

NASA's Market Research Guide

May 15, 1998

Overview

The Federal Acquisition Streamlining Act of 1994 (FASA) requires that federal agencies, to the extent practical;

- **state requirements in terms that enable and encourage companies to supply commercial and nondevelopmental items,**
- **revise procurement policies, practices, and procedures -not required by law- to remove impediments to the acquisition,**
- **buy commercial items, commercial services, and nondevelopmental items to meet agency needs, and**
- **require prime contractors and subcontractors at all levels to incorporate commercial and nondevelopmental items as components of systems they develop for federal agencies.**

FASA specifically requires federal agencies to conduct market research prior to developing new specifications for procurement and before soliciting bids or proposals for a contract which exceeds \$100,000. FASA also requires the Government to purchase commercial items and services in a commercial manner which allows for tailoring the solicitation/contract terms and conditions consistent with customary commercial practices.

The purpose of this paper is to provide contracts and technical personnel with a basic guide to the conduct of market research. *It should not be read as requiring certain effort or approaches nor as replacing existing regulatory or statutory requirements for the definition of requirements, conduct of market research and purchase of commercial or non developmental items.* The paper is organized in a manner which should allow readers a quick reference guide on various day to day market research issues related to conduct, sources and types of information, contract file documentation and commercial or non-developmental item tailored solicitation/contract terms and conditions.

By way of introduction, Market Research is a tool used to determine what is available on the market to meet a specific need you as a buyer or requiring activity have to meet your organizational goals and objectives and determine the terms and conditions customarily used in the commercial market for the item or service being procured.

All of us are buyers. We all go to the grocery store for food, the electronics store for televisions, VCR's, stereos and the like, the car dealership for our automobiles, and so on. As private buyers we usually tend to perform some sort of market research for our personal purchases. For example, when shopping for

food we may compare prices at different markets, we may consider rebates (cutting coupons from the paper), or comparing the price of similar items against our personnel preferences. We normally do these things in all purchases we make, either consciously or subconsciously. It is this same basic common sense concept that the Federal Acquisition Streamlining Act (FASA) tried to institute in Federal procurement through formalizing the requirement to conduct Market Research.

The concept is not new, most agency requiring activities and procurement personnel had been performing the necessary step all along. What is new is that we now must document our market research, scrub our requirements to ensure that when appropriate we buy an item that is commercially available or that does not require a new development effort, and tailor the solicitation/contract terms and conditions consistent with customary commercial practices.

Most of the confusion among procurement personnel in today's environment is related to who does the market research and what level of documentation is adequate. Unfortunately, the answer is - it depends! There is no standard answer, the level of research and documentation will vary depending on the complexity and dollar value of the requirement and the nature of the item or service being contemplated.

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Market Surveillance

Market surveillance is an effective tool to assist agency management in its strategic planning when conducted as a continuing, ongoing activity, and not isolated to specific acquisitions. This type of market research provides an agency and requiring activities with current knowledge of changes, advances and trends in technology and products of interest. It provides a valuable marketplace/commodity database to support determinations regarding industry capability, product availability, competitive market forces, and use of alternative sources.

Market surveillance is most appropriately conducted by requiring activities and at higher levels of management due to strategic planning implications that may be realized through expected and potential product and market advances. Using activities will also be served by performing an on-going market surveillance effort and maintaining a data base for use on specific requirements.

Various methods may be employed to perform market surveillance. The key to performing on-going market surveillance is to ensure that industry representatives have access to individuals or organizations that are conducting the ongoing surveillance. Industry conferences or trade shows also enable management and using activities to become familiar with market trends, product or service advances, delivery capability, product or service pricing, and new companies to the industry. The ongoing market research data should be shared within an organization and outside to other interested branches, divisions or organizations within an agency. Market surveillance data should be considered and utilized in both short and long term acquisition planning.

When conducting market surveillance one should attempt to answer the following questions:

What are my organization's short term or current/recurring needs (current fiscal year)? As an example one might think of office supplies, replacement lab equipment, updated computer software and hardware.

What are my organization's long term or unique needs (next 2-3 fiscal years)? Examples of these types of requirements might be an expendable launch vehicle for a satellite, a integrated software program to manage the organization's financial matters, new lab facilities (building and equipment).

What are the organization's long term strategic needs (advances needed to further an organizations goals)? Examples of this type of need might be a new highly reliable low cost reusable launch vehicle for placing a range of satellites into orbit; space life support systems capable of supporting human flight in excess of 3 years with high reliability, capable of self refreshing, and within current launch vehicle weight restrictions; or a state of the art planetary rover capable of autonomous operation and independent decision making.

What are the industry's current products and service capability? What have they produced or are producing or providing right now.

What new development programs are they working on? IR&D activities, specific developmental work being conducted for outside organizations.

What trends are noticed within the industry? Retention of highly qualified technical personnel for research activities, industry moving toward autonomous facilities for manufacturing, swift introduction of latest technology in the industry, increasing competition from foreign firms, increases or decreases in product or service quality.

Who are the industry leaders in terms of performance, quality, price, delivery capability, capacity, depth of products or services, etc.?

What are the industries levels of quality and ability to maintain quality products and services?

The previous questions are not meant to be all inclusive but rather as examples. Each organization needs to determine what their own goals and objectives, are and how to best capture industry capabilities and progress to meet that organizations desired set of information needs. It is essential that an organization performing an on-going market surveillance activity develop a data base of some sort to capture all information obtained and allow for the dissemination and access of that information to requiring activities within the organization, as well as maintaining ties and possibly sharing information with other organizations within an agency and across agencies or departments to ensure maximum efficiency and needless duplication of effort.

FAR 10.001

When conducted as part of an agency's continuing market surveillance, market research can help the agency to more realistically forecast the relative merits of developing or acquiring products and systems based upon current assessments of existing systems and technologies, production processes and capacities, and distribution and support capabilities.

Market Research

Statement of Need (SON)

An acquisition begins with a description of an agency's need stated in terms sufficient for conducting market research. Typically, it is a narrative description of items or services the agency requires, expressed as general statements of the items'/service intended use in terms of function to be performed, performance requirement, essential physical characteristics, and, if necessary, the environments in which they will operate. Integrated logistics support requirements may be included in SON's for other than consumable items.

Some requirements are critical and essential; others may be desirable, and capable of being expressed as targets or objectives. Differences between these two categories should be made clear in the SON. Identifying essential requirements does not require the agency to describe its needs in terms of the lowest level of technical capabilities or features that will meet those needs. Indeed, the agency has substantial latitude to describe its needs in a manner that reflects an optimum acquisition strategy (e.g., considering which item/service represents the best value in terms of quality, expected life of the item, quality or qualification of personnel for services, vendor past performance, etc.).

An agency's SON should be written in a manner that promotes full and open competition (or maximum practicable competition under the Simplified Acquisition Threshold). Restrictive provisions can be included only when authorized by law or when the agency can justify their necessity. Specific products or features cannot be required in SON's unless research has clearly established that no other products or features can meet agency needs (the same holds for minimum qualifications of personnel for services). That finding must be supported by required justifications and approvals. (Refer to FAR 11.002 for further information and requirements for development of a SON).

FASA revised the commercial item definition, expanding the coverage to "items of a type which are customarily used for non-governmental purposes..., including minor modifications..., or customarily available modifications available in the commercial market place..." to that item in order to meet the government requirement (see appendix A, Definitions).

Effective research will help to determine, initially, the availability of commercial items and will produce the following types of information that will aid in developing the final requirements documents.

- Capability of an offeror's product (or personnel for services) to meet all elements of the agency's description of needs.
- As an alternative, the product's (or personnel for services) capability to compensate for failing to meet all stated needs by offering other advantageous features or performance.
- As another alternative, the feasibility and potential cost of modifying the offered product to meet the agency's needs.
- Information regarding the offered product's design stability, prospects for future design enhancements, and their impact on the product to be delivered during the term of any resulting contract.
- Production processes, facilities, depth of personnel and their experience, and capacities.
- Distribution and logistics support capabilities, and access to qualified personnel.

Industry Feedback

Following the development of the SON, an agency must conduct market research to help define the agency's requirements by determining whether sources of commercial items or services are available to satisfy them. Commercial or non-developmental items may satisfy those requirements either "as is" or

through modification. This step may help to determine whether the agency's requirements could be appropriately modified, to allow the use of commercial items/services. It also helps determine whether commercial items/services could be incorporated in the deliverable item as components or tasks.

The SON will allow potential sellers to compare their commercial and/or non-developmental products to the Government need and provide useful feedback to those conducting the market research. This initial industry contact is most appropriately conducted by the requiring activity, and if appropriate, with participation of the buying office as necessary.

Procurement/contracting personnel will not normally have a major role in the preparation of SON's; however, contracting personnel should participate as a team member in the initial industry contact and as a part of the team developing the final requirements document for the acquisition. Consequently, they should be able to understand the SON and recognize that it is written clearly and in general terms. The more general the SON is, the greater the possibility that the commercial marketplace can satisfy the agency's needs.

There are various methods that can be used to disseminate the SON and solicit feedback from industry. The information and request can be posted to a industry accessible web page (i.e., NASA Center procurement page), a request for information (RFI) or sources sought synopsis can be issued through the Commerce Business Daily (CBD), an industry conference can be held, particular sources that are known to be capable can be contacted, etc.

There are no clearly defined steps or processes for soliciting industry feedback, but a reasonable effort should be put forth and the final result should be the ability to identify one or more of the following: 1) an item of a type which is customarily used for non-governmental purposes or non-developmental item/service exists that will meet the need, 2) revising or altering the need so that a commercial item or non-developmental item/service can meet it, 3) with customary modification or alteration a commercial or non-developmental item exists to meet the need 4) with minor, non-customary modification a commercial item can meet the need, 5) components that are commercial or non-developmental items/services can be utilized in the final product to meet the need, 6) no commercial or non-developmental items/services exist to meet the need, and 7) finalization of the requirement document (SOW, Work Statement, Specification, etc.)

Further contact with industry after requirements have been finalized and prior to issuance of the final solicitation can obtain the following additional information to benefit the agency:

- Standard commercial practices for customizing, modifying or tailoring products to meet customer needs, and their associated costs.
- Customary terms and conditions governing commercial sales of the product, including warranties, buyer financing, and discounts.
- Copies of standard, commercial agreements that have been used in commercial sales of the product.

- The applicability of any industry-wide laws or regulations to purchases of the product.
- The number of manufacturers of the product, as well as the status, size, and location of each.
- Extent of competition and the nature of competitive forces in the market place.
- Relevant packaging, handling, storage, and transportation practices.
- Customer references to enable the agency to evaluate others' experiences with the product and their observations regarding its quality, reliability and maintainability.
- Market prices and pricing trends.
- Purchasing histories of other agencies or organizations for the same or similar items, including pricing and contract performance data.

FASA targeted the business conduct of federal agencies and not only the need to buy commercial items but buying them in a commercial manner. In order to procure items or services which are of a type customarily used for non-governmental purposes and maximize the associated savings, buying activities must consider tailoring of the solicitation/contract terms and conditions in a manner which is consistent with commercial practices. By procuring supplies and services in this manner the government avoids the added costs of unique government contractual requirements and the associated administrative and development costs when existing items either "as is" or modified will meet the agency need. In order to ensure that tailoring of terms and conditions was consistent with customary commercial practices, Part 12 of the FAR precludes the tailoring of the terms and conditions in a manner which is inconsistent with customary commercial practices, unless a waiver is granted.

Documenting Results

Appendix D is provided as an example of a standard format which can be utilized to document the results of the market research activity. The form is provided as a sample only and should not be construed as the best or only way to document market research results. The remainder of this section provides FAR guidance language with specific citation, as well as, suggested approaches to documenting the various stages which may be employed during the market investigation process.

FAR 10.002(b)(1)

The extent of market research will vary, depending on such factors as urgency, estimated dollar value, complexity, and past experience. Market research involves obtaining information specific to the item being acquired and should include--

(i) Whether the Government's needs can be met by--

(A) Items of a type customarily available in the commercial marketplace;

(B) Items of a type customarily available in the commercial marketplace with modifications; or

(C) Items used exclusively for governmental purposes;

- (ii) Customary practices regarding customizing, modifying or tailoring of items to meet customer needs and associated costs;
 - (iii) Customary practices, including warranty, buyer financing, discounts, etc., under which commercial sales of the products are made;
 - (iv) The requirements of any laws and regulations unique to the item being acquired;
 - (v) The availability of items that contain recovered materials and items that are energy efficient;
 - (vi) The distribution and support capabilities of potential suppliers, including alternative arrangements and cost estimates; and
 - (vii) Size and status of potential sources (see Part 19).
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FAR 10.002(e)

Agencies shall document the results of market research in a manner appropriate to the size and complexity of the acquisition.

With the above two cites from the FAR in mind, it is important to remember that FAR 10.001(b) states that agencies are not to request more than the minimum information necessary from potential sources.

The first step is the market surveillance performed by the requiring activity (and support by procurement personnel if requested) and involves the defining of requirements through the statement of need and survey of market products and/or services. The requiring organizations should maintain a record of the steps taken prior to development of the requirements document. This record should include the initial statement of need, sources contacted or referred to, an appropriate discussion of why a commercial or non-developmental item (with or without modification) will or will not meet the need (in appropriate detail to explain the finding), and the requirement document (SOW, Work statement, Spec., etc.). This initial documentation need not be all inclusive, but should demonstrate a reasonable effort to identify potential sources and supplies or services.

If market surveillance indicates that a commercial or non-developmental item or service is not available to meet the government requirement the requiring activity should document this finding, including; the impact of altering the requirement to allow for the use of a commercial or non-developmental item or service, and the likelihood that minor modifications or customarily available modifications could meet

the need. This documentation need not be voluminous but should clearly convey the impact to the using organization and if appropriate to its mission or goals. It is then incumbent upon the buying activity to review the results and findings of the technical activity.

If the initial industry feedback results in a determination that a commercial or non-developmental can meet the requirement the procurement and technical personnel should focus the next phase of market research on determining the customary industry practices, including warranty, buyer financing, discounts, packaging, delivery, acceptance, quality assurance, etc.) and proceed to develop a solicitation/contract in accordance with FAR Part 12.

If commercial or non-developmental items exist that can meet an agency's requirements, the agency is required to use FAR Part 12.

FAR 12.101

Requires all Agencies to :

- conduct market research to determine if commercial or non-developmental items are available that could meet agency needs.
- acquire commercial or non-developmental items, when available, to meet agency needs.
- require prime and subcontracts at all tiers to incorporate, to maximum extent practical, commercial or non-developmental items as components of items supplied to the agency.

FAR 12.202

Market research is an essential element of building an effective strategy for the acquisition of commercial items and establishes the foundation for the agency description of need, the solicitation, and resulting contract.

Since market research will identify standard commercial practices, it provides a foundation for building an effective solicitation and a successful contract. This is especially valuable when you are preparing commercial item solicitations and contracts, because you are limited, by law, to include only terms and conditions consistent with "standard commercial practices." Adequate market research will enable you to prepare these solicitations and contracts in a manner that is consistent with customary commercial practices.

It is important to remember that the FAR Part 7.105(b)(1) states that acquisition plans must address the extent and results of market research and indicate the impact on the various elements of the plan.

When planning an acquisition, you should maximize the use of competitive market forces. Through market research, the level of market competition and the number of potential sources capable of satisfying requirements can be identified. The extent of competition in the market, and its nature, should be factors in developing acquisition strategy.

The Solicitation/Contract

This section is intended to provoke thought on the part of procurement and technical personnel and identifies some of the more likely terms and conditions/subject matter areas of a solicitation/contract that may require tailoring when the acquisition is conducted under FAR Part 12.

When acquiring commercial items or services it is important to remember that the FAR Part 12 allows for tailoring of contract terms and conditions consistent with customary industry practices and if non-customary tailoring is required by the agency a waiver must be approved, by Code H, prior to incorporating those provisions in the solicitation/contract.

The tailoring of terms and conditions necessary for procurement of supplies in many cases will be different from that necessary when procuring services. Some of the additional areas to consider under the acquisition of services are covered at the end of this section.

Customary and Tailored Terms and Conditions (Commercial Purchases)

When gathering information regarding customary industry practices during the conduct of market research, emphasis should be placed on changes, quality assurance, contract financing, rights in technical data/computer software, and any specific product or service unique customary industry practices.

Changes

The standard language in FAR clause 52.212-4 Terms and Conditions - Commercial Items contains the following language regarding changes "c) Changes. Changes in the terms and conditions of this contract may be made only by written agreement of the parties."

In contrast, the standard changes clause for fixed price acquisitions of non-commercial supplies reads as follows:

FAR 52.243-1 Changes--Fixed Price (Aug 1987)

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any,

make changes within the general scope of this contract in any one or more of the following:

(1) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.

(2) Method of shipment or packing.

(3) Place of delivery.

(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

(c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

(d) If the Contractor's proposal includes the cost of property made obsolete or excess by the change, the Contracting Officer shall have the right to prescribe the manner of the disposition of the property.

(e) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

(End of clause)

The alternate versions of this clause which apply to most service type contracts revise the specified sections of the above clause as follows:

Alternate I (Apr 1984). If the requirement is for services, other than architect-engineer or other professional services, and no supplies are to be furnished, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Description of services to be performed.

(2) Time of performance (i.e., hours of the day, days of the week, etc.).

(3) Place of performance of the services.

Alternate II (Apr 1984). If the requirement is for services (other than architect-engineer services, transportation, or research and development) and supplies are to be furnished, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Description of services to be performed.

(2) Time of performance (i.e., hours of the day, days of the week, etc.).

(3) Place of performance of the services.

(4) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government, in accordance with the drawings, designs, or specifications.

(5) Method of shipment or packing of supplies.

(6) Place of delivery.

The two main features which the FAR clause imparts on the Government are the right to make unilateral changes and the requirement for the contractor to proceed with work as changed. If the item or service being procured is such that there is no likelihood for the Government to require a change then the standard commercial clause language should suffice. However, if there is a likelihood that the Government may need to require changes then the contracting officer should consider tailoring the changes language within the standard clause.

If tailoring is necessary, it must be consistent with customary commercial practices and if not a waiver must be obtained from Code H. Market research results should identify the customary commercial practices with regard to contract changes and the extent to which the language can or should be modified to remain consistent with customary commercial practice.

Quality assurance

When addressing this area it is important to request information regarding ISO certification status, past performance of the item/service, customary market practice regarding inprocess inspections, customary acceptance practices, customary warranties offered by the seller, and any unique requirements necessary to insure a higher level of quality control (i.e., spaceflight item).

FAR 12.402

Acceptance.

(a) The acceptance paragraph in 52.212-4 is based upon the assumption that the Government will rely on the contractor's assurances that the commercial item tendered for acceptance conforms to the contract requirements. The Government inspection of commercial items will not prejudice its other rights under the acceptance paragraph. Additionally, although the paragraph does not address the issue of rejection, the Government always has the right to refuse acceptance of nonconforming items. This paragraph is generally appropriate when the Government is acquiring noncomplex commercial items.

(b) Other acceptance procedures may be more appropriate for the acquisition of complex commercial items or commercial items used in critical applications. In such cases, the contracting officer shall include alternative inspection procedure(s) in an addendum and ensure these procedures and the postaward remedies adequately protect the interests of the Government. The contracting officer must carefully examine the terms and conditions of any express warranty with regard to the effect it may have on the Government's available postaward remedies (see 12.404).

(c) The acquisition of commercial items under other circumstances such as on an "as is" basis may also require acceptance procedures different from those contained in 52.212-4. The contracting officer should consider the effect the specific circumstances will have on the acceptance paragraph as well as other paragraphs of the clause.

FAR 12.404 Warranties.

(a) Implied warranties. The Government's post award rights contained in 52.212-4 are the implied warranty of merchantability, the implied warranty of fitness for particular purpose and the remedies contained in the acceptance paragraph.

(1) The implied warranty of merchantability provides that an item is reasonably fit for the ordinary purposes for which such items are used. The items must be of at least average, fair or medium-grade quality and must be comparable in quality to those that will pass without objection in the trade or market for items of the same description.

(2) The implied warranty of fitness for a particular purpose provides that an item is fit for use for the particular purpose for which the Government will use the items. The Government can rely upon an implied warranty of fitness for particular purpose when--

(i) The seller knows the particular purpose for which the Government intends to use the item; and

(ii) The Government relied upon the contractor's skill and judgment that the item would be appropriate for that particular purpose.

(3) Contracting officers should consult with legal counsel prior to asserting any claim for a breach of an

implied warranty.

(b) Express warranties. The Federal Acquisition Streamlining Act of 1994 (41 U.S.C. 264 note) requires contracting officers to take advantage of commercial warranties. To the maximum extent practicable, solicitations for commercial items shall require offerors to offer the Government at least the same warranty terms, including offers of extended warranties, offered to the general public in customary commercial practice. Solicitations may specify minimum warranty terms, such as minimum duration, appropriate for the Government's intended use of the item.

(1) Any express warranty the Government intends to rely upon must meet the needs of the Government. The contracting officer should analyze any commercial warranty to determine if--

(i) The warranty is adequate to protect the needs of the Government, e.g., items covered by the warranty and length of warranty;

(ii) The terms allow the Government effective postaward administration of the warranty to include the identification of warranted items, procedures for the return of warranted items to the contractor for repair or replacement, and collection of product performance information; and

(iii) The warranty is cost-effective.

(2) In some markets, it may be customary commercial practice for contractors to exclude or limit the implied warranties contained in 52.212-4 in the provisions of an express warranty. In such cases, the contracting officer shall ensure that the express warranty provides for the repair or replacement of defective items discovered within a reasonable period of time after acceptance.

(3) Express warranties shall be included in the contract by addendum (see 12.302).

Contract Financing

Contract Financing

FAR 32.202-1 Policy

(i) Use of financing in contracts. It is the responsibility of the the contractor to provide all resources needed for performance of the contract. Thus, for purchases of commercial items, financing of the contract is normally the contractor's responsibility. However, in some markets the provision of financing by the buyer is a commercial practice. In these circumstances, the contracting officer may include appropriate financing terms in contracts for commercial purchases when doing so will be in the best interest of the Government.

Contracting officer's must also ensure that the requirements and issues under FAR 32.202-1 (b) are also meet and/or addressed.

When contract financing is a subject of market research the contracting officer should consider:

- (a) The extent to which other buyers provide contract financing for purchases in that market;
- (b) The overall level of financing normally provided;
- (c) The amount or percentages of any payments equivalent to commercial advance payments (see 32.202-2);
- (d) The basis for any payments equivalent to commercial interim payments (see 32.202-2), as well as the frequency, and amounts or percentages; and
- (e) Methods of liquidation of contract financing payments and any special or unusual payment terms applicable to delivery payments (see 32.202-2).

Rights in Technical Data

FAR 12.211

Except as provided by agency-specific statutes, the Government shall acquire only the technical data and the rights in that data customarily provided to the public with a commercial item or process. The contracting officer shall presume that data delivered under a contract for commercial items was developed exclusively at private expense. When a contract for commercial items requires the delivery of technical data, the contracting officer shall include appropriate provisions and clauses delineating the rights in the technical data in addenda to the solicitation and contract (see Part 27 or agency FAR supplements).

FAR 12.212 Computer software.

(a) Commercial computer software or commercial computer software documentation shall be acquired under licenses customarily provided to the public to the extent such licenses are consistent with Federal law and otherwise satisfy the Government's needs. Generally, offerors and contractors shall not be required to--

- (1) Furnish technical information related to commercial computer software or commercial computer software documentation that is not customarily provided to the public; or
- (2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose commercial computer software or commercial computer software documentation except as mutually agreed to by the parties.

(b) With regard to commercial computer software and commercial computer software documentation, the Government shall have only those rights specified in the license contained in any addendum to the contract.

Other commercial practices.

FAR 12.213

It is a common practice in the commercial marketplace for both the buyer and seller to propose terms and conditions written from their particular perspectives. The terms and conditions prescribed in this part seek to balance the interests of both the buyer and seller. These terms and conditions are generally appropriate for use in a wide range of acquisitions. However, market research may indicate other commercial practices that are appropriate for the acquisition of the particular item. These practices should be considered for incorporation into the solicitation and contract if the contracting officer determines them appropriate in concluding a business arrangement satisfactory to both parties and not otherwise precluded by law or Executive order.

Tailoring of provisions and clauses for the acquisition of commercial items

When the results of market research indicate that the agency need requires unique provisions within the contract then the contracting officer may add those terms as addenda to the solicitation/contract provided that additional term or condition is consistent with standard commercial practices. If the added provision(s) is(are) not consistent with commercial practices the contracting officer must obtain a waiver from the Associate Administrator for Procurement, Code HS.

Commercial Services

Commercial services include installation services, maintenance services, repair services, training services, and other services procured in support of a item fitting the definition of a commercial item (see Appendix A - Definitions), and if the source of such services offers them to the general public and the government contemporaneously and under similar terms and conditions, utilizes the same work force to perform the service; or services of a type offered and sold competitively in substantial quantities in the commercial marketplace with established catalog or market prices for specific tasks performed under standard commercial terms and conditions. Commercial services do not include services that are sold based on hourly rates without and established catalog or market price for that service.

The clauses prescribed in Part 12 do not address specific service requirements. Therefore, when developing the solicitation/contract for commercial services it is important to consider those requirements which may be unique to the Government or installation involved. For example, if a contractor will be performing services on a Government installation there are normally terms and conditions regarding the access to the installation, use of installation resources, and security issues.

Access

When determining the appropriate terms and conditions covering a service contractors access to a Government installation it is important to remember that in the commercial service industry it is

reasonable and likely that a company like IBM if buying maintenance services would address issues such as facility access in their commercial contracts. Part 12 of the FAR does not require an Agency to not insure the safety and integrity of their facilities. With this in mind, a contracting officer should consider the minimum acceptable requirements for a service contractors access to the installation. Issues such as nature of the work being performed by the contractor, facilities and information to which the contractor will have access during the performance of the service, and any special requirements unique to the agency or facilities and information.

In addition to unique access issues it is prudent for government contracts to address such issues as access to the government facility during holidays and inclement weather.

Installation Resources

In some rare instances it may be appropriate to provide a service contractor with office space or access to resources while the contractor is on the government installation. In this case it would be appropriate for the contract to address the contractors use of those installation resources.

Security

Some service requirements may include access to classified or sensitive government data or even proprietary data of a third party. When procuring these types of services on a commercial basis the contracting officer should consider use of appropriate terms and conditions to ensure protection and non-disclosure of this data.

FAR 12.302.

(a) General. The provisions and clauses established in this subpart are intended to address, to the maximum extent practicable, commercial market practices for a wide range of potential Government acquisitions of commercial items. However, because of the broad range of commercial items acquired by the Government, variations in commercial practices, and the relative volume of the Government's acquisitions in the specific market, contracting officers may, within the limitations of this subpart, and after conducting appropriate market research, tailor the provision at 52.212-1, Instructions to Offerors-- Commercial Items, and the clause at 52.212-4, Contract Terms and Conditions-- Commercial Items, to adapt to the market conditions for each acquisition.

(b) Tailoring 52.212-4, Contract Terms and Conditions--Commercial Items. The following paragraphs of the clause at 52.212-4, Contract Terms and Conditions--Commercial Items, implement statutory requirements and shall not be tailored--

(1) Assignments;

(2) Disputes;

(3) Payment (except as provided in Subpart 32.11);

(4) Invoice;

(5) Other compliances; and

(6) Compliance with laws unique to Government contracts.

(c) Tailoring inconsistent with customary commercial practice. The contracting officer shall not tailor any clause or otherwise include any additional terms or conditions in a solicitation or contract for commercial items in a manner that is inconsistent with customary commercial practice for the item being acquired unless a waiver is approved in accordance with agency procedures. The request for waiver must describe the customary commercial practice found in the marketplace, support the need to include a term or condition that is inconsistent with that practice and include a determination that use of the customary commercial practice is inconsistent with the needs of the Government. A waiver may be requested for an individual or class of contracts for that specific item.

(d) Tailoring shall be by addenda to the solicitation and contract. The contracting officer shall indicate in Block 27a of the SF 1449 if addenda are attached. These addenda may include, for example, a continuation of the schedule of supplies/services to be acquired from blocks 18 through 21 of the SF 1449; a continuation of the description of the supplies/services being acquired; further elaboration of any other item(s) on the SF 1449; any other terms or conditions necessary for the performance of the proposed contract (such as options, ordering procedures for indefinite-delivery type contracts, warranties, contract financing arrangements, etc.).

Appendix A **DEFINITIONS (Reference FAR 2.101)**

"Commercial component" means any component that is a commercial item.

"Commercial item" means--

(a) Any item, other than real property, that is of a type customarily used for nongovernmental purposes and that--

(1) Has been sold, leased, or licensed to the general public; or

(2) Has been offered for sale, lease, or license to the general public;

(b) Any item that evolved from an item described in paragraph (a) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

(c) Any item that would satisfy a criterion expressed in paragraphs (a)

or (b) of this definition, but for--

(1) Modifications of a type customarily available in the commercial marketplace; or

(2) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. Minor modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;

(d) Any combination of items meeting the requirements of paragraphs (a), (b), (c), or (e) of this definition that are of a type customarily combined and sold in combination to the general public;

(e) Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in paragraphs (a), (b), (c), or (d) of this definition, and if the source of such services--

(1) Offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and

(2) Offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public;

(f) 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 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;

(g) Any item, combination of items, or service referred to in paragraphs (a) through (f), notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or

(h) 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.

"Component" means any item supplied to the Federal Government as part of an end item or of another component.

"Nondevelopmental item" means--

(a) Any previously developed item of supply used exclusively for governmental purposes by a Federal agency, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement;

(b) Any item described in paragraph (a) of this definition that requires only minor modification or modifications of a type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency; or

(c) Any item of supply being produced that does not meet the requirements of paragraphs (a) or (b) solely because the item is not yet in use.

"Simplified acquisition threshold" means \$100,000, except that in the case of any contract to be awarded and performed, or purchase to be made, outside the United States in support of a contingency operation (as defined in 10 U.S.C. 101(a)(13)) or a humanitarian or peacekeeping operation (as defined in 10 U.S.C. 2302(7) and 41 U.S.C. 259(d)), the term means \$200,000.

Appendix B

COLLECTING MARKET DATA

Catalogs, Periodicals, and Other Sources

Listed below are some readily available, easily accessed sources that provide product and industry data.

Thomas Register - An alphabetical listing of companies; addresses and phone numbers; product listing; description of products; and manufacturers of products.

Vendor files - Identify suppliers; distributors; subcontractors; representatives of products; brochures; and past and present Government contracts.

Mandatory and optional schedules

List products and services; suppliers; prices; contract period; and ordering information.

BOAs

Identify the name of contractor with whom agreement is made; description of supplies or services; methods for pricing and delivery; contracting offices authorized to issue orders; and future orders allowable under the agreement.

Trade journals

Address products; price information (i.e., trends in the immediate area, price escalations, etc.); Government needs vs. commercial needs.

Consumer Price Index

Published monthly by the Bureau of Labor Statistics. The CPI provides a guide to changes to "retail" prices. It is used as a price adjustment factor in some areas of procurement (leasing in particular) and as a general gauge of inflation. However, the Producer Price Index is usually a better source of data on price trends for the Government, since the Government is usually a "wholesale" buyer.

Producer Price Index

Published by the Bureau of Labor Statistics (BLS). It tracks changes in the prices which producers receive from the initial commercial purchasers of their products. It reflects the selling prices of selected manufacturers or the prices quoted on organized exchanges such as the Chicago Board of Trade. The prices are generally f.o.b. origin for immediate delivery.

Specialized Publications

These publications offer current market information regarding products and their suppliers. Publications like Federal Computer Week and Communications Week may be of special interest.

Other information sources include:

Yellow pages

Consumer Reports on-line

Procurement directories

Commodity indices

Product brochures and promotional literature

Catalogs published by manufacturers, distributors, and dealers

The following information sources and search techniques may be beneficial, along with Internet sources listed in the following section.

- Presolicitation notices in the CBD.
- Review of acquisition history and exchange of acquisition information, including source lists.
- Solicitation mailing lists, qualified products lists, and qualified bidders lists.

- Review of the results of recent market research undertaken to meet similar or identical requirements.
- Contacting experts regarding specific market capabilities.

Effective market research enables you to shape a procurement package to fit market conditions and encourage responses from the sources most capable of meeting the requirement. Market data is directly applied to the procurement tasks illustrated in Exhibit 7-1.

Procurement Tasks Applicable to Market Data

- Identify additional qualified sources.
- Analyze validity of cost estimate.
- Prepare negotiation objectives
- Prepare solicitation
- Select contract type.
- Select method of procurement.
- Identify special requirements (e.g., warranties, options, multiyear contracting).
- Analyze specification for restrictions.
- Select methods of publicizing and realistic time for responses.
- Identify evaluation criteria.
- Prepare contract administration plan.
- Select packaging, packing and marking requirements.
- Identify price-related factors.
- Select quality assurance requirements.
- Select delivery/shipment requirements.

Appendix C

WEB Based Market Research

Sources of Information

The Commercial Advocates Forum, an Internet source whose URL is <http://www.cadv.org/cadv.htm>, provides access to i-Mart, a comprehensive search tool for locating potential sources. I-Mart searches by either a description of the product or service, or by Federal Supply Classification (FSC) or Federal Supply Group (FSG). It utilizes various search engines that can be selected to search for sources by industry (Aircraft, Chemicals, Computers and Electronics, Office Equipment, et al.). I-Mart can be contacted at: <http://www.imart.org>.

Many different sources of market information are available from the various Web sites accessible

below...

NASA's Contract Consolidation Initiative page. Url: <http://nais.nasa.gov/msfc/cci/first.html>

GSA's "Shoppers Advantage" service. Url: <http://www.fss.gsa.gov>

General Product Information Sources:

Thomas Regional Electronic. Url: <http://www.thomasregional.com>

Network Directory, TREND(r) Online provides buyers with over 400,000 industrial and commercial suppliers, organized under more than 4,500 product and service categories.

Thomas Register of American. Url: <http://www.thomasregister.com>

Manufacturers provides sourcing information on nearly 52,000 industrial products and services, specifications and availability information from thousands of manufacturers. Thomas Register also contains a complete 2-volume Company Profiles section and a comprehensive 8-volume Catalog File section. Headquarters and branch addresses, phone numbers and asset ratings are provided on more than 148,000 U.S. firms.

National Association of Purchasing Management. Url: <http://www.catalog.com/napmsv>

Silicon Valley, Inc.'s on-line database of seller information sorted by purchasing categories. A valuable tool for preliminary market research.

Industry.Net. Url: <http://www.industry.net>

Free access to a wide variety of information they need to make their day-to-day buying decisions. It offers its clients (primarily manufacturers, distributors, and service providers) the opportunity to market their products to buyers.

CommerceNet. Url: <http://www.commerce.net>

A not-for-profit corporation that is conducting a large-scale market trial of technologies and business processes to support electronic commerce via the Internet.

BizWeb. Url: <http://www.bizweb.com>

Biz Web's motto is "We scour the Internet for company and product information so you won't have to." Thousands of companies are categorized and listed by the goods or services they provide.

The Manufacturer's Information Network. Url: <http://mfginfo.com>

A source of information for industry and those services related to manufacturing.

General Business Information.

Access Business Online(tm). Url <http://www.clickit.com>

Comprehensive business service that uses a proprietary system called Touch & ReachOut(tm) to make access to a wealth of top quality business information. It provides comprehensive and timely information, communication and transactions across 20 major market areas. It promises to ultimately offer the user the ability to navigate to 40,000 locations within three clicks of the mouse.

U.S. Securities & Exchange Commission Corporate Information Database.
Url: <http://www.sec.gov/edaux/searches.htm>

This data base contains financial filings required of companies as required by the SEC.

Big Yellow!. Url: <http://www1.bigyellow.com>

Yellow Page listings of over 16.5 million business in the United States. A service of NYNEX Information Technologies Company. Also contains helpful links to other business information.

Hoover's on-line MasterList Plus. Url: <http://hoovers.com>

This database contains listings for over 10,000 companies. Hoover's Company Profile Database, which is only available to subscribers, contains in-depth profiles of over 2,480 companies.

Council on Competitiveness. Url: <http://nii.nist.gov/coc/coc.html>

The appendices to the Council on Competitiveness Report on U.S. Research & Development Competitiveness, entitled Endless Frontier, Limited Resources U.S. R&D Policy For Competitiveness, contain studies of research & development practices in the Aircraft, Automotive, Chemical, Electronics, Information Technologies and the Pharmaceuticals industries.

Aircraft

The Internet Parts Locator System. Url: <http://www.ipls.com>

Provides the commercial aviation industry worldwide aircraft spare parts availability and online repair capabilities. IPLS enables you to search the database, request a quote from one of the listing companies, post messages to the aviation specific news groups, and be part of on-line discussion groups.

Apparel, Fiber & Textiles

The Garment Industry Development Corporation. Url: <http://www.gidc.org/search2.htm>

Provides access to New York's vast apparel production capability through its Domestic Sourcing Database. It provides fast and easy access to New York manufacturers and contractors including supplier's capabilities, capacity, machine types and quality control techniques.

National Sourcing Database (NSDB).Url: <http://avalon.epm.ornl.gov/nsd6/wais/#top>

Integrates several data sources with information on companies producing apparel items, textile and fabric products, and machinery and equipment.

Architect, Engineering & Construction Product Information

Search www.sweets.com for building/construction products.

Chemicals

ChemConnect. Url: <http://www.chemconnect.com>

A worldwide Chemical Suppliers Directory and Chemicals Exchange. The ChemConnect Search Engine allows the user to query the ChemConnect chemical products database.

Computers and Electronics

Price Watch. Url: <http://www.pricewatch.com>

A fast way to find the "street price" on a computer product. Price Watch Corporation is an independent research firm that studies the street prices of computer components. Their web database is updated about 3 times a day at undetermined times.

The Maven. Url: <http://www.maven.businessweek.com>

An on-line computer buying guide. This site provides detailed specifications and performance comparison in five major product areas: desktop computers, notebooks, printers, monitors, and modems. The Maven also includes the PriceWizard, an interactive tool that lets users pick a system based on performance, price, or features and then customize it based on manufacturer-supplied information.

TechnoGate. Url: <http://www.technogate.com>

An on-line technology information database and communication network developed by the Canadian Advanced Technology Association (CATA). TechnoGate provides fast information exchange for the world-wide technology industry.

The Electronic Industries Association. Url: <http://www.eia.org>

Represents over 12,500 U.S. electronics manufacturers. Information concerning many of these firms can be accessed through the EIA homepage.

Electronic Buyer's News. Url: <http://catalyst.cmp.com:433>

Interactive Sourcing Directory and on-line guide to products, manufacturers and distributors. Economics, Statistics, & Marketing Information

CBDNet. Url: <http://cbdnet.gpo.gov/index.html>

The official free online listing of Government contracting opportunities which are published in the Commerce Business Daily.

STAT-USA/Internet. Url: <http://www.stat-usa.gov>

A service of the U.S. Department of Commerce that includes the National Trade Data Bank, the U.S. Government's most comprehensive source of international trade data and export promotion information; the Economic Bulletin Board, a comprehensive source for government-sponsored economic releases and business leads; and Global Business Procurement Opportunities, an international procurement marketplace for businesses that provides billions of dollars in procurement opportunities from all over the world.

International Sources

The Thomas Register of European Manufacturers. Url: <http://www.tipcoeuropa.com>

A pan-European industrial buying guide that provides immediate access to 130,000 industrial suppliers throughout 12 European Union countries.

Office Equipment

Better Buys for Business. Url: <http://www.betterbuys.com>

Offers a guide to various kinds of office equipment. It refuses to accept advertising, so as to offer an unbiased analysis. There are Better Buys reports on all the major types of office equipment -- copiers, fax, multifunctional equipment, printers, phones systems, mailing equipment, and more. You can either subscribe to all the guides or buy individual ones.

Research

PowerPort. Url <http://www.dbisna.com>

An information brokerage service. You submit research questions or consulting problems to this network of information service providers. In return, you will receive a detailed proposal covering a range of research/consulting plans, turnaround times, fixed price quotes, and background qualifications from the Providers interested in your project. There is no charge for submitting a request, no charge for proposals, no obligation to buy and satisfaction is guaranteed.

Subscriptions Required

Hoover's Company Profile Database. Url: <http://hoovers.com>

Only available to subscribers, contains in-depth profiles of over 2,480 companies. See link above.

Dunn & Bradstreet's. Url: <http://www.dnb.com>

A catalog of tools to identify and assist in evaluating potential suppliers based on purchasing needs; demographics such as size, geography, woman or minority owned business; ISO 9000 registration; past performance information; non-delivery or insolvency information. D&B offers reports, publications, supplier base analysis and software.

Appendix D

Market Research Report

1. PR# _____

2. Title: _____

3. Product or Service Code _____

4. Estimated Contract Value (including options): \$ _____

5. In accordance with FAR Part 10, market research has been conducted for this acquisition. The following techniques were used (Check all that apply):

Personal knowledge in procuring supplies/services of this type.

Contact with the requester and/or other knowledgeable people in Government and industry regarding the commercial nature of this requirement and standard industry practices in this area of supply/service.

Review of recent market research results for similar or identical supplies/services (Cite Contract or Order Number).

Publication of a formal request for information on NAIS, in the Commerce Business Daily, and/or in appropriate technical journals.

Publication of a formal request for information on NAIS, in the Commerce Business Daily, and/or in Review of Government and/or commercial data bases for relevant information.

Publication of a formal request for information on NAIS, in the Commerce Business Daily, and/or in Review of Internet resources, such as the Commercial Advocates Forum website (<http://www.acq.osd.mil/ar/cadv.htm>) or (<http://panza.gsfc.nasa.gov/210/market/procmis7.htm>) for relevant information.

Publication of a formal request for information on NAIS, in the Commerce Business Daily, and/or in

Use of source lists for identical or similar items obtained from Government, professional and/or industry sources.

Publication of a formal request for information on NAIS, in the Commerce Business Daily, and/or in view of catalogs and other generally available product literature. (on-line and/or hardcopy).

Interchange meetings or presolicitation conferences with potential offerors.

Other: _____

6. Based on the results of the above research, it is determined that this requirement:

Publication of a formal request for information on NAIS, in the Commerce Business Daily, and/or in can be met by commercial items, commercial items with customary or minor modifications, or nondevelopmental items.

OR

Publication of a formal request for information on NAIS, in the Commerce Business Daily, and/or in cannot be met by commercial items, commercial items with modifications or nondevelopmental items. Further, a re-evaluation has been made in accordance with FAR 10.002(b) and this requirement cannot be modified to permit fulfillment by any of the above types of items.

OR

Publication of a formal request for information on NAIS, in the Commerce Business Daily, and/or in

(Example: Market research may reveal that a combination of commercial/non-commercial items can meet the Government's needs.)

ADDRESS NOS 7 THROUGH 9 BELOW IF THE REQUIREMENT CAN BE MET (EITHER IN WHOLE OR IN PART) BY COMMERCIAL ITEMS, COMMERCIAL ITEMS WITH MODIFICATIONS OR NONDEVELOPMENTAL ITEMS. CONTINUE ON ADDITIONAL SHEETS IF NECESSARY.

7. Standard industry terms and conditions (e.g. warranty, maintenance, discounts, buyer financing, freight, delivery, acceptance/rejection, etc.) under which commercial sales of the required supplies/services are made:

8. Laws or regulations unique to the required supplies/services:

9. Based on the above information, the basic clauses and provisions prescribed in FAR Part 12:

Publication of a formal request for information on NAIS, in the Commerce Business Daily, and/or in are sufficient for use in this acquisition and do not require any tailoring to be consistent with industry's commercial practices.

OR

Publication of a formal request for information on NAIS, in the Commerce Business Daily, and/or in require tailoring to be consistent with industry's commercial practices. All such tailoring will be included in the solicitation issued for the required supplies/services.

Contracting Officer

Date

Last updated 4:46 PM on 06/08/1998

Owner: [Tom Deback](#)

Curator: Diane Thompson