Recent Changes in Definitions and Determinations of Commerciality: How They Can Affect Your Products and Services Sold to the Federal Government

Presented by Darrell Hineman, CPA, CFE, Director
Donald Harris, DCMA, Contract Price/Cost Analyst

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Objectives

- FAR Commercial Item Definition
- Defense Contract Management Agency (DCMA) six Commercial Item Centers of Excellence (CoEs)
- What form of “uncertified cost data” will be acceptable and the types of information to support a Commercial Item Determination (CID) application, under pending DFARS proposed changes
- Impact on subcontractors commercial item determination and future prime contractor purchasing systems
- Opportunities for nontraditional defense contractors under the pending DFARS regulations
- Impact on civilian Federal agency interpretation of commercial items
Commercial Item Definition (FAR 2.101)

Commercial item definition contains 8 specific areas:

1. Simplified definition of an established marketplace commercial item:
   Commercial items include any item of a type customarily used by the general public, or by nongovernmental entities, for purposes other than governmental purposes that has been sold, leased, or licensed, or offered for sale, lease, or license to the general public (see FAR 2.101).

2. An **item that evolved** through advances in technology or performance and that is **not yet available** in the commercial marketplace, **but will be available** in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;
3. An established or evolved commercial item that was modified using customarily available modifications “of a type” in the commercial marketplace; or minor modifications “of a type” not customarily available in the commercial marketplace made to meet Federal Government requirements.

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;
## Commercial Item Definition (FAR 2.101)

<table>
<thead>
<tr>
<th>Items A</th>
<th>Established Marketplace</th>
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<tbody>
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<td>Items B</td>
<td>Evolved to be Available in Commercial Marketplace</td>
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<td>Items C</td>
<td>Modification that is Customarily Available</td>
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<tr>
<td>Items D</td>
<td>Minor Modifications, Not Customarily Available</td>
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</tbody>
</table>
Commercial Item Definition (FAR 2.101)

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 paragraph (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;
Commercial Item Definition (FAR 2.101)

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. 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.
Commercial Item Definition (FAR 2.101)

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 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.

It does not mention foreign Governments?

Other Non-Federal Government Sales

- State
- Counties
Is there a difference between selling items versus selling services, as defined in the FAR?

- If so, what is the difference?
- Does the FAR mention “commercial services?”
- Does it even matter?
Develop a robust “Cadre”
of commercial acquisition expertise
to support the acquisition community with
commercial item recommendations and pricing

OPERATIONAL 30 JUNE 2016
Congressional encouragement of Commercial Items

Issues with Commercial Item Determinations (CIDs)

• Inconsistent determinations within Department
• Challenging of prime CID due to varying interpretations or inadequacy
• Timeliness of Government CID

Challenges with price reasonableness

• Contractor resistance to providing required data, especially at subcontract level
  • Impacts both CO and prime contractor’s ability to determine fair and reasonable
• Market research to find commercial comparable items can be challenging
  • Big differences in quantities, lack of recent history
• The 6 Centers of Excellence are in place and ready to support the ACO/PCOs
• Processes and procedures in development to ensure consistency across reviews.
• All reviews get a subsequent review at one level higher
• Focused reviews of both CID and Pricing are returned to requester in average of 30 days
  • Prime delay – lack of supporting information
  • Meeting the 10 day objective when all data is provided
• Commercial Item Group (CIG) gets the tough calls and supports Commerciality in 80% of all cases
• Advance Agreements are being worked
  • Using available resources in the Cost & Pricing Center to get in place
  • Avoids distraction from current proposal reviews
  • Sets ground rules for data required and submission
  • Does NOT override the PCO

• CBAR modification is being worked to accommodate adding CIDs

• DCMA is maintaining a database of completed reviews and recommendations

• PCOs have the final call
• CIG strives to accomplish PRICE analysis based on available data and sales information.
• Cost analysis is a last resort.
• Will assist HCAs, when requested, sort out any conflicts in prior determinations
What We Provide

- Assistance with market research and developing expertise in existing and emerging commercial markets
- Recommendations on commerciality
- Price reasonableness recommendations
  - Include recommended price ranges as applicable
  - All primes as requested w/o threshold
  - Subs above $10m
- Assistance with Contractor Purchasing System Review (CPSR) reviews focused on commercial acquisition by the Prime
- Experts consisting of both Pricing Specialists and Engineers (59 total personnel)
Centers of Excellence

Denver, CO
Markets: Space Vehicle & Launch, Systems, Cyber & Services

Indianapolis, IN
Markets: Automotive, Aeronautics, Aircraft Engines

Boston, MA
Markets: Medical Services, Chemicals and Materials

Philadelphia, PA
Markets: Naval Transport & Equipment, Troop Supply (Shelters, Personal Equipment)

St. Petersburg, FL
Markets: Vehicles, Weapons, Ammo

Phoenix, AZ
Markets: Heavy Machinery
Demand has been steadily increasing
The items reviewed to date average 80% recommendation for commerciality
Average turnaround time is 40 days
Establishing a “.mil” database for acquisition community
  - Database will have multiple search functions/capabilities (e.g. search by part number, company, etc.)
Memorandums of Agreement

- DCMA chartered to achieve agreements with companies to enable DoD’s expansion of commercial acquisitions
  - Focused on repeatable two-step process (i.e. commerciality recommendation and price reasonableness analysis) to gather the necessary information (in a format already maintained by the contractor) for market research and price reasonableness, and in the review of a contractor’s written request for exceptions to certified cost or pricing data under FAR 52.215-20
  - Supports “Third Offset Strategy” to broaden DoD supplier base
    - Increase commercial suppliers and broaden the technology base
- Goal is to quickly achieve initial agreement – then expand and modify to further enhance the process
Let’s look at a typical actual case...

Is it Commercial?

Is it priced Fair and Reasonable?
Case Study – An Encryption Device

- The facts presented:
  - The unit is Top Secret/SCI
  - Another unit offered for comparison
  - Same form, fit and function
  - Both Radiation hardened
  - Key was an embedded Programmable Read Only Memory (PROM)
  - Approximate Quantity 400 over 5 years
  - Average Price $92K
Case Study

When we were called -

Acquisition was 18 months old

They were at an impasse

Critical need just around the corner
At the table, the contractor clarifies -

It’s made on the same line

Color of the box, part number and name are different as well

It’s exactly the same EXCEPT the key
The contractor finally offers an analogy -

Your neighbor buys a Kwikset® lock for his front door and keys it to match his other doors
You have to do the same for your house and get the same type, model and color
It’s exactly the same EXCEPT the key
Case Study

• The facts – it is “of a type”:
  • The unit is TS/SCI because of the USG key, the commercial version uses a commercial key using the same algorithm
  • The unit offered for comparison can be interchanged until a keyed PROM is added
  • Same form, fit and function
  • Both Radiation hardened
  • The USG is crypto controlled while the Commercial version is Proprietary and locked up.
Case Study

But is it Fair and Reasonable?
Case Study

The facts presented:

- The TS/SCI unit is $92K
- No guaranteed USG quantities but an anticipated usage higher than commercial expected
- The unit offered for comparison sold in smaller quantities at the same price
- Several outstanding proposals for the commercial version were at the same price – yet also smaller quantities
At the table, the contractor clarifies -

- It’s made on the same line
- The same price is offered to the USG as the Commercial Customers
- No charge was being made for the crypto account
- It was developed and qualified at the contractor’s expense
- No cost data would be offered
It is Fair and Reasonable
Accessing Support

- Requests are submitted through a centralized e-mail inbox (Commercial@dcma.mil)
- Requests are assigned to the corresponding commercial industry market expertise
- DCMA will support request from DCAA regarding commercial items and pricing
- DCMA may coordinate verification of sales data with DCAA
- DCAA and DCMA have engaged and discussed augmentation of groups during system reviews (e.g. Estimating & Purchasing)
- DCMA is developing a Database to collect information on completed cases and to include PCO final determinations
Prime Responsibilities Over Subcontractor’s CID

- Primes are responsible to determine whether a particular sub’s supply or service meets the definition of a commercial item (DFARS 244.402)
  
  (a) Contractors shall determine whether a particular subcontract item meets the definition of a commercial item…Contractors are expected to exercise reasonable business judgment in making such determinations, consistent with the guidelines for conducting market research in FAR Part 10.
- Primes accessibility to DoD robust database of commercial item determinations list or can a Prime contribute to the list
**Prime Responsibilities Over Subcontractor’s CID**

- Procurement files must adequately substantiate the market research (FAR Part 10) in commercial item determination (CID)
  - Standard forms
  - Sufficient Information
  - Time Elapsed
  - Quantities Purchased

- **Relevant sales** data means information provided by an offeror of sales of the same or similar items that can be used to establish price reasonableness taking into consideration the age, volume, and nature of the transactions (including any related discounts, refunds, rebates, offsets or other adjustments). DFARS 215-401
Prime Responsibilities Over Subcontractor’s CID

• **Comment:** A number of respondents stated that proposed rule 2013–D034 required an offeror to obtain inappropriate subcontractor data in order to make commerciality determinations and price reasonableness determinations.  
  (Federal Register 53102, Aug 11, 2016)

• **Response:** This proposed rule does not change the existing Federal Acquisition Regulation (FAR) requirement that offerors shall obtain from subcontractors whatever information is necessary to support a determination of price reasonableness. Further, this rule provides that no cost information may be required from a prospective subcontractor in any case in which there are sufficient nongovernment sales of the same item to establish reasonableness of price.
Prime Responsibilities Over Subcontractor’s CID

- No CID presumption rule for Prime contractors as granted under DFARS 212.102(a)(iii)(A), where the CO may presume that a prior CID made by a military department, a defense agency or another component of DoD...
  (Federal Register 53104, Aug 11, 2016)

- Market Research (DFARS 215.401) pending rule: defines 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 impact, if any, will these new requirements for CID documentation have on a Contractor’s Purchasing System Review?
DFARS – Nontraditional Defense Contractors (NDC)

• Proposed amendment to the DFARS 202.101, Definitions (Federal Register 53104, Aug. 11, 2016)

Nontraditional defense contractor (NDC) means an entity that is not currently performing and has not performed any contract or subcontract for DoD that is subject to:

[1] full coverage under the cost accounting standards [CAS]…,

[2] for at least the 1-year period preceding the solicitation of sources by DoD...

• This definition should increase the number of possible (sub)contractors participation. Does it???
DFARS – Nontraditional Defense Contractors (Pending DFARS 212.102)

- Supplies and services provided by NDC may be treated as commercial items (10 U.S.C. 2380A).

- This permissive authority is intended to enhance defense innovation and create incentives for cutting-edge firms to do business with DoD.
DFARS – Nontraditional Defense Contractors (Pending DFARS 212.102)

• It is not intended to recategorize current noncommercial items, however, when appropriate, contracting officers may consider applying commercial item procedures to the procurement of supplies and services from business segments that meet the definition of NDC even though they have been established under traditional defense contractors.

• The decision to apply commercial item procedures to the procurement of supplies and services from NDCs does not constitute:
  1. A requirement for a commercial item determination (CID); and
  2. It does not mean the item is commercial.
DFARS – Nontraditional Defense Contractors (Pending DFARS 212.102)

• What are the opportunities for NDCs?

• What industries are DoD targeting?

• Will participation increase with the change in the DoD regulations? Or are they the same players?

• Should NDC be concern with entering the DoD arena?
Non-DoD Agencies Commercial Item Determination

• Impact on civilian agencies’ interpretation of commercial items
• Will the new definition and positions taken by DoD be accepted by other agency?
• Section 853 NDAA for FY 2016 provides that contracting officer shall consider evidence provided by an offeror of recent purchaser prices paid by the Government for the same or similar commercial items when established price reasonableness, subject to certain conditions. (Fed Reg. 53103, Aug 11, 2016)
✓ Does this include Non-DoD agency?
QUESTIONS/COMMENTS
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