

The Commerciality Decision and Documentation of Market Research

The Federal Acquisition Streamlining Act (FASA) of 1994 (Section 8104, paragraph 2377 of Public Law 103-355), established a preference for the acquisition of commercial items. The FASA requires documentation of the Government's commerciality decision. A commerciality decision is a determination of the availability of commercial items that will meet the Government's requirements. Notwithstanding Government acquisition reform initiatives that have emphasized the preference for acquisition of commercial items, it is still evident that many obstacles exist to ensuring this legislative preference is understood and effectively implemented. According to a 5 January 2001 memorandum signed by the Under Secretary of Defense For Acquisition and Technology, an Integrated Process Team (IPT) chartered in March 1999 to review Department of Defense (DoD) commercial item determinations, found inconsistent commercial item determinations and weak market research among the obstacles that still exist to broader use of commercial items within the DoD.¹ The Army Materiel Command (AMC) found similar obstacles to more widespread use of commercial items during its Acquisition Reform Initiatives Assessment Team (ARIAT) reviews.²

How can Government acquisition personnel make more informed decisions with respect to whether to acquire a commercial item? Clearly, knowledge of what is available in the commercial marketplace is fundamental to an informed commerciality decision. In order to determine if there are commercial items capable of meeting the Government's performance requirements Federal Acquisition Regulation (FAR) (Parts 10 and 12) requires that market research be conducted to determine whether or not commercial items are available that could meet the agency's need.

Specifically, FAR 10.001 states (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 enable use of commercial or non-developmental items, as defined in FAR 2.101. The findings of the market research must be documented (FAR 10.002 (e)).

FAR 12.101 also requires Agencies to conduct market research. Specifically, FAR 12.101(a) states the following:

Agencies shall --

- (a) Conduct market research to determine whether commercial items or nondevelopmental items are available that could meet the agency's requirements;

¹ Memorandum for Secretaries of the Military Departments, J.S. Gansler, 5 Jan 2001, with attached Clarification of FAR Part 12 for Consistency

² AMC ARIAT Final Report for FY 99

(b) Acquire commercial items or nondevelopmental items when they are available to meet the needs of the agency; and

(c) Require prime contractors and subcontractors at all tiers to incorporate, to the maximum extent practicable, commercial items or nondevelopmental items as components of items supplied to the agency.

This FAR Part 12 policy expands the preference for commercial items established by the FASA by mandating that agencies shall acquire commercial items, or non developmental items, to meet the needs of the agency. (FAR 12.101(b)).

Too often, however, it is difficult to discern whether or not a thorough investigation of current market capabilities or an evaluation of commercially available items has been accomplished. It has become evident that even when market research is conducted, it is not documented in sufficient detail to provide maximum value in the strategy planning and solicitation preparation phases of an acquisition.

The lack of documentation of market research findings and associated commerciality determinations may be the result of misunderstandings of what market research really is. Requirements personnel often have a great deal of technical knowledge in their particular area of expertise, but fail to recognize that constant market surveillance is equally vital to the acquisition process. An increased understanding is needed by all Government personnel involved in the acquisition process of the importance of documenting market research findings. This information is essential in acquisition planning for competition issues, consideration of small business set-asides, and understanding customary commercial market business practices to shape negotiation strategies and contract terms and conditions. Additionally, this information is needed for Contracting Officers to make informed commerciality determinations. Market research information is available in many forms to include knowledge that is attained at professional symposiums and conferences, and information that is available from internet sources and trade journals. However, if this information is not documented, it is often unknown by the Contracting Officer and, therefore, not considered in the commerciality decision. The issuance of a Sources Sought Announcement in the Commerce Business Daily (CBD) is another valid method of performing market research for some requirements, but often, complex items require an in-depth review of current technologies. Reliance on CBD Sources Sought Announcements alone may not be sufficient depending on the complexity of the Government's requirement. To the extent that CBD Sources Sought Announcements are used, the Government's description of its requirements should be stated in terms of performance requirements that will enable use of commercial solutions.

FAR 10.002(e) establishes that market research findings must be documented, but many questions remain on how and to what extent the research findings should be documented. The 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.

FAR Part 10 does not stipulate how the documentation should be prepared; it merely states that it should be prepared “in a manner appropriate to the size and complexity of the acquisition.”

FAR 10.002 does, however, list seven areas that should be included in the conduct of the research, subject to urgency, estimated dollar value, complexity, and past experience. This regulatory information provides a guide as to the types of information that should be documented as a result of market research. 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 as set forth in FAR Part 19.

It should be noted that the first item in the above list discusses commercial items, and emphasizes the importance of market research to obtain information to support the commerciality decision.

When considering whether a commercial item is available, it is first necessary to be clear about what a commercial item really is. FAR 2.101 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 marketplace in time to meet delivery requirements. Surely items like space heaters and other environmental control units fit the

definition, so a closer look at requirements of this type must be made to ascertain whether or not an existing commercial item could satisfy the Government's specific 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 requirements could be modified to enable use of a commercial item.

FAR Part 11 states 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 shall "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."

This regulatory guidance further emphasizes the need to perform comprehensive market research so that potential technical solutions including commercial equivalents are explored before requirements are finalized.

Headquarters AMC sponsored training in June 2000 to help requirements and acquisition personnel with the issues associated with conducting thorough market research and documenting the research findings for use in acquisition planning.³ This "train the trainer" course emphasized the planning, conduct and documentation of market research, and use of market research documentation in making a commerciality decision. AMC activities can contact their Competition Advocate's office to find out about the availability of this training. While the course is structured as an intense exercise in market research, it can be tailored to meet local needs, including just-in-time training for teams that are initiating planning for a new acquisition and, therefore, could benefit from an increased understanding of research techniques and documentation requirements.

A very useful market research tool can be found on the DoD Commercial Advocates Forum, an Internet source at <http://www.cadv.org/cadv.htm>, which provides access to i-MART, a comprehensive search tool for locating potential sources. The i-MART tool searches by either a description of the product or service, or by Federal Supply Classification or Federal Supply Group. It utilizes various search engines that can be selected to search for sources by industry (Aircraft, Chemicals, Computers and Electronics, Office Equipment, et al.). The direct web link to i-MART is <http://www.imart.org>. Many different sources of market information are available from the various sites accessible through i-MART.

³ Market Research & Commerciality Workshop developed by BRTRC for AMC

The legislative requirement to maximize use of commercial items to fulfill the Government's requirements is a challenge to everyone involved in the acquisition process. Only by learning more about the commercial marketplace, and the business practices that prevail there, can acquisition professionals make informed decisions regarding availability of commercial items to meet mission requirements.

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