We've written about nontraditional defense contractors (NTDCs) several times on this blog, the most recent of which is **this article** . We noted in that article that a new DFARS rule permitted contracting officers to treat goods and services offered by NTDCs as commercial items, meaning that no certified cost or pricing data would be required to support the prices being offered.

Which is, of course, a good thing—at least, if you are an NTDC. (NTDCs are defined as any business that "is not currently performing and has not performed any contract or subcontract for DoD that is subject to full coverage under the cost accounting standards … for at least the 1-year period preceding the solicitation of sources by DoD for the procurement.")

Subsequently we noted that Don Mansfield had opined that the definition of an NTDC might result in the situation where *every small business is potentially a NTDC* (because, by definition, small businesses are exempt from CAS coverage). Don suggested that they would thus be eligible under DFARS 212.102(a)(iii) for Part 12 commercial item procurement procedures, regardless of whether the small business' goods/services had been formally determined to be commercial items.

Well, maybe. It makes sense, but our experience tells us that when an interpretation of an acquisition rule makes sense, somebody is going to disagree with it.

Anyway, on March 5, 2019, the Acting Principal Director of Defense Pricing and Contracting (DPAC) issued a **guidance memo** regarding use of NTDCs and Other Transactions (OTs). The memo makes clear that the purpose of both OTs and NTDCs is to speed access to the innovative technologies of commercial entities.

Sigh

We have written many times about DOD's love/hate relationship with innovation. It's almost funny that DOD would love to have the innovation offered by commercial entities but doesn't really want anything that might disrupt the *status quo*. Think we're exaggerating? Check out our articles on Palantir's attempts (including several lawsuits) to try to get a foot in the acquisition door in order to provide DOD with its leading intelligence fusion software.

DOD has an empirically proven love/hate relationship with innovation and with acquisition of commercial items, which is why both Congress and the Section 809 Panel keeps telling DOD to do better in those areas. Over and over again.

So now comes another guidance memo that reminds contracting officers that DFARS permits use of streamlined acquisition methods, including OTs and NTDCs, to facilitate access to that sweet, sweet, privately developed innovative technology. But who will force the COCOMs to require that technology?

One more thing: the memo clarifies that, when a contracting officer uses the NTDC rule to acquire goods and services, that is not the same thing as making a commercial item determination (CID). The memo states “The decision to apply commercial item procedures to the procurement of supplies and services from a nontraditional defense contractor does not require a commercial item determination, and does not mean the supplies or services are commercial.”

That’s a good clarification. It’s consistent with the actual DFARS language. But it leads us to the question regarding whether a NTDC should insist on a CID rather than accept a quick-‘n’-dirty Part 12 acquisition? We mean, accepting streamlined NTDC procedures solves one immediate problem (submission of certified cost or pricing data), but it doesn’t really solve the underlying concern—which is to get DOD to accept a good or service as being a commercial item whose pricing is based on market forces rather than a detailed cost buildup.

In other words, it’s a bit of a trade-off.

The contractor has the leverage to the extent that DOD wants that cheap innovative technology, and once DOD has the tech, much of the leverage goes away. Why should DOD take the time and effort to consider a CID if it doesn’t need to? But if the CID isn’t made, then the contractor will be right back where it started from at the next acquisition. The problem will not have been solved; it will simply have been kicked down the street.

OTs and NTDCs give DOD something it wants: streamlined access to privately funded innovative technology. We suggest that proper consideration for that access should be a commercial item determination, when doing so can be justified by the FAR.