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A Lawyer's View of Commercial Items

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COMMERCIAL ITEM CONTRACTING
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Government, Industry Agree—Commercial *is* Better

The main gripe against Government contracting over the years has been that it takes too long and it costs too much. It is not unheard of for a Government procurement to consume three or more years. And who can forget the infamous headlines of a spendthrift Government shelling out hundreds of dollars (a piece!) for hammers or toilet seats?

But, tightening purse strings and Government cut backs have agencies scrambling to find ways to do procurement better for less. Government contractors used to getting fat off of the Government's prodigal ways are finding the dollars beginning to dry up. For both Government and contractor, the answer is increasingly, commercial item contracting.

Background

The switch to commercial products is not entirely without prodding. A lot of prodding. In a prior edition of *A Lawyer's View* entitled, "Buying Commercial Products—New Rules for an Old Idea," we tracked some of the historical efforts to bring Government shopping in line with the commercial marketplace. Legislative and regulatory efforts aimed at spurring commercial acquisition date back to 1972 when the Commission on Government Procurement concluded that the Government should take greater advantage of the commercial market. *See* 3 *Report of the Commission on Government Procurement* pt. D (Dec. 1972). But most of the past measures amounted to mere suggestion. Commercial item contracting was, thus, relegated to small dollar purchases while the majority of procurement officials gladly cleaved to their finely honed technical packages.

Not until recently has commercial item contracting been taken so seriously or given so much attention. In 1994, Congress passed the Federal Acquisition Streamlining Act ("FASA"), which mandated that the Government buy commercial to the maximum extent practicable and set up a frame work in which to do just that. Pub. L. No. 103-355, 108 Stat. 3243. The Clinger-Cohen Act of 1996 (formerly FARA) reemphasized the Government's commitment to commercial item contracting and instituted a special test program that authorized agencies to utilize the Government-wide purchase card and simplified acquisition procedures to purchase commercial products on an unprecedented scale. *See generally*, National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186. Additional drivers, such as the need to do more with less (sound familiar?) have, for many, finally brought the efficacy of going commercial to light.

Still, many Department of Commerce Contracting Officers ("CO") have been slow to catch on, rarely using the new commercial procedures set out in FAR Part 12. Perhaps this is because of a general lack of understanding or comfort with the procedures. This edition of A Lawyer's View seeks to demystify going commercial and to explain why commercial products should be your first choice.

Defining Commercial Requirements—Less Onerous

In order to make effective use of Part 12 commercial contracting procedures, the first step is to decide how to frame the requirement. The manner in which an item is described in the solicitation will have a profound effect on the offers received and may have unexpected performance implications. Unlike with conventional procurements, however, the Government need only describe its need—there is no need to describe how to achieve the goal. Commercial item contracting puts the onus on the contractor to be the problem solver.

Assume, for example, the Department has a need for hundreds of cases of chocolate chip cookies (too many to use micro-purchase procedures) and that for good reason, the CO has decided not to use the imprest fund or the Government-wide purchase card to purchase the cookies. If the CO were to use any of these methods, Part 12 would not apply to the procurement [FAR 12.102(c)].

Also assume that market research has revealed that commercial items are available that meet the Department's need.

The Statement of Work

The immediate goal of the procurement official is to make sure he will attract the type of products or solutions sought. This means essentially two things: procurement officials must consider all of the program requirements and convey those requirements in a solicitation that describes the desired products and the purpose they are to serve.

The description of agency need must contain sufficient detail for potential offerors of commercial items to know which commercial products may be suitable. FAR 12.202(a); *Access Logic, Inc.*, B-22492, 97-1 CPD ¶ 36; *NASA*, B-220941 — affirmed on reconsideration. The effort expended preparing a

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statement of work (or product description) will depend on the complexity of the industry involved as well as on the product, itself. Availability, desired characteristics, product limitations, and size of the purchase are some of the things that will need to be considered up front.

If procuring a relatively unique item, or if research reveals very few suppliers exist, it may also be worthwhile to spend time getting to know product manufacturers and their primary customers. It may be useful to examine product test results or other evidence that the product is suitable for specific program needs. In other words, the research will need to be more directed.

In our chocolate chip cookie example this would not likely be an issue, but it might if, for example, the agency needs the chocolate chip cookies for NOAA Corps food rations. This might necessitate an unusually long shelf life and perhaps water tight or water proof packaging. In this case, it would be a mistake to solicit run-of-the-mill chocolate chip cookies. Likewise, it would be a mistake to conduct preliminary research as if the agency did not have these special requirements. Research using the minimum requirements *and* convey these requirements in the statement of work.

If the program office anticipates a large expenditure, or if it is buying a large number of products, it is advisable that COs explore the terms given to the contractors' most favored customers and attempt to negotiate similar terms for the Government.

Once all of the right issues have been considered, it is time to convey the requirement in a solicitation. Resist the urge to simply specify brand names. The better tact is to outline requirements and describe the intended use for the products. Use industry specific vernacular and industry savvy gained through experience and market research to specify sizes, terms, required upgrades or modifications. This is exactly what FAR 12.202 requires.

Provide for alternative proposals [FAR 12.205(b)]. They serve as a final check in ensuring a perfect fit. The efficacy of allowing for alternative proposals may not be readily apparent, but there is a clear benefit if the solicitation has not called for detailed, labor intensive technical proposals. Alternative proposals allow the Government the opportunity to assess and fine tune its requirements and to become more familiar with types of products and services various contractors offer.

Choosing the Proper Procurement Method

How the requirement is framed will depend, in part, on the method of procurement utilized. FAR Part 12 does not prescribe any new procurement procedures; rather, it directs COs to borrow procedures from Parts 13, 14 or 15 as appropriate.

The test program instituted by the Clinger-Cohen Act of 1996 requires use of simplified acquisition procedures (Part 13) to the maximum extent practicable for commercial procurements between $100K and $5M [FAR 12.203; 13.6]. If buying commercial, there are few, if any, reasons not to use one of the simplified procedures. They boast even fewer restrictions than basic commercial item contracting, and are potentially much less time consuming. The test program, if proven successful, may all but eliminate the use of Parts 14 and 15 with commercial procurements.

When the test program is unavailable because the procurement is in excess of $5M, COs will use either Part 14 or Part 15 in conjunction with Part 12. Considerations about which Part to use are the same as those in conventional procurements. If Part 15 is the method of choice, commercial item contracting provides streamlined evaluation procedures which should make the effort less daunting. *See* Far 12.6.

Technical Information

This is where many procurement officials lose it. Asking for tons of technical information and the ubiquitous "technical approach" can ruin a commercial item procurement. At the very least, the benefit of going commercial may be lost.

This tendency is naturally more prevalent when contracting for products that will need to be manufactured or otherwise processed for the procurement, or when contracting for services. The "approach" does give some insight into whether a contractor will be successful in these instances, but this insight is limited. It is better to ask for company capability statements, brochures and other product literature which gives somewhat equivalent insight minus the time and monetary commitment. In this way, the Government retains flexibility and is in a better position to receive the exact products or services desired at a fraction of the cost. It also potentially eliminates certain administrative burdens—a definite plus.

Certain procurements do not necessitate obtaining technical information at all. That is the case with our chocolate chip cookie requirement. The request need be only for "chocolate chip cookies." It might also be necessary to specify crunchy or chewy, bite-sized or deluxe, and so on. Technical information, however, is not necessary to ensure procurement of the desired product. This general rule of thumb should be kept in mind whenever procuring a product that is relatively familiar and commonplace.

Where technical information is necessary, keep it to a minimum. Further, when deciding what technical information to solicit from contractors, choose forms that are most likely already in existence such as items used to advertise the product in the commercial market place. I have already mentioned some examples; others might include photographs, reports, magazine or newspaper articles describing or comparing products, manufacturer warranty statements, annual statements, and canned presentations.

Even in cases where the requirements are somewhat unique or complex, it is not always necessary to require detailed technical proposals. In the case where the chocolate chip cookies are needed for NOAA Corps food rations, for instance, rather than requesting contractors' technical approach to ensuring the shelf life of the cookies or the water tightness of the packaging, why

not ask for test results on materials used, or examples in which the proposed materials have been used successfully in water?

This example may be an oversimplification of the problem many procurement officials face, but the concept is a useful one. If procurement officials abstain from specifying such matters as staffing levels, staffing mix or specific methods of achieving a desired result, the need to obtain and assess elaborate technical proposals will be nil.

Format and Applicability of Certain Laws

It should now be fairly clear that decisions concerning technical requirements, the statement of work and the proper procurement method are key to conducting a successful commercial item procurement. Although not to be compared with such considerations, procurement officials need to also understand the unique format of the commercial solicitation and the applicability of certain laws to commercial procurements. The simplified format and the elimination of numerous required contract clauses is reason enough to use commercial item contracting.

The Government is generally required to use Standard Form (SF) 1449 when conducting commercial procurements.[1] The format is very streamlined and does not have the customary Sections B through M. Instead, all standard contract clauses are contained in five (5) templates as follows: FAR 52.212-1 conveys instructions to offerors, FAR 52.212-2 conveys evaluation terms, FAR 52-212-3 contains offeror representations and certifications, FAR 52.212-4 prescribes contract terms and conditions peculiar to commercial items and FAR 52.212-5 prescribes contract terms and conditions required by statute or Executive order. *See* FAR 12.303. This streamlined format trims a conventional contract document down by about two thirds.

Many contract clauses were made inapplicable to commercial item procurements. Typically, these include labor statutes, environmental and record-keeping requirements. A complete list is provided in FAR 12.5.

Price Reasonableness Determination

A sticking point in many Government transactions is determining price reasonableness. FASA's motto: get competition, not documents. Use market research and experience to get a general idea of the going rates for commercial products and services. See what others are paying. Inquire about discounts or special upgrades or services offered to favorite customers. Examine catalogues or other paraphernalia supplied to commercial clients.

About the only time detailed cost information should be necessary in commercial procurements is when the procurement is sole source (to be avoided if possible) or where it is otherwise impossible to make cost comparisons such as in the case of a new or modified product. Even in such instances, certified cost and pricing data is off limits [FAR 12.209], but COs can get essentially the same information without the certification.

Knowledge of the Industry is a Plus

It is not enough merely to consider procurement issues when buying commercial products. Playing in the commercial market means developing a certain amount of business savvy. It also means acquiring a working knowledge of the vernacular and intricacies of the specific industries providing the products.

A recent Board decision vividly illustrates this point. In *Max Blau & Sons, Inc.*, GSBCA No. 9827, 91-1 BCA ¶23,626, the Government constantly complained about excessive burrs (sharp edges) on the compressor blocks that it had procured, forcing the contractor to set up a special deburring operation. Noting that the minor burrs were commonly accepted by commercial customers, the Board found that the Government constructively ordered the contractor to engage in deburring operations that were beyond the scope of the contract. *Id.*

Results such as that in this case may very well push procurement offices to become highly specialized and departmentalized offices in which groups of COs concentrate on specific markets or products. One thing is for sure, the writing is on the wall. COs must become knowledgeable about the commercial markets in which they deal. Such knowledge is essential to the success of commercial item contracting on any meaningful scale.

Choosing Among Offers—Potential Problem Areas

Certain problem areas may arise when employing commercial contracting procedures. This is because it is difficult to reconcile the concept of buying commercial with the way the Government does business. Federal systems will continue to need specialized products in which there may or may not be a commercial market. The concept of "non-developmental item" partially bridges the gap by deeming products sold exclusively to governments, commercial, if they have been developed at contractor expense and sold in substantial quantities to several government entities [FAR 2.101]. Still problems exist and procurement officials should be prepared to handle them.

Is the Product Really Commercial?

The first problem procurement officials are likely to face may very well be determining whether an offered product is commercial. The answer depends on who (or even, when) you ask.

The FAR gives the definition extensive treatment [FAR 2.101]. For now, suffice it to say that: a commercial item is any item that is available in the commercial market and that does not require significant adaptations or development to meet Government needs.

This definition is intended to serve as the threshold test for determining whether FAR Part 12 is triggered for a particular procurement. When preliminary research reveals that products meeting this definition may be available to meet the Government's needs, FAR 12.102 directs the CO to use Part 12

to procure the products.

This initial determination is relatively straightforward, but perhaps a bit too simple for real world application. Suppose the CO determines that it has adequate basis to conduct the procurement as a Part 12 procurement. Must the CO then procure only products that come within the FAR's definition, or may the CO tailor the definition of "commercial" in particular solicitations? In other words, does it really matter whether the offers received meet the FAR's definition of "commercial item?"

At least one pre-FASA GAO case suggests that the definition in the solicitation determines whether an item is "commercial" in a particular procurement. *See TEAC America Corp.*, B-259831, 95-1 CPD ¶273. This might suggest that the FAR's definition is not intended to limit the COs ability to define requirements or prescribe what is commercial for individual procurements.

There is a case for the supremacy of the FAR definition, however. The FAR's definition is incorporated by reference in the Definitions section of commercial contracts. It is also fairly clear that to initiate a commercial procurement, COs are supposed to be reasonably certain that they will receive offers that qualify as commercial items (presumably as defined in the FAR).

Case precedent suggests that GAO will likely look to the FAR's definition and to generally accepted industry standards. The safest bet is to use the FAR's definition and construe the facts of a particular case within its confines. For instance, rather than altering the definition of "commercial," the CO could use his discretion to judge whether it is reasonable to assert that a product is commercial within the FAR's definition in a given procurement. GAO has recognized the COs discretion to do so. *See generally*, *Trimble Navigation, Ltd.*, B-271882.2, 96-2 CPD ¶102.

Enhanced or Modified Commercial Products

The question of whether a product qualifies as a commercial product is most likely to arise when a product has been enhanced or modified or is newly developed. In this case, COs should exercise sound discretion and judgment regardless of the definition employed. As was just pointed out, the GAO will look to see whether the CO's decision was reasonable.

The problem of modified products highlights the need to know the commercial market and to pin point the exact commercial item being procured. Generally, if the enhanced or modified product desired is also offered in the commercial market it is fair to say that it qualifies as commercial.

On the other hand, if the product will be enhanced or modified to meet the Government requirement or if the enhancement is so new that it has not yet been introduced in the commercial market, losing offerors may cry foul if the purchase comes under a commercial procurement. This area is likely to be highly contentious because the concept of "commercial" must be applied on a case-by-case basis.

The best advice I can give here is to assess the magnitude of the enhancement or modification. If it is relatively minor, the product is properly classified as commercial. *See* FAR 2.101. If the changes alter the basic nature or function of the product it is probably not a commercial product.

Unexpected Responses to Commercial Solicitations

What happens if the CO, despite all of his efforts, determines that some or all of the offers received in response to a commercial procurement fail to qualify as commercial—can he go forward? It depends.

GAO has made it fairly clear that if the solicitation is for commercial items, then in order to comply with the solicitation, the offer must be commercial. *See generally, Trimble Navigation, Ltd.*; *Canberra Industries, Inc.*, B-271016, 96-1 CPD ¶269. Thus, it is not advisable that COs consider noncommercial offers under Part 12 procurements.

If none of the offers are commercial, the CO has at least two choices. Cancel the solicitation and start over, or convert to a conventional procurement. In the case of cancellation, before going back out with the new solicitation, double-check the market research. Talk to venders to ascertain why no offers were submitted. It may have something to do with the product description or the structure of the procurement.

The other choice is to convert to a conventional procurement. This may be a better choice if it appears that most or all of the commercial vendors of the desired product responded to the initial solicitation. The process is very similar to converting an IFB to an RFP. One additional step should be taken in this case, however. In order to avoid the perception of unfairness or the possibility that potential vendors were left out of the competition, issue a second CBD notice explaining that the procurement has been converted to an IFB or RFP, as the case may be, and that vendors may submit offers by a specified date.

Commercial Offers to Conventional Procurements

Even in conventional contracting, the push toward performance-based service contracting and the general requirement to describe product needs in terms of purpose, will require a change in the government's approach to contracting. The Government has stated that it will buy commercial whenever practicable, and contractors seem to have taken the Government at its word.

I recently reviewed a contract in which the specifications called for venders to develop certain computer equipment for use in NOAA's GIS program. One of the offers responded to this procurement with an offer of commercial products. It described how the commercial product would meet the Government's need and expected full consideration for award. Because of the way the procurement was structured, this vendor's offer did not comply with the solicitation and thus was not considered for award.

As it turns out, NOAA really needed developmental products to incorporate into the existing system. But, what if the Government did not have such constraints? If the solicitation is written in terms of performance requirements and purpose, it is

conceivable that a commercial offer would be perfectly acceptable. If not so written, however, the Government would miss an opportunity to buy commercial simply because the procurement was not set up to accommodate such offers.

Something Else To Keep In Mind

Commercial item contracting is not a panacea that will make all government contracting woes disappear. It is, however, one of the most significant outcomes from the present climate to streamline or fix everything in Government procurement. Procurement Officials are afforded an opportunity they can ill-afford to pass up—a chance to take Government procurement in a new direction in which common sense and judgment dictate. The disadvantage of course is that it will be difficult for agencies to continue to micro-manage procurements. It is this lawyer's view that the pluses outweigh the minuses.

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[1] The Department has obtained a class deviation from the requirement to use SF 1449. See Memo from Kenneth J. Buck, Director, Acquisition Policy and Programs, to Heads of Contracting Offices (April 19, 1996). Contracting Officers, therefore, may choose to use other currently available forms. The contract clauses prescribed in FAR 12.303 will still apply.