

Federal Contracting for Commercial Goods and Services

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Abstract. This paper provides a discussion of the policies and practices of the federal government in the purchase of commercial items and services. Instructors in purchasing courses who wish to introduce material on the government market may find this subject matter to be a good candidate for an introductory treatment of federal buying. Current regulatory changes in this area will be discussed during the presentation.

Over the past few years the Federal Government has made concentrated efforts to purchase commercial items and services in a less-bureaucratic fashion than had been done earlier. This paper discusses these changes and explores the current policies and procedures that are in place to streamline these purchases. It includes a discussion of the changes in the underlying laws and the resulting philosophy and policies. We discuss the requirements of the Federal Acquisition Regulation (FAR) Part 12—Acquisition of Commercial Items—and the reduced list of less-complex clauses that are required. While many unique terms and conditions (T&Cs) remain, entering into a commercial acquisition contract need not be fearfully rejected by businesses.

Introduction. Part 12 of the Federal Acquisition Regulation (FAR) prescribes policies and procedures unique to the acquisition of commercial items. It implements the Federal Government's preference for the acquisition of commercial items contained in Title VIII of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) by establishing acquisition policies more closely resembling those of the commercial marketplace and encouraging the acquisition of commercial items and components. This paper summarizes the policies and procedures from the FAR for federal government acquisition of Commercial goods and services.

The general policy is to buy commercial items and services whenever they will meet the needs of the government. Doing so should help fill those needs in a much more cost-effective manner than having products or services specifically designed for an agency. Buying items that can be modified from existing commercial items is also encouraged. Finally, buying items that have been previously developed and used (*nondevelopmental* items) is also encouraged. For the vast majority of the items and services that the government buys, commercial items will work to meet the needs of the government. However, making this change (since 1994) has not always been easy or obvious to the workforce. Similarly, commercial vendors have not all rushed to become government contractors. Although the requirements are simplified from the requirements for the non-commercial items, they still may be unfamiliar to those who have only used the Uniform Commercial Code (UCC).

The FAR requires federal government agencies to-

- (a) Conduct market research to determine whether commercial items or nondevelopmental items are available that could meet the agency's requirements,
- (b) Acquire commercial items or nondevelopmental items when they are available to meet the needs of the agency, and
- (c) Require prime contractors and subcontractors at all tiers to incorporate, to the maximum extent practicable, commercial items or nondevelopmental items as components of items supplied to the agency.

A commercial item is

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.

Any item that would satisfy this criterion, but for minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements.

Installation services, maintenance services, repair services, training services.

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. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed or a specific outcome to be achieved.

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.

Also, under the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136), the contracting officer also may use Part 12 for any acquisition for services that does not meet the definition of commercial item, if the contract or task order

- (i) Is entered into on or before November 24, 2013;
- (ii) Has a value of \$25 million or less;
- (iii) Meets the definition of performance-based contracting;
- (iv) Includes a quality assurance surveillance plan;
- (v) Includes performance incentives where appropriate;
- (vi) Specifies a firm-fixed price for specific tasks to be performed or outcomes to be achieved; and
- (vii) Is awarded to an entity that provides similar services to the general public under terms and conditions similar to those in the contract or task order.

Policy. There are methods other than the procedures in FAR Part 12 for the federal government to acquire commercial items. Most of these provide for even more simplified processing than the streamlined procedures of Part 12. Such methods include purchases made

- (1) At or below the micro-purchase threshold;
- (2) Using the Standard Form 44;
- (3) Using the imprest fund;
- (4) Using the Governmentwide commercial purchase card; or
- (5) Directly from another Federal agency.

Each of the first 4 items is under the general heading of simplified purchases of relatively low-dollar value. Micro-purchases are under \$2,500 and are most often made using the purchase card of item (4). The Standard Form 44 is a Purchase Order, Invoice, and Payment form generally used in remote locations or for emergencies when no other support is available, for example if emergency repairs must be made to a truck in a remote area. The imprest fund is a petty cash-type of revolving account for purchases under \$300. Finally, the last item is a reminder to use existing resources within the government.

For acquisitions of commercial items exceeding the simplified acquisition threshold of \$100,000, but not exceeding \$5,000,000 (\$10,000,000 for acquisitions entered into under the special authority described below), including options, contracting activities are to use the simplified procedures of a test program for commercial items, currently set to expire in 2006.

Special Policies Related to Attacks. In addition to the above policies,

Contracting officers may treat any acquisition of supplies or services that, as determined by the head of the agency, are to be used to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack, as an acquisition of commercial items.

Streamlined Pre-Award Procedures. Generally, for acquisitions in excess of the simplified acquisition threshold, an agency's statement of need for a commercial item will describe the type of product or service to be acquired and explain how the agency intends to use the product or service in terms of function to be performed, performance requirement, or essential physical characteristics. Describing the agency's needs in these terms allows offerors to propose methods that will best meet the needs of the Government.

When using Part 12 of the FAR, the contracting officer may allow fewer than 15 days before issuance of the solicitation. Also, the contracting officer may allow fewer than 30 days response time for receipt of offers.

The contracting officer shall use the Standard Form 1449, Solicitation/Contract/Order for Commercial Items. Contracting officers may combine the required synopsis, which announces the need for the supplies or services by the government, with the issuance of the solicitation into a single document. When this is done, the announcement will state This is a combined synopsis/solicitation for commercial items prepared in accordance with the format in Subpart 12.6, as supplemented with additional information included in this notice. This announcement constitutes the only solicitation; proposals are being requested and a written solicitation will not be issued.

Contract Type. Agencies shall use firm-fixed-price contracts or fixed-price contracts with economic price adjustment for the acquisition of commercial items. Indefinite-delivery contracts

may be used where the prices are established based on a firm-fixed-price or fixed-price with economic price adjustment. Use of any other contract type to acquire commercial items is prohibited. These contract types may be used in conjunction with an award fee and performance or delivery incentives when the award fee or incentive is based solely on factors other than cost.

Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items.

Contracts for the acquisition of commercial items shall, to the maximum extent practicable, include only those clauses

- (1) Required to implement provisions of law or executive orders applicable to the acquisition of commercial items; or
- (2) Determined to be consistent with customary commercial practice.

The FAR now contains five provisions or clauses that are specially developed for commercial items.

Instructions to Offerors-Commercial Items. This provision provides a single, streamlined set of instructions to be used when soliciting offers for commercial items and is incorporated in the solicitation by reference. The contracting officer may tailor these instructions or provide additional instructions tailored to the specific acquisition.

Offeror Representations and Certifications-Commercial Items. This provision provides a single, consolidated list of certifications and representations for the acquisition of commercial items and is attached to the solicitation for offerors to complete and return with their offer. Generally, this provision may not be tailored.

Contract Terms and Conditions-Commercial Items. This clause includes terms and conditions which are, to the maximum extent practicable, consistent with customary commercial practices and is incorporated in the solicitation and contract by reference. The contracting officer may tailor this.

Contract Terms and Conditions Required to Implement Statutes or Executive Orders-Commercial Items. This clause incorporates by reference only those clauses required to implement provisions of law or executive orders applicable to the acquisition of commercial items. The contracting officer shall attach this clause to the solicitation and contract and, using the appropriate clause prescriptions, indicate which, if any, additional clauses are applicable to the specific acquisition.

When the use of evaluation factors is appropriate, the contracting officer must insert a provision that discusses the factors that will be used to evaluate offers. Where technical information is necessary for evaluation of offers, agencies should, as part of market research, review existing product literature generally available in the industry to determine its adequacy for purposes of evaluation.

When acquiring commercial items, contracting officers shall be required to use only those provisions and clauses prescribed in Part 12. They shall be revised, as necessary, to reflect the applicability of statutes and executive orders to the acquisition of commercial items. The contracting officer may include in solicitations and contracts by addendum other FAR

provisions and clauses when needed. This might include clauses for an indefinite-delivery type of contract; include appropriate provisions and clauses for the use of options, or clauses regarding the use of recovered material.

Agencies may supplement the provisions and clauses prescribed in this part (to require use of additional provisions and clauses) only as necessary to reflect agency unique statutes applicable to the acquisition of commercial items or as may be approved by the agency senior procurement executive, or the individual responsible for representing the agency on the FAR Council, without power of delegation.

Streamlined Evaluation of Offers. Offers shall be evaluated in accordance with the criteria contained in the solicitation. For many commercial items, the criteria need not be more detailed than technical (capability of the item offered to meet the agency need), price and past performance. A technical evaluation would normally include examination of such things as product literature, product samples (if requested), technical features, and warranty provisions. Past performance should be an important element of every evaluation and contracting officers should consider past performance data from a wide variety of sources both inside and outside the Federal Government

Contracting officers are to select the offer that is most advantageous to the Government based on the factors contained in the solicitation. Fully document the rationale for selection of the successful offeror including discussion of any trade-offs considered.

Determination of Price Reasonableness. While the contracting officer must establish price reasonableness, the contracting officer should be aware of customary commercial terms and conditions when pricing commercial items.

Cost Accounting Standards (CAS) do not apply to contracts and subcontracts for the acquisition of commercial items when these contracts and subcontracts are firm-fixed-price or fixed-price with economic price adjustment

Applicability of Laws to Contracts for Commercial Items. Several laws (5) have been made specifically not applicable to contracts for the acquisition of commercial items, e.g., the Drug-Free Workplace Act of 1988. In addition, certain requirements of other laws (3) are not applicable to executive agency contracts for the acquisition of commercial items, e.g., the requirement for a certificate and clause under the Contract Work Hours and Safety Standards Act. Also, the applicability of some laws (3) have been modified in regards to Executive agency contracts for the acquisition of commercial items, including the Truth in Negotiations Act.

Applicability of Laws to Subcontracts for Commercial Items. Additional laws (12) have been made not applicable to subcontracts at any tier for the acquisition of commercial items or commercial components at any tier. Also, the requirements for a certificate and clause under the Contract Work Hours and Safety Standards Act are not applicable to subcontracts. Finally, the applicability of a few laws (3) has been modified in regards to subcontracts at any tier for the acquisition of commercial items or commercial components.

Contracts for commercial items shall rely on contractors' existing quality assurance systems.

Conclusion. The federal government has taken several important steps to simplify the acquisition of goods and services that may be regarded as commercial in nature. This is expected to save the government money as compared to developing unique governmental items. It also saves on processing costs, as it is much easier to be sure of price reasonableness and to justify it, given that there is a commercial market for the item being acquired. Companies that are selling common commercial items that would also be used by the government should be encouraged to look into supplying some of the \$305 billion dollars of federal purchases annually.

REFERENCE

FAR, *Federal Acquisition Regulation*, current version available at <http://www.arnet.gov/far/>