



Commercial Item Determinations: A Refresher and Reflection on the Latest Practices from Industry Practitioners

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Agenda

- Overview of Commercial Item Contracting
 - Policy Goals
 - Overview of Governing Rules
 - Advantages, Disadvantages
- Commercial Item Determinations
 - Responsibilities
 - Definitions and Standards
 - Recent Rules
 - Best Practices
 - Additional Guidance



Policy Goals

- Provide Government access to commercial innovations, remove barriers to commercial companies entering the Government market
- Eliminate need to develop specs if item is available already in commercial marketplace
- State-of-the art technology without having to conduct R&D with Government funding
- Rely on market forces to reduce costs and determine a fair and reasonable price
- Shorten time to acquire goods and services



Overview

- **Governing Rules**
 - Commercial item contracting traces its roots back to the Federal Acquisition Streamlining Act (FASA) of 1994.
 - Implemented in FAR Part 12 (“Acquisition of Commercial Products and Services”), DFARS Part 212 (“Acquisition of Commercial Items”), and related clauses.
 - Requires that agencies acquire commercial items if market research determines that commercial items are available to meet agency’s requirements.
 - Requires prime contractors and subcontractors at all tiers to acquire commercial items “to the maximum extent practicable.”
 - Creates streamlined procedures for awarding contracts, as well as terms and conditions designed to “resemble those customarily used in the commercial marketplace.”



Advantages and Disadvantages

Advantages:

- Streamlined acquisition procedures
- Simplified terms and conditions
- Limited flowdowns
- Other commercial practices (e.g., warranty, inspection)
- IP rights similar to those customarily provided to commercial customers
- Changes only by mutual agreement
- No government accounting standards, cost principles
- Limited audit rights

Disadvantages:

- No cost-reimbursement contracts (only FP or T&M), which places greater risk on contractor
- Universe of customers/procurements may be limited (must fit within CI definition)
- Government may not automatically assume liability for infringement under standard “authorization and consent” clause
- May be harder to raise “government contractor defense” to third party claims
- Compliance obligations not completely eliminated



General Commerciality Principles

- General Principles
 - “Determining whether a product or service is a commercial item is largely within the discretion of the contracting agency, and such a determination will not be disturbed by [GAO] unless it is shown to be unreasonable.” (*Aalco Forwarding, Inc.*, B-277241, Oct. 21, 1997)
 - COs have “flexibility” to consider variety of information, including:
 - “Prior Agency Or Department Determinations”
 - DoD COs must defer to prior DoD determination, or document why it’s wrong
 - Prior “Contractor Determinations”
 - Contractor’s use of “Commercial Facilities”



Responsibilities

- Responsibilities, Purpose
 - Prime Contracts
 - Contracting Officers (COs) have broad discretion to determine if a product or service qualifies as a “commercial item,” for purposes of:
 - Determining, during acquisition planning, whether a prime contract should be awarded using FAR Part 12 procedures/terms and conditions.
 - Note: Once contract is awarded under Part 12, changes can only be made by mutual agreement; CO can’t unilaterally change to include non-commercial terms and conditions.
 - Determining, under sole source procurements, whether a particular contractor’s product or service qualifies as commercial (e.g., to decide whether the contractor is exempt from submission of certified cost or pricing data under TINA).



Responsibilities

- Responsibilities, Purpose
 - Subcontracts
 - Responsibility for determining commerciality of items delivered under subcontracts generally rests with the prime contractor.
 - Reasons for conducting a commercial item determination include:
 - Determining subcontract “flowdown” clauses.
 - Determining whether subcontractor is exempt from submission of certified cost or pricing data under TINA.
 - However, USG may review the prime’s determination of commerciality, for example when evaluating price (FAR 15.403-1(c)(3)) or when conducting a Contractor Purchasing System Review (CPSR).



Definitions and Standards

- Definitions/Standards
 - “Commercial item” definition split into commercial products and commercial services in Dec. 2021 – no substantive changes.
- Commercially-Available-Off-The-Shelf Items (FAR 2.101)
 - COTS means “any item or supply (including construction material) that is—
 - i. A commercial item . . . ;
 - 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....”
 - Note: Even if an item does not qualify as “COTS,” it might still qualify as a “commercial item” for purposes of FAR Part 12.



Definitions and Standards

- Commercial Products (FAR 2.101(1))
 - “Any item, 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.
 - But, “general public” does not include federal, state, local, or foreign governments.
 - Evidence that a product has been “offered” for sale can include advertising materials, published catalogs, public websites, etc.



Definitions and Standards

- Commercial Products (cont'd)
 - Examples:
 - Communication device with different frequencies, modes, or memory
 - Antenna used in military helicopter, which was similar to those used in commercial helicopters, even though “exact same antenna” not sold commercially
 - Ruggedized version of commercial computer
 - Commercial data management platform

Definitions and Standards

- Evolved Products (FAR 2.101(2))
 - “Any item 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. . . .”
 - Examples:
 - Product updates
 - Model changes
 - Product improvements
 - New versions of software programs



Definitions and Standards

- “Minor” and “Customary” Modifications (FAR 2.101(3))
 - “Any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, but for –
 - i. Modifications of a type customarily available in the commercial marketplace; or
 - ii. Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements.”
 - Examples:
 - Modification of doors on commercial blast container
 - Addition of auxiliary engine to commercial de-icing equipment
 - Customizing app for government users, similar to customization provided to commercial customers



Definitions and Standards

- Minor Modifications (continued)
 - When is a modification considered “minor”?
 - Minor modifications “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)(ii))
 - Factors to be considered include “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.” (FAR 2.101(3)(ii))
 - For DOD, NASA, and Coast Guard, total value of modifications must not be greater than
 - TINA threshold, or
 - 5% of the total contract price at time of award. (FAR 15.403-1(c)(3)(iii))



Definitions and Standards

- Combination of Items (FAR 2.101(4))
 - “Any combination of items meeting the requirements of paragraphs (1), (2), (3), or (5) of this definition that are of a type customarily combined and sold in combination to the general public”
 - Examples:
 - A computer network that uses commercially available hardware and software and uses a commercial help desk
 - A supercomputer built by combining commercially available video game consoles
- Intracompany Transfers (FAR 2.101(5))
 - “Any item, combination of items, or service referred to in paragraphs (1) through (6) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.”



Definitions and Standards

- Nondevelopmental Items (FAR 2.101(6)):
 - “A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.”
 - “Nondevelopmental item” means item “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.”
 - Can include items that require “minor modification or modifications of a type customarily available in the commercial marketplace,” even if not yet in use.
 - “Developed exclusively at private expense” still allows development costs to be recovered indirectly through IR&D (DOD CI Guidebook, Part A, p. 51).



Definitions and Standards

- Ancillary Commercial 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 item], regardless of whether such services are provided by the same source or at the same time as the item; 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”
 - Example:
 - Hardware, software maintenance



Definitions and Standards

- “Of A Type” Commercial 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” based on “catalog” or “market price.”
 - 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
 - Look at services being procured, not “audience, location, and subject matter” for the services. *JKB Sols. and Servs. v. United States*, 170 Fed.Cl. 241(2024) (finding instructor services commercial even though course provided was gov’t unique)



Definitions and Standards

- “Of A Type” Commercial Services (continued):
 - “‘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.”



Definitions and Standards

- “Of A Type” Commercial Services (continued):
 - Services not included in a formal pricelist or catalog may be treated as commercial items 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.” (DOD CI Guidebook).
 - Must also show that services of the same type were “sold competitively in substantial quantities.”
 - And services “of a type” sold commercially may be treated as a commercial item only if CO determines in writing “that the offeror has submitted sufficient information to evaluate . . . price reasonableness,” including prices paid under other gov’t and commercial contracts. (FAR 15.403-1(c)(3)(ii))



Definitions and Standards

- NBCRE 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 nuclear, biological, chemical, or radiological attack, as an acquisition of commercial items.

(2) A contract in an amount greater than \$20 million, that is awarded on a sole source basis for an item or service treated as a commercial item under paragraph (f)(1) of this section but does not meet the definition of a commercial item as defined at FAR 2.101 shall not be exempt from—

- (i) Cost accounting standards; or
- (ii) Certified cost or pricing data requirements.”



Definitions and Standards

- Nontraditional Defense Contractors (DFARS 212.102(a)(iv))
 - Recent legislation and changes to DFARS 212 allow DOD to use commercial item procedures to procure products or services from “Nontraditional Defense Contractors.”
 - “Nontraditional defense contractor” defined as “an entity that is not currently performing and has not performed any contract or subcontract for DoD that is subject to full coverage under [CAS], for at least the 1-year period preceding the solicitation of sources by DoD for the procurement.” DFARS 202.101
 - Does not require separate commercial item determination for specific products or services being acquired from the nontraditional defense contractor.
 - Contracting Officers have discretion, “when appropriate,” to use this authority when acquiring supplies or services “from business segments that meet the definition of ‘nontraditional defense contractor’ even though they have been established under traditional defense contractors.” DFARS 212.102(a)(iv)
 - Note: May 5, 2024 DoD memo reminds COs that contractor can make Nontraditional Defense Contractor determinations for its suppliers and subcontractors that meet definition.



Definitions and Standards

- Major Weapons Systems (DFARS 234.7002)
 - A major weapons system may be acquired as commercial item only if Sec Def determines in writing that—
 - The system qualifies as commercial,
 - Such treatment is necessary for national security,
 - Offeror has submitted sufficient information to evaluate price reasonableness of system, and
 - Advance notice given to congressional committees.
 - Information to evaluate price reasonableness may include
 - Prices paid by gov't and commercial customers; and
 - Labor costs, material costs, and overhead rates.
 - Responsibility for determination may not be delegated below Deputy Sec Def.



Definitions and Standards

- Major Weapons Systems (cont'd)
 - Subsystems, components, and spares for a major weapons system may be treated as commercial items only if—
 - System as a whole has been acquired as a commercial item, or
 - The CO determines in writing that items are commercial, and that offeror has submitted sufficient information to evaluate price reasonableness.
 - Restriction 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 . . . on which the prime contractor adds no, or negligible, value.”



Recent Developments

- Final Rule on Data for Commercial Products for Major Weapon Systems
 - Provides guidance on data required to support commerciality and price reasonableness determinations for major weapon system procurements, per Section 803 of FY23 NDAA.
 - Issued May 30, 2024 (89 Fed. Reg. 46805), modifies DFARS 234.7002, 252.215-7010.
 - Applies to subsystems, components, or spare parts proposed as commercial and not previously determined to be commercial.
 - Expected impact:
 - DOD says no significant impact on gov't or industry because merely clarification; additional guidance may **decrease** time for determinations.
 - In response to comments on proposed rule, DAR Council repeatedly said information “should be readily available” via companies’ product information and sales records and concluded “this rule does not impose additional administrative costs or recordkeeping burdens on commercial companies.”



Recent Developments

- Final Rule on Data for Commercial Products for Major Weapon Systems (cont'd)
 - CO must make written commerciality determination
 - With higher approval, may require submission of cost information for price reasonableness.
 - Contractors must:
 - Identify comparable commercial product (from them or others).
 - Provide comparison between physical characteristics and functionality.
 - If applicable, provide description and support for modifications.
 - For price reasonableness, submit or provide access to representative sample of prices paid for same or similar commercial products by gov't and commercial customers.
 - Customer information may be redacted with contractor certification of customer types.



Recent Developments

- Prior Commercial Item Determinations (DOD)
 - Recent legislation and changes to DFARS Part 212 require DOD to presume that an item is a commercial item if:
 - The item is included in the DOD Commercial Item Database (available only to DOD), which contains prior commerciality determinations, or
 - The contracting officer has “other evidence that an item has previously been acquired by DOD using commercial item acquisition procedures under FAR part 12.”
 - To “overturn” a prior commercial item determination made by a military department, a defense agency, or another component of DOD, a contracting officer must request higher level approval from the Head of the Contracting Activity.
 - No deference required for commerciality determinations by civilian agencies, including GSA.
 - No deference to “deemed” commercial products/services from nontraditional defense contractors.



Best Practices

- Best Practices for Preparing Commercial Item Determinations
 - Identify relevant Commercial Item definition(s)
 - Consider if alternative definitions might apply (e.g., “minor modification” and “evolved” from commercial item).
 - Compile supporting data, such as:
 - Copies of commercial catalogs, price lists, customer invoices.
 - Copies of commercial contracts/license agreements/terms of use.
 - Advertising materials (e.g., brochures, public websites, customer proposals).
 - Technical information/product documentation, particularly for “evolved” items and “minor” or “customary” mods.
 - Commercial customer lists/sales reports.
 - Previous commercial item determinations.



Best Practices

- Prepare written justification
 - COs and primes expect detailed, easy to understand justification – don't debate it, support it!
 - Use applicable definition(s) as roadmap to explain why offering is “commercial.”
 - Depending on specific definition(s), a well-documented commercial item determination will typically include:
 - Description of the product/service, including how it can be used by commercial customers (*i.e.*, is not used solely for government purposes).
 - Summary of how the product/service was developed, including source of funds (*e.g.*, privately funded versus government-funded) as well as any modifications.
 - Discussion of how the product is marketed to commercial customers/general public.
 - Description of commercial customers/commercial sales (*e.g.*, number of commercial customers, dollar value of commercial sales).
 - Differences in terms and conditions (*e.g.*, quantities, time periods, delivery times, market factors).
 - Identification of any similar products available in the commercial market (*e.g.*, competing products/services).
 - Discussion of any prior commercial item determinations (particularly important for DOD).



Best Practices

- Be prepared!
 - Don't assume COs will accept commerciality even if the same or similar items were previously procured as commercial items.
 - Anticipate questions and have responses ready.
 - Technical descriptions, market research, price analysis.
 - Maintain information (including supporting documentation) in central repository so multiple product teams can leverage previous work product.
 - Maintain repository of any CO or prime contractor determinations.



Best Practices

- Considerations for “of a type”
 - Identify all similar products company (or other companies) sell or offer for sale for non- governmental purposes
 - This may be an entire class of products or one or more specific products
 - Document how the of a type item is similar to the other product(s)
 - Function/purpose
 - Materials
 - Dimensions
 - Manufacturing processes
 - Analyze any differences in the products
 - If differences aren’t significant, document why not
 - Review sales data
 - May influence which products to cite as examples to CO



Best Practices

- Considerations for customary or minor modifications
 - “Customarily available”
 - Does the company (or competitors if information is publicly available) offer the same type of modifications to the same or similar products for non-government customers?
 - E.g., all such products may be customized to fit the customer’s available space, type of connectors, or specific performance requirements
 - If the modifications are not similar, are the differences significant, or just variations in scope?
 - Identify and document examples
 - Would the company offer the same type of modifications if asked?



Best Practices

- Considerations for customary or minor modifications (cont'd)
 - “Minor”
 - What is the purpose of the modification?
 - Does it alter the item’s physical characteristics?
 - Does it alter the item’s form, fit, or function?
 - How does scope of the modification compare to the item’s size, dollar value, level of effort, etc.?



Best Practices

- Considerations for commercial services
 - Identify commercial products that services support and documentation of products' commerciality
 - For of a type services, identify all similar services the company (or other companies) sells in substantial quantities in the commercial marketplace
 - This may be an entire class of services or one or more specific services
 - Document catalog or market prices for similar services



Best Practices

- Considerations for commercial services (cont'd)
 - Document how the of a type service is similar to the other service(s)
 - Markets/customer base
 - Purpose
 - Work product and deliverables
 - Skillsets and qualifications of employees
 - Relevant industry or government standards
 - Analyze any differences in the services
 - If differences aren't significant, document why not
 - Review sales data
 - No definition of “substantial quantities”; may vary by industry or type of services



Best Practices

- Considerations for prime/subcontractor
 - Prime is responsible for making commercial item determinations for its subcontractors, but CO can disagree and demand justification
 - Prime often merely a pass-through, with most substantive communications between subcontractor and government
 - But may be more successful with a united front
 - Even if not responsible for substantive responses to CO, prime should stay involved because decision could affect negotiation and pricing of prime contract
 - Both prime and subcontractor should have documentation to support commercial item determination and price reasonableness.
 - Amount of required information and possible certification may differ with size of overall program, size of subcontract, type of product/service, etc.



Additional Guidance, Resources

- DOD Commercial Item Handbook
 - [Part A](#) provides guidance for making commercial item determinations, including examples and sample Commercial Item decision trees.
 - [Part B](#) provides additional guidance for pricing commercial items.
- [DCMA Commercial Item Group](#)
 - Maintains database of prior DOD Commercial Item Determinations.
 - If requested by a DOD buying activity, will “evaluate, perform market research, and write a Commercial Item Determination (CID)” for specific products or services.



Questions?



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