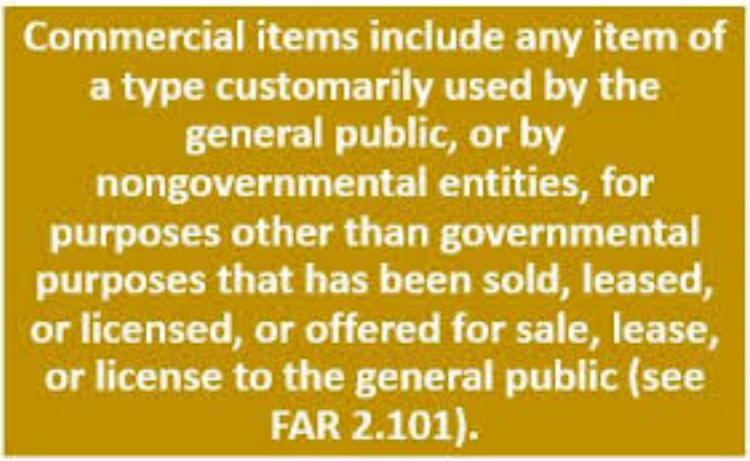


The Federal Acquisition Streamlining Act of 1994 (FASA) established a statutory preference for acquisition of "commercial items" instead of military specification (MIL-SPEC) items, whenever possible. Ever since that time, certain groups within and without the Department of Defense have been fighting against that statutory preference. We noted some of the contentious history in **this article**, discussing last year's attempt—ultimately an unsuccessful one—to roll-back the DFARS regulatory language to a new approach that was remarkably similar to the pre-FASA methodology used by Contracting Officers more than 20 years ago.

Many of the more contentious disagreements center on the definition of "commercial item" (and the definition of commercial item services), which is currently found at FAR 2.101. How does an item (or service) qualify as a "commercial item," and if it does, then how does the customer establish the price it is paying is a fair and reasonable one? This issue is especially important with respect to non-competitive acquisitions of spare parts, where the contractor asserts that its spare parts are "of a type" that it routinely sells (or offers for sale) in the commercial marketplace. Such problems tend to result in **adverse reports** from the DoD Office of Inspector General.

The DoD has issued a Commercial Item Handbook to help Contracting Officers determine whether or not an item or service meets the FAR definition. The Handbook acknowledges that "the commercial item definition is broad" and that many items and services will meet the definition. Importantly, the Handbook states—

The commercial item definition is not limited to items acquired by the Government from prime contractors; it also extends to commercial items acquired from subcontractors at all tiers, including items transferred from a contractor's divisions, affiliates, or subsidiaries.

That statement means that the issue of whether or not a part (or service) meets the FAR definition is not simply the problem of DoD or civilian agency Contracting Officers; it means that the issue is also a problem for prime contractors and lower-tier subcontractors. Making a proper commercial item determination ultimately is a problem for acquisition professionals throughout government contracting.

And nobody is especially good at it.

The problem is two-fold. First, the determination must be based on solid data and information. The supplier or contractor who seeks to have its items/services declared to be commercial items must provide sufficient evidence to permit the buyer or Contracting Officer to make an accurate determination. The burden is on the supplier to provide the evidence, and suppliers who are not transparent and forthright in providing that evidence should not expect the determination to go in their favor. Suppliers should not expect a determination of commerciality unless they provide the person making that determination with convincing evidence.

Second, the determination must be documented. The documentation must be sufficient to survive a skeptical review by an OIG auditor or DCMA CPSR reviewer. This is a critical area in which many otherwise proper commercial item determinations fail. Importantly, a failure in this area may lead to a determination that the price being paid cannot be supported as being fair and reasonable. For Contracting Officers, that finding may be an embarrassment or even a career set-back. For contractors, that finding might result in disallowed supplier costs.

Much has been written about failed commercial item determinations and, as a result of concerns in this area, the DoD has created “centers of excellence” to help its Contracting Officers get it right. In this article, we want to focus on a situation where the commercial item determination was made correctly, but the underlying customary commercial item practices were misinterpreted. In other words, the government went to the commercial marketplace to buy a commercial item service, but did so in a manner that the commercial marketplace did not support. The government’s missteps led to a successful **bid protest** at the Government Accountability Office (GAO).

We think this particular bid protest is noteworthy because it shows us another side of commercial item determinations, another viewpoint into this difficult area. It shows us that when

a buyer makes a determination that a particular item or service is commercial, then that buyer also needs to design an acquisition strategy that corresponds to the way that item/service is sold commercially.

In other words, when the government (or higher-tier contractor) buys a commercial item/service, then it must acquire that item or service in the same manner in which it is offered for sale in the marketplace. The buyer cannot impose his or her own acquisition methodology on the commercial methodology; s/he must accept what the market offers.

In the instant case (link above), Red River Waste Solutions (RRWS) protested the terms of a solicitation issued by the Department of the Army for solid waste management services "at or near Fort Polk, Louisiana." RRWS protested "that the solicitation, which seeks commercial services pursuant to Federal Acquisition Regulation (FAR) Part 12, contains terms that are inconsistent with customary commercial practice. …" RRWS was the incumbent contractor, and noted that the new solicitation contained terms that were significantly different from its current contract. Among other changes, the new solicitation eliminated CLINs for variable costs and, instead, required offerors to "to submit prices that reflect 'all fixed and variable costs' on a per-ton basis, and 'only permits the Contractor to invoice on tonnage collected." RRWS asserted in its protest that using a per-ton basis for invoicing was inconsistent with customary commercial practices.

The government disagreed, and asserted that its market research had led to a determination that a per-ton basis pricing methodology was aligned with customary commercial practices in this area. As the GAO decision stated—

In response to RRWS's protest, the agency acknowledges that the services contemplated by this solicitation are commercial services, and that the solicitation is subject to the requirements of FAR Part 12. … Nonetheless, the agency asserts that it performed market research supporting a determination that requiring per-ton fixed prices in refuse contracts is customary commercial practice. The agency's market research consisted of the following: (1) review of other Army refuse contracts; (2) request for feedback from industry in a Sources Sought Notice (SSN); and (3) contact with a sales representative for Thomas Trash Services, a company located in upstate New York. … [T]he agency states that it considered other Army refuse contracts at Fort Bragg in North Carolina, at Fort Drum in New York, and at Fort Stewart in Georgia, to determine whether those contracts contained prices based on tonnage. … The agency found that Fort Bragg 'utilizes CLINs based on months'; that Fort Stewart operates its own landfill and, therefore, 'do[es] not track cost by tonnage'; and that Fort Drum 'utilizes a tonnage approach' for its post-wide refuse contracts. … Finally, the agency states that it

obtained ‘historical market research’ that had been performed in September 2014 by personnel at Fort Drum, New York, by contacting a sales representative for Thomas Trash Services, a company located in upstate New York. Based on this contact, the agency stated:

[The named sales representative] explained that fixed and variable costs can be combined to establish a per ton price. [The sales representative] stated that this is the method of pricing used by Thomas Trash Services and it is a practical method of pricing for trash removal services. Based on [the sales representative's] expertise and knowledge of industry, it has been verified that pricing based on tonnage is an acceptable commercial practice.

The problem with the foregoing is that it did not represent adequate market research into customary commercial practices associated with the commercial item service being acquired. In our view, it appears to be a rather lackadaisical approach to performing market research. Indeed, it appears that the research was more focused on how the government acquired, rather than how the market offered, the services being sought.

The GAO decision stated—

… we agree with the protester’s assertion that it was unreasonable for the agency to rely on other government refuse contracts as a basis for establishing customary commercial practice, since contracts with the federal government are not generally considered to be part of the commercial marketplace. … If government contracts were generally considered part of the commercial marketplace, everything the government procures could be considered a commercial item, and a significant portion of FAR Part 12 would be rendered superfluous. … In this regard, since the intent of FAR Part 12 is that both the government and its contractors will benefit by the government’s acquisition of commercial goods and services using the same terms and conditions used in the commercial marketplace, such benefits fail to be realized when the government includes solicitation terms in commercial acquisitions that are contrary to that objective. In short, the agency’s reliance here on other government refuse contracts does not provide a reasonable basis for its determination that the pricing provisions in this solicitation reflect customary commercial practice. … Finally, we agree with the protester’s contention that the market research previously performed by Fort Drum personnel through their contact with a sales representative for a trash company in upstate New York does not provide an adequate basis for concluding that this solicitation’s price-per-ton approach reflects customary commercial practice. Here, the record does not contain, or even reference, any particular commercial refuse contract to which the New York trash company was a party. Further the record does not contain any documentation from the sales representative himself, nor does it even contain any documentation from the Fort Drum personnel who contacted the sales

representative.

Because the agency did not perform adequate market research, and because the agency structured the terms of its solicitation in a manner other than customary commercial practices (based on that inadequate market research), the protest was sustained.

This successful bid protest has implications not only for government Contracting Officers, but also for acquisition professionals throughout the various tiers of government contracting. It stands for the proposition that when a commercial item or service is being acquired, it must be acquired in a manner consistent with the manner in which the commercial marketplace offers it for sale. If somebody wants to impose a government-unique pricing methodology on a commercial item or service, then that person is undercutting his/her commerciality argument—and perhaps leaving the acquisition vulnerable to a successful protest.

(*Hat tip to Bob Antonio of WIFCON for posting the bid protest on his site.*)