



Reduced Risk Through **Commercial Item Contracting**

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Background

- **Historical Impediments to Contracting with the Federal Government**
 - Government-unique auditing and accounting requirements (e.g., Cost Accounting Standards, Truth in Negotiations Act, etc.)
 - Government-unique specifications and standards
 - Technical data and computer software rights
 - Government-unique contract requirements (e.g., government specifications, unilateral changes, etc.)

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2



Background

- **In October 1994, the government enacted the Federal Acquisition Streamlining Act (FASA)**
 - Dramatically changed the government's procurement philosophy
 - A key provision in FASA is the government's stated preference for the purchase of commercial items because the purchase of proven commercial items can:
 - Reduce the need for government-funded research and development
 - Minimize acquisition lead time
 - Reduce the need for detailed design specifications and expensive product testing
 - FASA further encourages government agencies to ensure that requirements are defined so that commercial items may be procured to fulfill agency requirements



Background

- **In 1995, the Federal Acquisition Regulation (FAR) council implemented FASA by revising FAR Part 12 to:**
 - Contain policies and procedures applicable only to commercial items
 - Create acquisition policies that more closely resemble the commercial marketplace
 - Identify exemptions from government contracting laws and regulations for commercial item contracts
- **Among other things, FAR Part 12 requires government agencies to:**
 - Conduct market research to determine if commercial items are available to satisfy the agency's requirements
 - Buy commercial items when they are available to meet the agency's needs
 - Require prime contractors and subcontractors at all tiers to incorporate, to the maximum extent practicable, commercial items as components of items supplied to the government



Benefits of Commercial Item Contracts

- **The government has a stated preference to acquire commercial items (this includes the acquisition of commercial services)**
 - DoD acquired over \$60M in commercial items in FY 2014
- **Commercial item contracts are “streamlined” to resemble non-government commercial contracts**
 - Fewer FAR/DFARS and other clauses and flowdowns
 - Exempt from many onerous government requirements
 - Allows companies to propose terms consistent with commercial practices in their industries
 - FAR Part 12 takes precedence over any other section of the FAR (see FAR 12.102(c))
- **Keeps overhead costs lower with less administrative burdens (less risk), which will help contractors to keep their prices competitive – this also benefits the government!**



What is a Commercial Item?

“Commercial Item” means (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;



What is a Commercial Item?

FAR 2.101 (cont...)

- (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;



What is a Commercial Item?

■ FAR 2.101 (cont...)

- (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. 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;



What is a Commercial Item?

■ FAR 2.101 (cont...)

- (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;



What is a Commercial Item?

■ FAR 2.101 (cont...)

- (5) Installation services, maintenance services, repair services, training services, and other services if
 - (i) Such services are procured for support of an item referred to in paragraphs (1), (2), (3), or (4) of this definition, 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;



What is a Commercial Item?

■ FAR 2.101 (cont...)

- (6) 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.



What is a Commercial Item?

■ FAR 2.101 (cont...)

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.



What is a Commercial Item?

■ FAR 2.101 (cont...)

- (7) 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; or
- (8) A non-developmental 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.



What is a Commercial Item?

■ Commercially Available Off-The-Shelf (COTS)

- An item does not need to be a COTS item to be a commercial item

■ Definition of COTS (see FAR 2.101)

- A commercial item as defined in paragraph (1) of the commercial item definition
- Sold in **substantial quantities** in the commercial marketplace
- Offered to the government under a prime contract or subcontract at any tier, **without modification** in the **same form** in which it is sold in the commercial marketplace



Recent Attempts to Narrow the Definition

- In 2012, DoD proposed a statutory change to the commercial item definition be included in the National Defense Authorization bill for FY 2013
 - Eliminate items “**of a type**” from the existing statutory prescription for goods (the definition of services in the statute does not contain “of a type” language)
 - Eliminate goods or services merely **offered** for sale, lease, or license (but not yet sold, leased or licensed) to the general public from the existing statutory definition
 - Adjust the standard for determining fair and reasonable prices that requires prior sale of “substantial” quantities to one that allows prior sale of “like” quantities
 - Proposal was not included in the House and/or Senate versions of the NDA bill for FY 2013



Recent Attempts to Narrow the Definition

- DoD Final Rule (77 Fed. Reg. 11480, 3/12/2012)
 - Requires a higher-level of approval for commercial item determinations for acquisitions over \$1 million when the determination is based on “of a type” or “offered for sale” language in the definition of a commercial item (DFARS 212.102)



Commercial Item Determinations

- **But the pendulum seems to be shifting...**
 - FY 2016 National Defense Authorization Act (“NDAA”)
 - § 851, Procurement of Commercial Items
 - Requires the Secretary of Defense to:
 - Establish and maintain a centralized and properly resourced capability to oversee the making of commercial item determinations for DoD procurements
 - Provide public access to such determinations
 - Allows COs to presume that a prior DoD commercial item determination serves as a determination for subsequent procurements of such items
 - To depart from the commercial item precedent, the CO must request review by the head of the contracting activity, which must be made within 30 days



Commercial Item Determinations

- FY 2016 National Defense Authorization Act
 - § 855, Market Research and Preference for Commercial Items
 - Within 90 days of the enactment of the NDAA, the undersecretary of defense for acquisition, technology and logistics must issue guidance to ensure defense acquisition officials “fully comply” with:
 - The statutory preference for commercial items
 - The requirement to conduct appropriate market research
 - At a minimum, the guidance shall prohibit the award of a contract in excess of the SAT for IT products or services that are not commercial items, unless the head of the agency makes a written determination that no commercial items are suitable to meet the agency’s needs
 - Within 180 days of the enactment of the NDAA, revise policy documents to ensure full compliance with FAR 10.001 “to conduct appropriate market research before developing new requirements”



Commercial Item Determinations

- FY 2016 National Defense Authorization Act
 - §856, Limitation on Conversion of Procurements from Commercial Acquisition Procedures
 - Prior to converting a FAR Part 12 procurement over \$1M to a non-commercial item procurement, the CO must make a written determination that
 - The earlier use of commercial acquisition procedures was in error or based on inadequate information; and
 - That the DoD will realize a cost savings from switching to FAR Part 15
 - Procurements over \$100M require approval by the head of the contracting activity
 - Within 180 days of the enactment of the NDAA, DoD shall develop procedures to track conversions of future contracts and subcontracts to reflect these requirements



Commercial Item Determinations

- FY 2016 National Defense Authorization Act
 - §857, Treatment of Goods and Services Provided by Nontraditional Defense Contractors as Commercial Items
 - Authorizes DoD to treat certain items and services provided by nontraditional defense contractors as commercial items
 - Definition of “Nontraditional Defense Contractor” revised
 - An entity that is not currently performing, and has not performed, for at least the 1 year period preceding the DoD solicitation, a DoD prime contract or subcontract that is subject to full Cost Accounting Standards coverage
 - Prior to this revision, “nontraditional defense contractor” included a contractor that performed in the prior year any other DoD contract in excess of \$500,000 under which the contractor was required to provide certified cost or pricing data



Commercial Item Contracts

- Commercial item contracts must be Firm-Fixed-Price (FFP) or FFP with economic price adjustment (based on fluctuating labor or material costs)
- Limited exceptions for labor-hour and time-and-materials contracts requiring various high-level government approvals



Commercial Item Contracts

- **Can have a commercial item subcontract even if the prime contract or higher-tiered contract is noncommercial**
 - FAR 44.402 and FAR clause 52.244-6, “Subcontracts for Commercial Items”
 - Contractors and subcontractors at all tiers shall, to the maximum extent practicable be required to incorporate commercial items or nondevelopmental items as components of items delivered to the Government



Commercial Item Prime Contracts

- Commercial Item Solicitations, Contracts, Orders are issued on Standard Form 1449

SOLICITATION/CONTRACT/ORDER FOR COMMERCIAL ITEMS				1. REQUISITION NUMBER	PAGE 1 OF
OFFEROR TO COMPLETE BLOCKS 12, 17, 23, 24, & 30					
2. CONTRACT NO.	3. AWARD/EFFECTIVE DATE	4. ORDER NUMBER	5. SOLICITATION NUMBER	6. SOLICITATION ISSUE DATE	
7. FOR SOLICITATION INFORMATION CALL:			8. NAME	9. TELEPHONE NUMBER (No collect calls)	10. OFFER DUE DATE/ LOCAL TIME

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Commercial Item Prime Contracts

- Solicitations incorporate by reference FAR clauses:
 - 52.212-1, "Instructions to Offerors – Commercial Items"
 - 52.212-3, "Offeror Representations and Certifications-Commercial Items"
 - 52.212-4, "Contract Terms and Conditions-Commercial Items"
 - 52.212-5, "Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items"
- Contracts incorporate by reference FAR Clauses:
 - 52.212-4, "Contract Terms and Conditions-Commercial Items"
 - 52.212-5, "Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items"

<input type="checkbox"/> 27a. SOLICITATION INCORPORATES BY REFERENCE FAR 52.212-1, 52.212-4, FAR 52.212-3 AND 52.212-5 ARE ATTACHED. ADDENDA <input type="checkbox"/> ARE <input type="checkbox"/> ARE NOT ATTACHED	<input type="checkbox"/> 27b. CONTRACT/PURCHASE ORDER INCORPORATES BY REFERENCE FAR 52.212-4, FAR 52.212-5 IS ATTACHED. ADDENDA <input type="checkbox"/> ARE <input type="checkbox"/> ARE NOT ATTACHED
<input type="checkbox"/> 28. CONTRACTOR IS REQUIRED TO SIGN THIS DOCUMENT AND RETURN COPIES TO ISSUING OFFICE. CONTRACTOR AGREES TO FURNISH AND DELIVER ALL ITEMS SET FORTH OR OTHERWISE IDENTIFIED ABOVE AND ON ANY ADDITIONAL SHEETS SUBJECT TO THE TERMS AND CONDITIONS SPECIFIED.	<input type="checkbox"/> 29. AWARD OF CONTRACT: REF. _____ OFFER DATED: _____. YOUR OFFER ON SOLICITATION (BLOCK 5), INCLUDING ANY ADDITIONS OR CHANGES WHICH ARE SET FORTH HEREIN, IS ACCEPTED AS TO ITEMS.

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Commercial Item Prime Contracts

■ FAR 52.212-4 – Addresses the following topics:

Inspection/Acceptance	Termination for Cause
<u>Assignment</u>	Title
Changes	Warranty
<u>Disputes</u>	Limitation of Liability
Definitions	<u>Other Compliances</u>
Excusable Delays	<u>Compliance With Laws Unique to Government Contracts</u>
<u>Invoice</u>	Order of Precedence
Patent Indemnity	System for Award Management (SAM)
<u>Payment</u>	<u>Unauthorized Obligations</u>
Risk of Loss	Incorporation by Reference
Taxes	
Termination for the Government's Convenience	

- Topics in **bold and underlined** cannot be tailored – all other clauses can be tailored



Commercial Item Prime Contracts

■ Example, 52.212-4, Paragraph (o), Warranty

- “The Contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this contract.”
 - Standard implied warranties under Article 2 of the Uniform Commercial Code, which only apply to the sale of goods
 - Contractors often want to expressly disclaim these implied warranties in favor of an express warranty (e.g., 12 month warranty of no defects in workmanship)
 - Revise if the contract requires the performance of services



Recent Updates

- **GSA Class Deviation (July 31, 2015 – Supplemented September 30, 2015)**
- **GSA Proposed Rule (May 31, 2016) – New GSAM Clause addressing common Commercial Supplier Agreement terms**
 - GSAM 552.212-4 or 552.232-78 read into the Agreement and takes precedence over conflicting terms:
 - *End User*: Definition of contracting parties to not include government employees in their personal capacity
 - *Law and Disputes*: Governed by Federal law
 - *Continued Performance*: No unilateral termination by the contractor
 - *Arbitration; Equitable or Injunctive Relief*: Only when expressly authorized by statute
 - *Additional Terms*: Limitations on a contractor's ability to unilaterally add terms
 - *No Automatic Renewals*
 - *Indemnification*: Only DOJ can represent the U.S. when the contractor is indemnifying the government
 - *Audits*: Limitations on the contractor's ability to audit the government's compliance with the agreement
 - *Taxes or Surcharges*
 - *Non-assignment*: No assignment without government prior approval
 - *Confidential Information*: Consistent with FOIA requirements



Commercial Item Prime Contracts

- **FAR 52.212-5**
 - “Check-the-Box” Format
 - Only the FAR clauses that have been checked off by the Contracting Officer apply to the prime contract
- **DFARS 212.301**
 - List of DFARS clauses that apply to commercial item solicitations and contracts



Commercial Item Prime Contracts

■ Best Practices

- FAR 52.212-4
 - Review the government's clauses
 - Know what is required and what can be tailored
 - Don't waste time trying to negotiate mandatory clauses that cannot be tailored
 - Identify the clauses you want to target for tailoring and provide a justification to the Contracting Officer
 - Be prepared to offer new clauses and justify them as the customary commercial practice
- FAR 52.212-5
 - Review the clauses checked off by the CO and negotiate out unnecessary and inapplicable clauses



Commercial Item Subcontracts

- Government contract statutes, rules, regulations, and clauses apply to the extent they are incorporated into the agreement
 - "Christian" doctrine *G. L. Christian & Associates v. U.S.*, 312 F.2d 418 (Ct. Cl., 1963) does not apply to subcontracts
 - *But see UPMC Braddock v. Harris*, 2013 U.S. Dist. LEXIS 45953 (D.D.C. March 30, 2013)



Commercial Item Subcontracts

- **U.S. Government subcontracts are also governed by commercial law such as the Uniform Commercial Code (U.C.C.), other statutory laws or the common law**
 - Article 2 of the U.C.C. only applies to the sale of goods
 - The U.C.C. has been enacted in all 50 states and the District of Columbia, the Commonwealth of Puerto Rico, Guam and the U.S. Virgin Islands
 - The goal behind the U.C.C. is to harmonize state law because most transactions involving the sale of goods extend beyond one state



Commercial Item Subcontracts

- **Prime Contract is not a Commercial Item Contract**
 - Prime Contract Contains FAR 52.244-6
 - Paragraph (c)(1) identifies mandatory FAR flowdown clauses
 - Paragraph (c)(2) permits the prime contractor to flow down to subcontracts for commercial items a minimal number of additional clauses necessary to satisfy its contractual obligations
 - e.g., Inspection and Acceptance, Warranty, Termination, Stop Work Order, Data Rights, Patent Indemnity, Changes, Definitions, Taxes, Risk of Loss, DPAS Rating, etc.
 - Prime Contract Contains DFARS 252.244-7000
 - Prime contractor is not required to flow down the terms of any DFARS clause in subcontracts for commercial items at any tier under the contract, unless so specified in the particular clause
 - While not required, the contractor may flow down to subcontracts for commercial items a minimal number of additional clauses necessary to satisfy its contractual obligation



Commercial Item Subcontracts

- **Prime Contract is a Commercial Item Contract**
 - Prime Contract Contains FAR 52.212-5
 - Paragraph (e)(1) identifies mandatory FAR clauses
 - Paragraph (e)(2) permits the prime contractor to flow down to subcontracts for commercial items a minimal number of additional clauses necessary to satisfy its contractual obligations
 - Prime Contract Contains DFARS 252.244-7000



Commercial Item Subcontracts

- **Prime Contractor's Perspective**
 - Prime contractor usually has the most bargaining power
 - There are some clauses in the prime contract that must be flowed down, or the prime contractor will be in breach
 - **But**, not all provisions **must** be or even **can** be flowed-down
 - EFT Payment Provisions through the System for Award Management (SAM)
 - Disputes Clause
 - Since the subcontract is likely only for a subset of the prime contractor's requirements, some provisions are likely not applicable
 - There are other clauses which, while not mandatory, should be modified and flowed-down in order to protect the prime contractor's interests (e.g., changes, termination, stop-work, etc.)



Commercial Item Subcontracts

■ Subcontractor's Perspective

- Subcontractor needs to accept the clauses the Prime must include to cover its legitimate risk (e.g., termination, warranty, etc.)
- Subcontractor needs to be able to identify the clauses that are not mandatory flow-downs, that do not cover a Prime's legitimate risk, or that cause a burden on the subcontractor
- Challenge for the subcontractor is to convince the Prime that these superfluous clauses add unnecessary costs, are overly burdensome to the subcontractor, or are just unfair
- Subcontractor needs to consider whether, once accepted, it will be able to flow-down clauses to its own lower-tier subcontractors



Exemptions for Commercial Item Contracts

■ Exemptions for Commercial Item Prime Contracts and Subcontracts

- FAR 12.503 and DFARS 212.503 identify certain laws or portions of laws **not applicable** to Executive Agency Commercial Item **Prime Contracts**
- FAR 12.504 and DFARS 212.504 identify certain laws or portions of laws **not applicable** to Commercial Item **Subcontracts** at any tier
- FAR 12.505 and DFARS 212.570 identify laws in addition to FAR 12.503/DFARS 212.503 and FAR 12.504/DFARS 212.504 which are **not applicable** to prime contracts or subcontracts for **COTS items**



Exemptions for Commercial Item Contracts

■ FY 2016 National Defense Authorization Act

- §854, Report on Defense-Unique Laws Applicable to the Procurement of Commercial Items and Commercially Available Off-the-Shelf Items
 - Within 180 days of enactment, DoD must submit to the congressional defense committee a report
 - Identifying the defense-unique provisions of law that are applicable to commercial item or COTS procurements, both at the prime contract and subcontract level
 - Discussing the impact of limiting inclusion of only those clauses required to implement law or Executive Orders, or consistent with standard commercial practice
 - Discussing limiting the flowdown of clauses in subcontracts for commercial items or COTS to those that are required to implement law or Executive Order
 - Including a list of all standard clauses used in FAR Part 12 contracts, including a justification for the inclusion of each clause



Exemptions for Commercial Item Contracts

■ Truthful Cost or Pricing Data (f/k/a Truth in Negotiations Act (TINA))

- Provides the government with all significant and relevant cost or pricing data available to contractors during price negotiations
 - Disclosure statute
 - Does not require contractors to use a certain supplier or subcontractor or accounting system
 - Defines requirements for the submission of cost or pricing data and exemptions
 - Requires certification that data are current, accurate and complete
 - Provides the government with the right to examine contractor's records
 - Sets forth rules governing remedies for TINA violations, known as "defective pricing"
- ### ■ Exemptions
- Commercial item as defined in FAR 2.101
 - Modifying a commercial item contract



Exemptions for Commercial Item Contracts

- **Cost Accounting Standards (CAS)**
 - Governs the measurement, timing and allocability of costs charged to certain negotiated government contracts
 - Imposes major accounting requirements on contractors having contracts subject to them
 - Requires the negotiation of impacts of changes to the contractor's cost accounting practices
 - Exemptions:
 - Firm-fixed-price and fixed-price with economic price adjustment (provided price adjustment is not based on actual costs incurred), time-and-materials, and labor-hour contracts and subcontracts for the acquisition of commercial items

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Exemptions for Commercial Item Contracts

- **FAR 52.215-2, "Audit and Records – Negotiation"**
 - Permits the government to audit a Contractor's cost records or certified cost or pricing data records for up to 3 years after the Contractor's receipt of final payment
 - **Most** commercial item contracts are exempt
 - Only applies if the contract exceeds \$150,000 **and**
 - Is a cost-reimbursement, time-and-materials, labor-hour, or price-redeterminable contract;
 - The contractor was required to provide certified cost or pricing data; or
 - The contractor is required to furnish cost, funding, or performance reports
 - **Note:** The clause will apply to a commercial item time-and-materials or labor-hour contract
 - **BUT**, FAR 52.212-5 includes an Examination of Records provision applicable to most commercial item prime contracts over \$150,000

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Exemptions for Commercial Item Contracts

- **Changes**
 - **Non-Commercial Item Prime Contracts**
 - Government can unilaterally direct changes
 - The contractor must proceed with the change as directed, even if the parties have not yet agreed on a corresponding equitable adjustment to the contract price and/or delivery schedule
 - **Commercial Item Prime Contracts (FAR 52.212-4(c))**
 - Changes may only be made by **mutual agreement** of the parties
 - Contractor does not need to perform the change until an agreement is reached
 - **Commercial Item Subcontracts**
 - Subcontractors should agree to accept unilateral changes directed by the government – in particular if the prime is a non-commercial item contract, **but** insist that all other changes be mutually agreed upon by the parties

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Exemptions for Commercial Item Contracts

- **Intellectual Property Protection**
 - Presumption technical data and computer software were developed exclusively at private expense
 - Does not apply to DoD acquisitions of major systems or subsystems or components
 - Still applies to DoD acquisitions of major systems or subsystems or components that are COTS
 - Relaxed marking requirements
 - Ability to negotiate standard commercial licenses

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Exemptions for Commercial Item *Subcontracts*

- **Small Business Subcontracting Plan – *Only Exempt for Commercial Item Subcontracts per paragraph (j) of the clause***
 - Includes goals expressed in terms of total planned subcontracting dollars for use of each type of small business concern
 - Includes total projected sales (in dollars), the total value of projected subcontracts to support the sales, and the total dollars planned to be subcontracted to each type of small business concern
 - Includes a description of the principal types of supplies and services to be subcontracted, and identification of the types of supplies and services planned for subcontracting to each type of small business concern
 - Includes policies and procedures for implementing the plan

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Conclusion

- **The government has a stated preference to purchase commercial items whenever possible, and have commercial items incorporated into non-commercial deliverables**
- **When selling a commercial item to the government or higher tier contractor**
 - Be prepared to justify that your product meets the definition of a commercial item in FAR 2.101
 - Insist on contract terms consistent with the FAR's preferential treatment
 - Recognize the clauses the customer must or should flow down
- **When buying a commercial item to support your program**
 - Enlist the help of the seller in justifying the deliverable meets the FAR's definition of a commercial item
 - Flow down clauses that are required and those that make good business sense, but avoid wholesale flowdowns that are unnecessary and only add cost

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Price Analysis Requirements

- **Price analysis must be performed to determine whether the price is “fair and reasonable”**
 - Price analysis performed in accordance with FAR 15.404-1(b)
 - Price analysis **does not** include an analysis of the contractor’s separate cost elements or proposed profit
 - For commercial item **goods**, the price analysis is conducted independent of the commercial item determination
 - For some commercial item **services**, to qualify as a commercial item, the services must be sold at “catalog” or “market” prices



Price Analysis Requirements

- **Price analysis techniques (FAR 15.404-1(b)(2)) - *first two techniques are the preferred techniques***
 - Comparison of proposed prices received in response to the solicitation (i.e., adequate price competition)
 - In FY 2014, DoD awarded about \$119 billion (42% of total contract obligations) on noncompetitive contracts
 - Comparison of proposed prices to historical prices paid, whether by the government or other than the government for the same or similar items
 - Can be used for commercial items, including those “of a type” or requiring minor modifications
 - Development of a “Prices Paid Tool” to provide government personnel with access to prices paid by the government for various products and services under different contracts (<https://strategicsourcing.gov/prices-paid-tool>)



Price Analysis Requirements

- **Price analysis techniques (cont...)**
 - Use of parametric estimating methods/application of rough yardsticks (such as dollars per pound or per horsepower, or other units) to highlight significant inconsistencies that warrant additional pricing inquiry
 - Comparison with competitive published price lists, published market prices of commodities, similar indexes, and discount or rebate arrangements
 - Comparison of proposed prices with independent government cost estimates
 - Comparison of proposed prices with prices obtained through market research for the same or similar items
 - Analysis of “data other than certified cost or pricing data” (defined in FAR 2.101)



Recent Developments

- **National Defense Authorization Act for FY 2013, Section 831 (1/2/2013)**
 - Required the issuance of guidance on the use of the government’s authority to require the submission of “other than certified cost or pricing data”
 - Include standards for determining whether information on the prices at which the same or similar items have previously been sold is adequate for evaluating the reasonableness of price
 - Include standards for determining the extent of uncertified cost information that should be required in cases in which price information is not adequate for evaluating the reasonableness of price
 - Ensure that in cases in which such uncertified cost information is required, the information shall be provided in the form in which it is regularly maintained by the offeror in its business operations
 - Provide that no additional cost information may be required by the DoD in any case in which there are sufficient nongovernment sales to establish reasonableness of price



Recent Developments

- **DCMA Announcement (12/2014)**
 - Hiring and training roughly 50 full-time commercial pricing experts based in St. Petersburg, Florida
 - Central resource to make recommendations to COs regarding commercial item determinations and fair and reasonable pricing
 - COs still make the final call on whether a good or service qualifies as a “commercial item”



Recent Developments

- **DoD Issued Guidance re Commercial Items and the Determination of Price Reasonableness for Commercial Items (2/4/2015)**
 - COs should establish a goal of making a commercial item determination within 10 business days after assembling all of the support data (either from available sources or the contractor, if necessary)
 - Key consideration is whether the government is paying a “fair and reasonable” price
 - For commercial items, preference to use market-based pricing
 - If market-based pricing is not available, the CO **may**, but **is not required to**, use cost-based analysis as the means of determining price reasonableness
 - Where there is minimal or no sales history to the government, the contractor should be asked to provide information on why the proposed price is fair and reasonable
 - The contractor should be in the best position to substantiate why the price is fair and reasonable



Recent Developments

■ DoD Issued Guidance (cont...)

- Standard for CO – Whether a reasonable businessman/woman reviewing the data would conclude that it is sufficient to demonstrate that the taxpayers are paying a fair and reasonable price for the item
- Requests for “data other than certified cost or pricing data”
 - Only difference may be the certification requirement
 - Contractor provide information in the form in which it is regularly maintained by the contractor
- DCMA Cost & Pricing Center designated to establish a team of acquisition professionals to assist contracting professionals in this area



Recent Developments

■ DoD Proposed Rule (80 Fed. Reg. 45918, 8/3/2015) –

- In the absence of adequate price competition, “market-based pricing” is the preferred method to establish a fair and reasonable price
 - “Market-based pricing” – pricing that results when **nongovernmental** buyers drive the price in a commercial marketplace. When nongovernmental buyers in a commercial marketplace account for a preponderance (50 percent or more) of sales by volume of a particular item, there is a strong likelihood the pricing is market based
- Relevant Sales Data
 - Same good or service that reflect market-based pricing
 - Substantially similar goods or services that reflect market-based pricing
 - Same good or service that do not reflect market-based pricing
 - Substantially similar goods or services that do not reflect market-based pricing



Recent Developments

■ DoD Proposed Rule (cont...)

- Standards for Relevant Sales Data
 - Age of Data – depends on the industry
 - Volume
 - Nature of Transaction (terms and conditions, date, quantity sold, sale price, type of customer, warranty information, key product technical specifications, maintenance agreements, etc.)
- Industry Concerns
 - Defines “market-based pricing” in a way that abrogates the ability of a product/service to qualify as a commercial item under the “offered for sale” terminology
 - Limits the “of a type” language to “substantially similar” goods or services
 - Requires prime contractors to obtain “whatever information is necessary” from subcontractors to support a price analysis



Recent Developments

■ DoD Proposed Rule (cont...)

- DoD withdrew this proposed rule on 12/7/2015
- DoD opened a new DFARS case 2016-D006 to implement the requirements of the NDAA for FY 2016 described herein as well as §831 of the NDAA for FY 2013



Recent Developments

■ DoD's Better Buying Power 3.0 (4/9/15):

- Theme: *Achieving Dominant Capabilities Through Technical Excellence and Innovation*
 - Our technological superiority is at risk
 - Based on effectiveness of research and development efforts
 - Innovation comes from government labs, non-profit research institutions, defense contractors, and increasingly, the commercial sector and overseas
- Focuses on, *inter alia*, commercial technology
 - "Remove barriers to commercial technology utilization"
 - "DoD can do a much more effective job of accessing and employing commercial technologies"



Recent Developments

■ DoD's Better Buying Power 3.0 (cont...):

- If DoD wants to gain access to innovative, cutting edge technologies, then DoD must:
 - Eliminate barriers to using commercial technology and products
 - Assess the need for both policy and regulatory changes (including intellectual property, liability implications and other commercial industry concerns)
 - Train the workforce on how to access commercial technology and products with existing authorities
- These are achieved by eliminating, to the maximum extent practicable, government-unique requirements that are inconsistent with the commercial practices of those companies



Recent Developments

- **DoD's Better Buying Power 3.0 (cont...):**
 - DoD focus on Commercial Item Determinations
 - Industry expressed uncertainty in transactions with DoD on commercial item acquisitions
 - Office of Defense Pricing initiated actions to streamline and accelerate this process
 - Issuing policy guidance
 - Increasing training
 - Implementing analytical support tools



Recent Developments

- **DoD's Better Buying Power 3.0 (cont...):**
 - YET provides that DPAP will develop a draft legislative proposal to revise the definition of the term "commercial item" to eliminate items and services merely *offered* for sale, lease, or license by September 2015
 - Note BBP 3.0 also focuses on ensuring cybersecurity of DoD's networks and systems, including unclassified controlled technical information



Recent Developments

■ FY 2016 National Defense Authorization Act

- §852, Modification to Information Required to be Submitted by Offeror in Procurement of Major Weapon Systems as Commercial Items
 - DoD increased authority to purchase a major weapon system (or a component thereof) as a commercial item without a price reasonableness determination, provided
 - The secretary of defense has determined that the system is a commercial item; and
 - Such treatment is necessary for national security
 - If a price analysis is required, before requiring cost or pricing data, DoD must accept available information about:
 - Prices for the same or similar items sold under different terms and conditions
 - Prices for similar levels of work or effort on related products or services
 - Prices for alternative solutions or approaches
 - Other relevant information that can serve as the basis for a price assessment



Recent Developments

■ FY 2016 National Defense Authorization Act

- §853, Use of Recent Prices Paid by the Government in the Determination of Price Reasonableness
 - Requires a CO to consider evidence presented by an offeror of recent purchase prices paid by the Government for the same or similar items in establishing price reasonableness provided...
 - The CO is satisfied that the prices remain a valid reference for comparison given the totality of the factors, including:
 - Time elapsed since prior purchase
 - Differences in quantities purchased
 - Differences in applicable terms and conditions



Summary

- DoD continues to struggle with the concept of commercial item contracting and how to encourage commercial contractors while ensuring the prices paid are fair and reasonable
- The confusion at the prime contract level is trickling down throughout the supply chain causing friction between commercial item suppliers and non-commercial item prime contractors
- FY 2016 NDAA appears to recognize the importance of commercial item contractors to DoD



Opportunities Available in GSA Multiple Award Schedule Contracting

- GSA Schedule Contracting provides government agencies with the ability to purchase commonly used, commercial items/services easily and inexpensively
- Currently 40 different schedules
- Over 11 million types of products and services offered for sale
- Over 15,000 vendors
- Sales exceed \$35 Billion annually
- Additional contracting opportunities under the VA Federal Supply Schedule Program – similar to GSA program
- GSA Schedule Contract is essentially a “hunting license”



Opportunities Available in GSA Schedule Contracting

- [00CORP](#) THE PROFESSIONAL SERVICES SCHEDULE
- [03FAC](#) FACILITIES MAINTENANCE AND MANAGEMENT
- [23 V](#) AUTOMOTIVE SUPERSTORE
- [36](#) THE OFFICE, IMAGING AND DOCUMENT SOLUTION
- [48](#) TRANSPORTATION, DELIVERY AND RELOCATION SOLUTIONS
- [51 V](#) HARDWARE SUPERSTORE
- [520](#) FINANCIAL AND BUSINESS SOLUTIONS (FABS)
- [541](#) ADVERTISING & INTEGRATED MARKETING SOLUTIONS (AIMS)
- [56](#) BUILDINGS AND BUILDING MATERIALS/INDUSTRIAL SERVICES AND SUPPLIES
- [58 I](#) PROFESSIONAL AUDIO/VIDEO TELEMTRY/TRACKING, RECORDING/REPRODUCING AND SIGNAL DATA SOLUTIONS
- [599](#) TRAVEL SERVICES SOLUTIONS
- [621 I](#) PROFESSIONAL AND ALLIED HEALTHCARE STAFFING SERVICES
- [621 II](#) MEDICAL LABORATORY TESTING AND ANALYSIS SERVICES
- [65 I B](#) PHARMACEUTICALS AND DRUGS
- [65 II A](#) MEDICAL EQUIPMENT AND SUPPLIES
- [65 II C](#) DENTAL EQUIPMENT AND SUPPLIES
- [65 II F](#) PATIENT MOBILITY DEVICES
- [65 V A](#) X-RAY EQUIPMENT AND SUPPLIES
- [65 VII](#) INVITRO DIAGNOSTICS, REAGENTS, TEST KITS AND TEST SETS
- [66](#) SCIENTIFIC EQUIPMENT AND SERVICES



Opportunities Available in GSA Schedule Contracting

- [66 III](#) CLINICAL ANALYZERS, LABORATORY, COST-PER-TEST
- [67](#) PHOTOGRAPHIC EQUIPMENT - CAMERAS, PHOTOGRAPHIC PRINTERS AND RELATED SUPPLIES & SERVICES (DIGITAL AND FILM-BASED)
- [70](#) GENERAL PURPOSE COMMERCIAL INFORMATION TECHNOLOGY EQUIPMENT, SOFTWARE, AND SERVICES
- [71](#) FURNITURE
- [71 II K](#) COMPREHENSIVE FURNITURE MANAGEMENT SERVICES (CFMS)
- [72](#) FURNISHING AND FLOOR COVERINGS
- [73](#) FOOD SERVICE, HOSPITALITY, CLEANING EQUIPMENT AND SUPPLIES, CHEMICALS AND SERVICES
- [736](#) TEMPORARY ADMINISTRATIVE AND PROFESSIONAL STAFFING (TAPS)
- [738 II](#) LANGUAGE SERVICES
- [738 X](#) HUMAN RESOURCES & EQUAL EMPLOYMENT OPPORTUNITY SERVICES
- [75](#) OFFICE PRODUCTS/SUPPLIES AND SERVICES AND NEW PRODUCTS/TECHNOLOGY
- [751](#) LEASING OF AUTOMOBILES AND LIGHT TRUCKS
- [76](#) PUBLICATION MEDIA
- [78](#) SPORTS, PROMOTIONAL, OUTDOOR, RECREATION, TROPHIES AND SIGNS (SPORTS)
- [81 I B](#) SHIPPING, PACKAGING AND PACKING SUPPLIES
- [84](#) TOTAL SOLUTIONS FOR LAW ENFORCEMENT, SECURITY, FACILITIES MANAGEMENT, FIRE, RESCUE, CLOTHING, MARINE CRAFT AND EMERGENCY/DISASTER RESPONSE
- [871](#) PROFESSIONAL ENGINEERING SERVICES
- [874](#) MISSION ORIENTED BUSINESS INTEGRATED SERVICES (MOBIS)
- [874 V](#) LOGISTICS WORLDWIDE (LOGWORLD)
- [899](#) ENVIRONMENTAL SERVICES





Overview of Schedule Process

- **Research Schedules applicable to offered products**
(www.gsa.gov)
- **Find current Solicitation on www.fbo.gov**
 - Solicitations are continuously updated and always pending (i.e., “Evergreen”)
 - Contain FAR and GSAM clauses (some in full text and some incorporated by reference)
- **Prepare a Proposal**
 - Each Solicitation is segmented into various Special Item Numbers (SINs)
 - Identify the applicable SIN for the offered products/services



Overview of Schedule Process

- **Complete the Commercial Sales Practices (CSP) Chart**
 - GSA Solicitations and Contracts Include the CSP-1 Form, required to be completed by all offerors
 - Sets forth the contractor’s pricing and discounting practices including identifying customers, prices, sales volumes, discounts, concessions, etc.
 - Identify price given to Most Favored Customer (or Category of Customers)
 - Make sure that the information and data provided is supported by appropriate documentation
 - Maintain clear and extensive descriptions of sales practices, and the bases for any particular concessions or discounts that were excluded from the CSP as not comparable or relevant



Overview of Schedule Process

- **Complete the Commercial Sales Practices (CSP) Chart (cont...)**
 - Used by GSA to evaluate and negotiate fair and reasonable prices based on contractor's pricing and discount practices with its best commercial customers
 - Provides the contractor with an opportunity to distinguish sales to certain customers or categories of customers and identify exceptions that would otherwise trigger the Price Reduction Clause
 - Must be updated during contract term
 - Not one size fits all and difficult to complete



Overview of Schedule Process

- **Failure to Accurately Disclose Information in CSP: GSAM 552.215-72, Price Adjustment - Failure to Provide Accurate Information**
 - GSA may perform a Post-Award Audit to assess whether the contractor provided current, accurate and complete commercial sales information
 - GSA can reduce the price of the contract or terminate for default the contract if the contractor:
 - Fails to provide all required information
 - Provides outdated, inaccurate or incomplete information
 - Changes pricing and discounts made after submission but more than 14 days prior to completion of negotiations



Overview of Schedule Process

- **Inaccurate Pricing Presents Significant Liability**
 - Failure to completely and accurately fill out the CSP-1 complicates the contractor's ability to comply with the Price Reduction Clause
 - Pricing questions and reviews often lead to expansions of the audit to other compliance areas
 - Could move from an audit to an investigation by the OIG or DoJ
 - Additional civil and, perhaps, criminal liability



Overview of Schedule Process

- **After submission of the CSP-1, a GSA price negotiator will review the information and seek to obtain the contractor's "best price" given to the contractor's "most favored customer" (MFC)**
 - In the commercial world, this also may be known as Most Favored Customer Pricing, or Lowest Provided or Guaranteed Pricing
 - MFC pricing is based on comparable terms and conditions among a contractor's best commercial customers
- **If applicable, the contractor should be prepared to identify why GSA should get less than the "best price"**
 - Examples
 - Sales to MFC are subject to different terms and conditions than GSA sales (e.g., different FOB terms, freight inclusive/exclusive pricing, etc.)
 - Sales to MFC involve dealers or resellers, while sales to GSA are direct sales
- **After negotiations with GSA have concluded, contractors should revise their CSP to reflect what was actually agreed upon with GSA**



Overview of Schedule Process

- Pre-award process takes about 90-120 days
- Contract award following GSA evaluation /negotiation / acceptance of offer
 - Indefinite Delivery/Indefinite Quantity (IDIQ) Contract
 - Most have a base term of 5 years, with three 5-year option periods
 - Agencies issue Task or Delivery Orders
 - No agency publication required
 - “Fair Opportunity to be Considered” standard
 - Orders issued by individual agency Contracting Officers
 - GSA merely administers Schedule Program and the contract (e.g., published pricing, modifications, etc.)



Key Issues and Clauses

- Price Reduction Clause (PRC):
GSAM 552.238-75, Price Reductions
 - Requires the contractor to notify the government if, during contract performance, it reduces its price list or otherwise provides an increased discount or other concession to the basis of award (BOA) customer
 - Designed to maintain the price/discount relationship negotiated at the time of award during subsequent contract performance
 - e.g., Discount given to BOA Customer, Entity “X” at time of award = 15%
 - Post-award, discount to BOA increases to 20%
 - Contractor must disclose increase to GSA and offer government new, increased discount of 20%



Key Issues and Clauses

■ Price Reduction Clause (cont...)

- Reduction extends from the same effective date and for the same time period as extended to the BOA customer
- No price reduction for sales:
 - To commercial customers under FFP definite quantity contracts with specified delivery in excess of the maximum order threshold specified in the contract
 - To federal agencies
 - Made to state and local government entities when the order is placed under a Schedule contract (and the state and local government entity serves as the BOA)
 - Caused by an error in quotation or billing
- Can always provide the government with a voluntary price reduction at any time under the contract



Key Issues and Clauses

■ Avoid Triggering the Price Reduction Clause

- Develop a strategy regarding the BOA customer
- Make sure BOA customer is clearly identified in the Schedule contract
- Implement adequate policies and procedures to ensure compliance
- Educate all sales employees on the **government and commercial** side regarding what triggers the PRC
- Implement internal controls to track sales and signal red flags when a sale may violate the PRC
- Clearly document any additional discounts or concessions to the BOA and why they do not trigger the PRC
- Promptly notify the Contracting Officer of any price reduction, even if it is result of a quotation or billing error
- Notice does not mean that the government will require a corresponding price reduction



Key Issues and Clauses

■ Economic Price Adjustment (EPA)

GSAM 552.216-70, Economic Price Adjustment—FSS Multiple Award Schedule Contracts

- Contractors are permitted to request an increase in the price of goods/services on the Schedule to correspond with an increase in commercial list/catalog prices
 - After first 12 months
 - No more than 3 increases will be considered for each subsequent 12 month period
 - Must be requested prior to the last 60 days of the contract period
 - At least 30 days must lapse between requested increases
- Aggregate increases over any 12 month period shall not exceed a specified percentage (varies per negotiations)
- Government can negotiate a decreased price, or request that the item be removed from the Schedule
- Contract should be bilaterally modified to reflect the price increases and the effective date of such increases



Key Issues and Clauses

■ Industrial Funding Fee (IFF)

552.238-74, "Industrial Funding Fee and Sales Reporting"

- Fee paid to GSA to cover GSA's administrative and program costs of administering the Schedule
 - Incorporated into contractor's price
 - IFF currently stands at .75%
 - Paid quarterly based on the calendar quarter – make sure you file timely
 - Reports and payments submitted within 30 days after the completion of each reporting quarter
 - Failure to pay constitutes a debt and interest will accrue
- When does an IFF audit occur?
 - Generally, annually or just prior to renewal (though, some contractors "never")
 - Performed during Contractor Assistance Visits
 - If problems or inconsistencies are discovered, expect follow-up audits
- What does the audit focus on?
 - Two main objectives: (1) to track all invoices for GSA orders and report Schedule sales correctly; and (2) correct calculation and payment of IFF to GSA
- Consequences of non-compliance include termination for default and withholding/set-off of payments



Key Issues and Clauses

■ Trade Agreements Act (TAA)

- TAA mandates that the USG purchase end products of U.S. or designated countries
- TAA prohibits USG acquisition of end products from non-designated countries
- Effectively precludes USG acquisition of non-designated country products/services
- So, for example, cannot sell end products made in Brazil, China, Thailand, or India
- In other words, no price “add-on” allowing for use of non-compliant offers, as in the Buy American Act context



Key Issues and Clauses

■ Penalties for Noncompliance

- Potential penalties for failing to comply with Schedule contract’s terms and conditions:
 - Price Adjustment
 - Termination for Default or Convenience
 - Suspension and Debarment
 - False Claims Act Liability
 - False Statements Act Liability
 - Other Fraud Statutes
 - Criminal Prosecution
- Developing and implementing an effective compliance program is critically important to avoid these penalties



Recent Developments

- **GSA Transactional Data Proposed Rule (80 FR 11619, 3/4/2015)**
 - Applies to GSA FSS contracts, as well as all GSA-awarded governmentwide acquisition contracts, multiagency contracts, and GSA-awarded IDIQ contracts.
 - Does not apply to FSS contracts awarded by the VA
 - Goals:
 - Share prices previously paid by agencies throughout the government
 - Improve GSA's ability to conduct meaningful price analysis
 - Replace the PRC with a clause that provides:
 - The government may request from the contractor a price reduction at any time during the contract period; and
 - The contractor may offer the CO a voluntary governmentwide price reduction at any time during the contract period
 - GSA would maintain the right throughout contract performance to ask a contractor for updates to the CSP when commercial benchmarks or other available data on commercial pricing is insufficient to establish price reasonableness



Recent Developments

- **GSA Transactional Data Proposed Rule (cont...)**
 - Impose on contractors the requirement to collect and electronically report transactional data to GSA on a monthly basis regarding sales to the federal government (within 15 days of the end of the month)
 - Mandatory pilot program for certain GSA FSS COTS and related commercial products and commoditized service offerings
 - Likely force contractors to sell to the GSA at the lowest price paid by the government, without taking into account commercial circumstances surrounding the procurement
 - Significant administrative and compliance burden, which have been underestimated by GSA
 - GSA said the following 5 Schedules will be included in the Pilot:
 - Schedule 51V: Hardware Superstore
 - Schedule 58 I: Professional Audio/Video Telemetry/Tracking, Recording/Reproducing and Signal Data Solutions
 - Schedule 72: Furnishings and Floor Coverings
 - Schedule 73SA: Food Service, Hospitality, Cleaning Equipment and Supplies, and Chemicals and Services
 - Schedule 75: Office Products Supplies and Services and New Products/Technology



Questions & Answers