

The Role of the Competition Advocate in Promoting the Acquisition of Commercial Items

The Federal Acquisition Streamlining Act (FASA) of 1994 (Sec. 8104, paragraph 2377 of Public Law 103-355), established a preference for the acquisition of commercial items, and also expanded the duties of Competition Advocates by assigning them responsibility for promoting the acquisition of commercial items (Sec. 8303, Additional Responsibilities for Advocates for Competition). FAR Part 6 implements this increased responsibility as follows:

"Agency and procuring activity competition advocates are responsible for **promoting the acquisition of commercial items**, promoting full and open competition, challenging requirements that are not stated in terms of functions to be performed, performance required or essential physical characteristics, and challenging barriers to the acquisition of commercial items and full and open competition such as unnecessarily restrictive statements of work, unnecessarily detailed specifications, and unnecessarily burdensome contract clauses" (FAR 6.502).(emphasis added)

There is no guidance or policy for the Competition Advocates stipulating how the responsibility for promoting commercial items is to be fulfilled. At CECOM, the Competition Advocate's staff, within the Competition Management Division (CMD) of the Legal Office, promotes and encourages the use of commercial items in the following ways:

- through participation in acquisition planning and the review of acquisition strategy documents
- assistance with market research
- participation in training sessions with requiring activities and contracting personnel

One of the avenues that CMD utilizes in advocating the acquisition of commercial items is the review of Acquisition Requirements Packages (ARPs) for excessive test, configuration and quality control requirements, as well as unnecessarily restrictive requirements, and participation with the Functional Requirements Authentication Board (FRAB) to discuss the results of the market research and whether a commercial item is available that would meet the Government's need.

FAR Parts 10 and 12 require that market research be conducted to determine whether or not commercial items are available that could suit the agency's need. Specifically, FAR Subpart 10.001, Policy, states that (a) "Agencies shall... (2) conduct market research appropriate to the circumstances (i) before developing new requirements documents for an acquisition by that agency." This must be accomplished prior to soliciting offers for acquisitions with an estimated value in excess of the simplified acquisition threshold (\$100,000). If market research establishes that a commercial item cannot fill the Government's need, agencies are required (FAR 10.002 (c)) to reevaluate the requirement for possible restatement to include commercial or nondevelopmental items, as defined in FAR 2.101. The findings of the market research must be documented (FAR 10.002(e)).

CMD reviews the data package prepared by the requiring activity and provides guidance on the proposed acquisition strategy. The file documentation should contain evidence of recent and thorough market research, and should address the availability of commercial or nondevelopmental items, as well as the possibility of using modified items to meet the agency's need. Requiring activities are reminded to review all new requirements for potential use of commercial items, and that the regulations prescribe a preference for commercial items.

Requiring activities and contracting personnel are also advised that requirements for items such as space heater units and air conditioners would most likely be considered a commercial item **of a type** even though modifications may be required to meet the Government's needs. FAR 2.101, Definitions, defines a commercial item as an item **of a type** customarily used for nongovernmental purposes that has been sold or offered for sale to the general public, or that will be available in the commercial market place in time to meet delivery requirements. If a commercial item is not readily available, the requirement should be revisited, and the user requirements confirmed to ascertain whether or not the requirement could be modified to allow for use of a commercial item.

FAR Part 11, Describing Agency Needs, provides that, to the maximum extent possible, requirements for supplies and services shall be stated in terms of functions to be performed, performance required, or essential physical characteristics. Requirements are to be defined so that offerors are enabled and encouraged to supply commercial items, or nondevelopmental items if commercial items are not available, and offerors of commercial items shall be provided an opportunity to compete in any procurement. Prime contractors and

subcontractors should be required to incorporate commercial items or nondevelopmental items as components.

FAR 11.002(v) further requires that agencies "modify requirements in appropriate cases to ensure that the requirements can be met by commercial items or, to the extent that commercial items suitable to meet the agency's needs are not available, nondevelopmental items."

In conclusion, one aspect of acquisition reform has been statutory and regulatory changes encouraging use of commercial items. The Competition Advocates have been established as the Commercial Items Advocates. In order to determine if there are commercial items capable of meeting the Government's performance requirements, requiring organizations need to perform market research. One technique used by the CECOM CMD has been to participate in early requirements planning/review boards to ensure these requirements are understood and implemented.

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