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IN REPLY
REFER TO J-33
PROCLTR 01-13

AUG 9 2001

MEMORANDUM FOR PROCLTR DISTRIBUTION LIST

SUBJECT: Determining Commerciality (DLAD 12.102)

This PROCLTR is intended to help DLA buying activities comply with the FAR guidance on commercial items, while maintaining efficient, effective agency business practices. It is also our intent to address concerns our buying activities have identified to us about commercial acquisitions and to clarify some issues that have been raised by industry. Additionally, the new DLAD coverage includes some clarifications of existing policy on determining commerciality that were determined necessary by the DoD Commercial Designations Integrated Process Team and identified in its March 2000 report.

The new DLAD guidance reflects an evolution in Agency thinking that has resulted ~~from~~ participation in various DoD groups promoting civil-military integration and significant DLA procurements involving commerciality determinations. Our DLAD guidance has been substantially rewritten, to ensure that contracting officers are given the full flexibility of the FAR definition of "commercial item." We want our guidance to enhance the contracting officer's ability to make the best business decision appropriate to the total circumstances surrounding a particular acquisition. The statutory preference is to support commercial acquisition, unless a commerciality determination is clearly inappropriate. At the same time, our DLAD ~~guidance~~ reaffirms that the contracting officer ultimately retains the individual authority and discretion to determine whether the commercial item definition has been met.

Comptroller General decisions on this issue have consistently found that ~~the~~ determination ~~whether~~ an item or service ~~meets~~ the commercial item definition is largely within the discretion of the contracting agency and will not be disturbed unless it is shown to be unreasonable. Canberra Industries, Inc., B-271016, June 5, 1996, 96-1 CPD 269; Coherent, Inc., B-270998, May 7, 1996, 96-1 CPD 214, Aalco Forwarding, Inc., et al., B-277241.8, October 21, 1997, 97-2 CPD 110, Crescent Helicopters, B-284706, May 30, 2000, 00-1 CPD 90.

This PROCLTR is effective immediately and remains in effect until it is incorporated into DLAD 4105.1. The point of contact for this PROCLTR is Mrs. Anne Burleigh, J-336, (703) 767-1358, DSN 427-1358 or email anne_burleigh@hq.dla.mil.

WILLIAM J. KENNY
Executive Director
Logistics Policy and Acquisition Management

Attachment



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PART 12

ACQUISITION OF COMMERCIAL ITEMS

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12.102 Applicability.

(a)(90) Part 12 is mandatory, except for the exemptions at FAR 12.102(d), if --

(i) * * *

(ii) *The COS field is blank, but the item or service is clearly a type that is used by non-Government customers and that would meet the definition of commercial item at FAR 2.101;*

(iii) (A) * * *

(B) The item, if other than the exact approved item cited in the procurement item description (PIC), has been determined technically acceptable;

(iv) *A non-Part 12 long-term contracting instrument expires and a new long-term contracting arrangement will be negotiated; unless the contracting officer conducts adequate market research, seeks commercial solutions, determines FAR Part 12 is inappropriate for use, and documents the contract file appropriately (see FAR 10.001(a)(2)(ii), 10.001(a)(3)(ii), 10.002(e), and 12.101); or*

(v) *Simplified acquisition procedures (FAR Part 13) are being used to acquire commercial items.*

(91) Part 12 cannot be used if --

(i) * * *

(ii) *The COS field is blank, but the item or service is clearly Government-unique (see FAR 10.002(d)(2));*

(iii) *Only noncommercial items are being acquired; except that nondevelopmental items can compete for a requirement that was solicited under FAR Part 12 (see FAR 11.002(a)(2)(iii));*

(iv) *The acquisition is conducted using an automated procurement system that (A) does not include FAR Part 12 (such as, for example, Procurement Automated Contract Evaluation (PACE)); or (B) is issuing an order against a pro-existing non-Part 12 contract;*

(v) *The acquisition is conducted under the Federal Prison Industries, Inc. (FPI) Program (FAR Subpart 8.6); or*

(vi) The following conditions apply --

(A)-(D) * * *

(92) *When an acquisition is conducted under the Javits-Wagner-O'Day (JWOD) Program (FAR Subpart 8.7), use of Part 12 is discretionary but strongly encouraged for commercial item acquisitions. The decision whether to conduct JWOD acquisitions using Part 12 can be based on cost-effectiveness, such as automated systems capabilities or other administrative considerations.*

(90)(1)(i) The contracting officer, not the offeror or contractor, has the individual authority and ~~responsibility to~~ determine if an item or service meets the definition of "commercial item" at FAR 2.101. The contracting officer has the latitude to employ the full flexibility of the FAR definition and the responsibility for making the best business decision appropriate to the total circumstances surrounding a particular acquisition. The statutory preference is to support commercial acquisition, unless a commerciality determination is clearly inappropriate. Contracting officers should consider whether applying commercial acquisition procedures would provide marketplace advantages resulting in lower overall costs to the Government; such as, for example, streamlined contractor proposal procedures, increased efficiencies for DLA, reduced customer wait times, increased buying leverage by joining a larger customer base, or access to improved acquisition strategies (e.g., commercial distribution systems, contractor support services, continuous upgrades, etc.) These factors should be documented in a Business Case Analysis, appropriate to the size and complexity of the acquisition. Contracting officers should not be unnecessarily restrictive in interpreting the commercial item definition. For example, the normal sales pattern of an item could be that it is sold infrequently or only to a specialized market segment, and yet the item could still be considered commercial. Contracting officers must ensure that inappropriate factors are not considered when determining commerciality. For example, a determination of commerciality is

separate and independent from a determination of price reasonableness. Concerns about the future ability to determine offered prices fair and reasonable do not factor into the decision as to whether a product or service meets the commercial item definition. Issues related to quality or item criticality are also not a basis for determining commerciality. The fact that the Government has a different application for an item than the commercial application does not necessarily mean the item cannot be considered commercial. (However, the Government must minimize risk through such means as the application of quality assurance terms and conditions in the contract. For this reason, any contract requirements that have previously applied to an item should never be automatically relaxed or removed when an item is determined commercial. This is especially true for requirements involving issues such as quality, configuration control, preservation, packing, packaging, marking, etc. Therefore, in the absence of appropriate market research that demonstrates otherwise, contracting officers may rely on previous contracting requirements. The only exception to this is when market research has confirmed a change is appropriate; and all procedures/controls for making such a change have been followed, such as, for example, coordination with the cognizant technical/quality specialist and/or the Engineering support Activity.) Whatever decision is made concerning commerciality, the contracting officer must be able to demonstrate that the determination is reasonable; and the determination must be documented, consistent with the size and complexity of the acquisition. If a commerciality determination is challenged, GAO considers the broad statutory and regulatory framework for defining what is a commercial item, the requirements of a specific solicitation, the substantive features of the item proposed, and the agency's contemporaneous evaluation and source selection record.

(ii) The contracting officer makes the final determination of commerciality but is required to request and consider the advice of appropriate specialists (see FAR 1.602-2(c)). DCA personnel can also provide assistance in obtaining information to help support the contracting officer's determination. If a requirement includes NSNs managed by another buying activity, the contracting officer must request and consider the advice of technical specialists at the managing activity. If technical advice from the managing activity is inconsistent with technical advice from the buying activity, the contracting officer must determine the reasons for the discrepancy and document how it was resolved. The contracting officer is not generally required to conduct additional market research to confirm an entry in the commercial field in the CDF (see 12.102(a)(90)(i)). The contracting officer may make a determination of commerciality on the basis of that recommendation, unless there is some reason to question it. Buying activities are only required to conduct market research to the extent "appropriate to the circumstances," in accordance with FAR and DLAD 10.001(a)(2).

(2) To meet paragraph (a) of the commercial item definition at FAR 2.101, an item must be "of a type customarily used for nongovernmental purposes" and must have been "sold, leased, or licensed to the general public" or "offered for sale, lease, or license to the general public." (See 12.102(90)(2)(i) - (iii). The phrase "customarily used for nongovernmental purposes" means a governmental entity is not the exclusive end user. The term "general public" does not include foreign military sales.

(i) Invoices documenting sales to commercial customers should normally be sufficient to indicate that an item or service has been sold to the general public.

(ii)-(iii) * * *

(3) To determine that an item is commercial pursuant to one or more paragraphs of the definition other than (a), the contracting officer shall obtain appropriate documentation as necessary, such as commercial product literature, technical opinion as to the effect of a modification, etc. The following guidance addresses some of these other paragraphs:

(i) Paragraph (b) is intended to address items that upgrade frequently, through product updates, model changes, and product improvements (for example, new versions of software). Buying activities could demonstrate that the item will be available in time to satisfy the Government requirement by, for example, obtaining an announcement documenting when the new product will be available to the public.

(ii) When making a determination under paragraph (c) of the commercial item definition, risk to the Government is lowest if the buying activity can obtain sufficient technical documentation to demonstrate direct traceability from the modified item to an item that met paragraph (a) or (b) of the definition. If that is not possible, the buying activity may attempt to demonstrate commerciality by documenting that the offeror or contractor manufactures the Government-unique items on an integrated production line, with little differentiation between the commercial and Government items. Alternatively, the buying activity may attempt to demonstrate commerciality by documenting that the Government-unique item and comparable commercial items have similar characteristics and are made with similar manufacturing processes.

(A) To support a representation that an offered item meets paragraph (c)(1) of the commercial item definition, the offeror or contractor must demonstrate that a modification is of a type customarily available in the commercial marketplace. Under paragraph (c)(1), a modification can be a "major" modification. If an offeror or contractor claims their item meets paragraph (c)(1), the buying activity must conduct appropriate market research to confirm this.

Modifications made for the purpose of meeting Federal Government requirements (i.e., Government-unique modifications) are not, by definition, "customarily available in the commercial marketplace."

(B) To meet paragraph (c) (2) of the commercial item definition, the offeror or contractor must demonstrate that a modification is a minor modification made for the Government. If an offeror or contractor claims a modification is minor, the buying activity must conduct an engineering analysis and/or exercise technical judgment to confirm this claim. This portion of the definition is intended to address modifications such as Government-unique paint color; special packaging; ruggedization; and minor changes in length, diameter, or headstyle of fasteners. In making a determination whether a modification is minor, the buying activity should consider the technical complexity of the change and the degree of risk associated with it. Risk can be gauged by the extent to which a change affects the contractor's operation and the price impact of the change. For example, if the price of a modified item is significantly more than the price of the commercial item, this may indicate that the modification involves a substantial amount of risk and may not be minor.

(iii) The definition of "commercial item" includes "services" (paragraphs (e) and (f)). Paragraph (e) addresses services in support of an item that meets paragraph (a), (b), (c) or (d) of the definition. Paragraph (f) is much broader. Services are defined as commercial under paragraph (f) if they are 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 under standard commercial terms and conditions. Services acquired by the Government do not have to be identical to those provided to commercial customers, if there are sufficient common characteristics between the commercial services and those required by the agency. Solicitation requirements must not individually, or in total, be of such a nature as to transform the type of services sought into something other than a commercial item. The established market price does not have to be published or written. It is a current price that is established in the course of ordinary and usual trade between buyers and sellers free to bargain and that can be substantiated by data from sources independent of the offeror. A price is based on a catalog or market price if the service being purchased is sufficiently similar to the catalog-priced or market-priced commercial service to ensure that any difference in prices can be identified and justified without using cost analysis.

(4) An item does not have to be developed at private expense to be commercial; except that nondevelopmental items must have been developed exclusively at private expense to be considered commercial (see paragraph (h) of the commercial item definition). Even if the Government paid for development of an item, or if an item has a military origin, a commercial market can subsequently develop for that item. The issue of who paid for development should factor into the contract negotiations but is not part of the commercial item determination.

(5) An item does not have to be "commercially available off-the-shelf (COTS)" to meet the commercial item definition. COTS items are a subset of the broader commercial item definition. COTS items must have been sold, leased or licensed in substantial quantities in the commercial marketplace and must be offered to the Government without modification. Because of these requirements, acquisitions of COTS items are considered to involve lower risk to the Government than other types of commercial buys. The definition of COTS item does not include services, or bulk cargo (such as petroleum products).

(6) Potential indicators of commerciality. The following guidance addresses some conditions that buying activities may consider as indicators that an item or service is potentially commercial. In most cases, buying activities will need to conduct additional market research to determine commerciality when these conditions exist.

(i) Commercial sales history. Documentation of sales to commercial customers may indicate an item or service is commercial (see 12.102(90)(2)(i)).

(ii) Notices or brochures announcing new products or services. An announcement of a forthcoming product or service may indicate commerciality (see 12.102(90)(2)(ii)).

(iii) Listing in catalogs or brochures. Inclusion in a commercial catalog or brochure may indicate an item or service is commercial (see 12.102(90)(2)(iii)).

(iv) Distributors. The existence of distributors may indicate an item or service is commercial. However, the contracting officer must determine the nature of the relationship between the manufacturer and the distributor. For example, some manufacturers use a distributor to handle Government sales; this does not necessarily mean the items or services are commercial.

(v) Components of commercial end items. If an end item has been determined to be commercial, many of the components of that end item are likely to be commercial. However, every component of a commercial end item cannot be presumed to be a commercial item. For example, an end item may have a component that is unique to the Government. The end item would still meet the commercial item definition, if that component was considered a minor modification to the end item. The component itself, however, would be unique to the Government and would therefore not meet the commercial item definition. One way for the contracting officer to determine if all the

components of a commercial end item can reasonably be considered commercial is to determine the basis for the commerciality determination of the end item. If an end item is a commercially available off-the-shelf (COTS) item, the contracting officer could reasonably make a determination that all the components of that end item are commercial. Generally, however, information on the end item alone will be insufficient to determine commerciality of the components, and information will be needed on the components themselves. This information could include, for example, sales and technical data. When reviewing a large number of components, commerciality reviews should be conducted on a group basis whenever possible (see 10.001(a)(2) (91)).

(vi) Prior Agency or Department determinations. When acquisition personnel have previously determined that an item or service meets the commercial item definition, buying activities should consider this a potential indicator of commerciality. The preference is to accept a prior determination of commerciality, unless there is a reason not to. However, buying activities must conduct market research, to the extent appropriate to the circumstances, to determine if a prior commerciality designation is relevant to the current buy. Some factors to be considered include the circumstances of the prior determination, the extent of market research conducted, and similarities between the current acquisition and the prior buy. Prior determinations of commerciality do not relieve contracting officers from their individual responsibility to make determinations of commerciality on current buys, based on market research appropriate to the circumstances. In some cases, previous determinations of commerciality may involve specific circumstances, and it cannot automatically be presumed the item is commercial for future buys.

(vii) Contractor/Subcontractor determinations. Only the Government has the authority to determine if an item or service meets the commercial item definition at FAR 2.101. Buying activities should consider contractor or subcontractor determinations as potential indicators of commerciality and must conduct market research to an appropriate extent to determine if such a prior commerciality designation can be applied to a current buy.

(viii) Predominantly Commercial Facilities. When buying activities have evidence that an item is produced in a facility that is predominantly engaged in producing similar items for the commercial market, this should be considered a potential indicator of commerciality. Buying activities must conduct market research to an appropriate extent to determine if sufficient documentation can be obtained on which to base a commerciality determination. It cannot be presumed that all items in a predominantly commercial facility are commercial, because some facilities produce both commercial and Government-unique items that are manufactured independently. However, products manufactured on integrated production lines with little differentiation between the commercial and Government products can generally be considered commercial.

(7) Contracts must require that additions to catalogs are subject to a determination of commerciality.

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