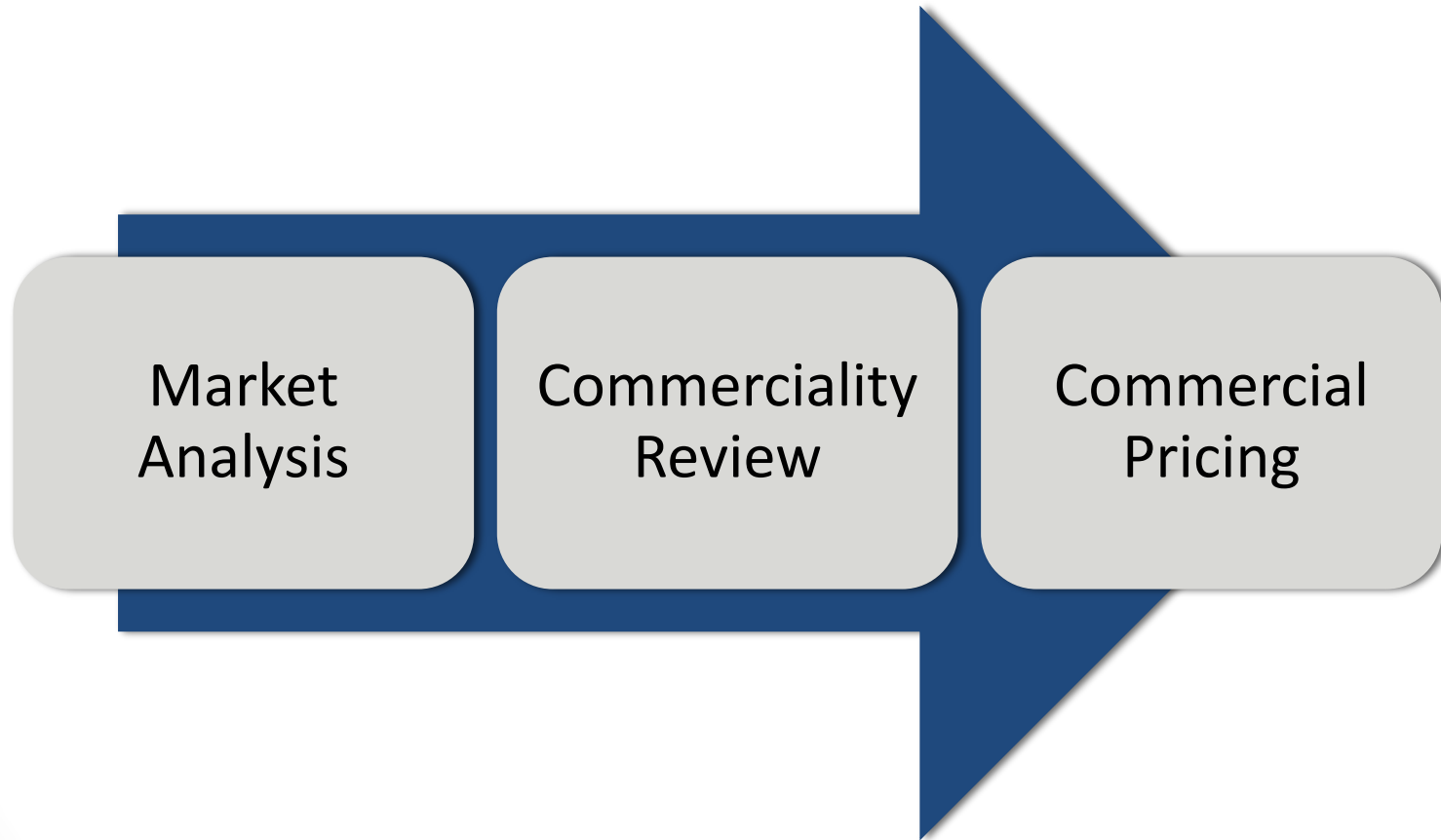
# Polling Question

# DCMA Commercial Item Group

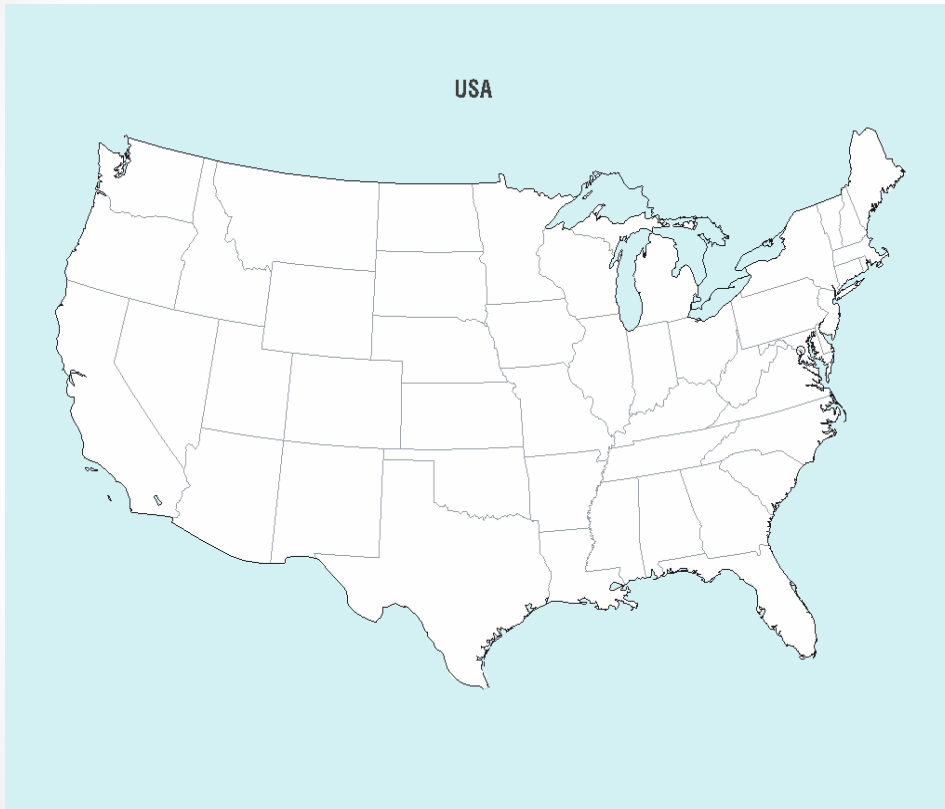
# DCMA Commercial Item Group

- Over 60 CIG personnel on board with intent to expand
  - Typically former DCAA or DCMA cost/price analysts, engineers and some from industry
- Services provided:
  - Commercial Item Determinations
  - Price Analysis
  - Negotiation Support
  - Market Research
  - Training

# DCMA Commercial Item Group (cont'd)



# DCMA Commercial Item Group (cont'd)



- **St. Petersburg, FL**
  - Group HQ
  - Special Operations, Classified Programs, Import/Export
- **Boston, MA**
  - NE Corridor
  - Services, Chemicals & Materials, Naval Transport
- **Indianapolis, IN**
  - Midwest
  - Automotive, Aeronautics, Aircraft Engines, R&D Institutions
- **Denver, CO**
  - Northwest + AK
  - Space, C4I
- **Phoenix, AZ**
  - Southwest + HI
  - Heavy Machinery, Supply-chain, Marine
- **Philadelphia, PA**
  - Mid-Atlantic
  - Supplies, Parts & Spares, Naval Transport



# DCMA Commercial Item Group (cont'd)

- **CIG Guidance - DoD Guidebook for Acquiring Commercial Items**
- Final version published in January 2018 and updated in July 2019, following a draft distributed in Feb. 2017. Published in two parts
  - Part A: Commercial Item Determination
    - [Guidebook Part A Commercial Item Determination](#)
  - Part B: Pricing Commercial Items
    - [Guidebook Part B Commercial Item Pricing January 2018](#)
- DoD Market Research Report Guide for Improving the Services Tradecraft in Acquisition – Mar 2017
  - [https://www.acq.osd.mil/asda/dpc/cp/policy/docs/sa/2017\\_Market\\_Research\\_Guide\\_\(Final\).pdf](https://www.acq.osd.mil/asda/dpc/cp/policy/docs/sa/2017_Market_Research_Guide_(Final).pdf)

# Discussion/Questions?

# Contact Information

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# Thank You!