
DAU Hot Topics Forum on:

Using commercial items to increase innovation, increase competition and lower costs

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Briefing Overview

- **Status of Current Guidance**
- **Commercial Item Determinations**
- **Determining Price Reasonableness**
- **Conclusion**

Status of Current Guidance

- Director DPAP Letter [“Guidance on Commercial Item Determinations and Determinations of Price Reasonableness for Commercial Items”](#) 2 Sep 16
- DFARS Case 2016-D006 in process (captures FY13 & FY16 directed changes)
 - Significant changes, including in area of major weapons systems
- DoD Guidebook for Acquiring Commercial Items drafted and scheduled to publish with DFARS D016-D006
- DFARS D017-D020 will implement the FY17 NDAA changes

Commercial Items

- **CID Tenets**

- **We must strive for consistency in CIDs within DOD**

- **Previous DOD CO CIDs set precedent**

- Since Commercial Items require a written determination, it should exist for you to rely on it (if not, you will have to write one for buys over \$1M – reference DFARS 212.102)
 - You probably do not need to do a deep dive on a previous CID if it makes sense on its face and you are familiar with the item
 - It is unnecessary to write a new CID when you can annotate reliance on a previous CID – that can serve as the record for the official contract file
 - If your previous buys for the same item were not commercial, you should seek to resolve any differences with the prior buying activity who purchased the same item as commercial

Commercial Items

- **CID Tenets**

- **Previous DOD CIDs set precedent**

- When making CID decisions, it is appropriate to consult with the primary buying activity or “the expert” on the procurement of that particular item (and consult with DCMA CIG)
 - Overturning a DOD CID requires engagement with your leadership, e.g. HCA
 - Before overturning a prior DOD CID, consult with the DCMA CIG
 - If you do overturn a prior CID, make sure you inform the DCMA CIG
 - Overturned CIDs should set the new precedent within DOD
 - There is a very high bar to overturn the CID
 - Consistency is the key
 - The new requirements in this area do not impact the need to determine price reasonableness

Commercial Items

- **CID Tenets**

- **Relying on Prime Contractor CIDs**

- Under DFARS 244.402, it is the prime contractor's responsibility to determine whether a subcontract item meets the commercial Item definition
 - While the prime may conduct a CID on an Interdivisional Work Transfer Agreement (IWTAs), treat IWTAs as primes rather than subcontractors
 - You can rely on prime CIDs unless they are in error or without foundation or are in direct conflict with existing government acquisitions for the same item which are not commercial
 - Since Commercial Items require a written determination by the PCO for acquisitions over \$1M, it is a reasonable expectation for contractors to follow suit in order for you to rely on their determination (and understand the basis for it)
 - Companies should follow their own procedures for CIDs

Commercial Items

- **CID Tenets**

- **New Commercial Item Determinations**

- Do not make your decision in a vacuum – it is important to understand how the same item is being purchased within DOD in order to ensure consistency
 - The government primary buying activity or expert on that commercial item has set a precedent that should be followed
 - » If not, coordinate with that activity

Determining Price Reasonableness

Introduction

- **Commercial items are not subject to the Truth In Negotiations Act (TINA) because the commercial marketplace should drive a fair and reasonable (F&R) price**
 - **Determining F&R is easy when commercial items are competed**
 - **Determining F&R is easy when purchasing items classified as commercial off the shelf (COTS) that are available to everyone**
 - **Determining F&R is easy when purchasing items that have many buyers in the marketplace and there is available sales data**

When is it challenging to determine F&R for commercial items?

Determining Price Reasonableness

- **F&R is challenging when we are buying “of a type” items on a “sole source” basis**
 - **The commercial market does not drive a fair and reasonable for our exact item**
 - **Market data on comparable items may be difficult to obtain and differences in our item and the commercial item make price comparisons challenging**
 - **We are prohibited from getting certified cost or pricing data**

Price Analysis Steps

- **Obtain Relevant Data for Comparison**
 - **Conducting Pricing Market Research-Prices within the Government and from other sources**
 - **Obtaining data from the Offeror**
- **Identify Factors that Affect Comparability**
- **Determine Impact**
- **Adjust prices**
- **Compare Prices**

Value Analysis

- **Value Analysis**
 - **Systemic & Objective evaluation of a product & its related costs (to the Govt.), whose purpose is to ensure optimum value**
 - **Should not be used as a substitution for price analysis, but can supplement the analysis**
 - Sole source-could involve assessing the cost of the item, e.g. a cost build-up and then adding the additional items that provide value
 - Understanding content of baseline comparison item is critical
 - A commercial item sold in the commercial market has a price that should already include items like mgmt. support & non-custom warranty
 - When commercial sales data are insufficient and you are doing a cost build-up, you will have to consider items like mgmt. support & non-custom warranty (would not be part of the direct cost to produce the item) when arriving at the final value to the Government

Conclusions

- **Recent changes in law include significant changes to commercial acquisition policy**
- **DOD must be consistent in creating CIDs with a preference for the primary buying activity to make the determination for all buyers**
- **Value analysis is useful if you do not have enough data to determine fair & reasonable with price analysis alone**
- **Commercial Items are negotiable-use your knowledge gained in market research to negotiate a good deal!**