

Impact of DA Policy on Commercial Items

In a memorandum dated 5 January 2001, issued by the Under Secretary of Defense for Acquisition and Technology, a Department of Defense (DoD) review found inconsistent commercial item determinations and weak market research among the obstacles that exist to broadening the use of commercial items within the DoD.

By memorandum dated 26 March 2001, Subject: Commercial Acquisitions, the Acting Assistant Secretary of the Army (Acquisition, Logistics and Technology) issued an Implementation Plan for Increasing the Use of FAR Part 12. It announced a policy that all services (with the exception of services under FAR Part 36) were presumed to be commercial and that FAR Part 12 policies and procedures would be used to buy these services. It further stated, “for those services where the results of market research indicate that the service is not commercial, the local Competition Advocate must approve the commercial determination.”

The Federal Acquisition Streamlining Act (FASA) of 1994 (Section 8104, paragraph 2377 of Public Law 103-355), requires that the head of an agency use the results of market research to determine whether there are commercial items or, to the extent that commercial items suitable to meet the agency’s needs are not available, non-developmental items (NDIs) that meet the agency’s requirements or could meet the agency’s requirements if those requirements were modified to a reasonable extent.

FAR Part 10 requires that agencies conduct market research appropriate to the circumstances before developing new requirements documents for an acquisition by that agency. 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 NDIs, as defined in FAR 2.101. The findings of the market research must be documented (FAR 10.002 (e)).

Issue: For those services where the results of market research indicate that the service is not commercial, approval from the local Competition Advocate must be obtained before the acquisition can be processed as a non-FAR Part 12 acquisition.

Discussion: In those instances when market research indicates that a commercial service that will satisfy the Government’s needs is not available, documentation of the commerciality decision, in the form of a Market Research Summary Document, must be sent to the Competition Advocate for approval.

The Market Research Summary Document can be prepared using the format and content guidance provided during the AMC sponsored training in June 2000 to help acquisition personnel in conducting market research and documenting the research findings for use in acquisition planning. This documentation should address the methods used to conduct market research, the data gathered throughout the research process, current market conditions, and finally a conclusion

as to whether or not a commercial item, or service, or a NDI, is available that will satisfy the Government's needs. If a commercial item or service or NDI is not available, the Market Research Summary Document should further include a discussion on actions taken to re-evaluate the requirement for possible restatement to enable use of commercial type items or services, or a justification for the decision to procure other than a commercial item or service, or NDI.

Issue: The Army procures many of the services it requires using cost or time and materials type contracts. That common practice is inconsistent with the newly created presumption that all services are commercial, and the FAR Part 12 procedures which only permit the use of firm-fixed-price (FFP) or fixed price with economic price adjustment (FP/EPA) type contracts for commercial acquisitions.

Discussion: FASA mandates that the FAR include a requirement that FFP or FP/EPA contracts be used to the maximum extent practicable for acquisitions of commercial items, and that cost type contracts be prohibited. (FASA Section 8002 (d) and FAC 90-32.) However, the FAR implementation of that statutory requirement is significantly more restrictive. FAR 12.207 provides that:

“Agencies shall use firm-fixed-price contracts or fixed-price contracts with economic price adjustment for the acquisition of commercial items. Indefinite-delivery contracts (see Subpart 16.5) may be used where the prices are established based on a firm-fixed-price or fixed-price with economic price adjustment. Use of any other contract type to acquire commercial items is prohibited.”

The FAR provision eliminates the flexibility that the “maximum extent practicable” statutory language provided, and imposes a complete prohibition on the use of any contract type other than FFP or FP/EPA for the acquisition of commercial services.

Legislative relief and/or changes through the FAR Council or Re-Invention Laboratories will be needed to enable continued use of cost and T&M type contracts for commercial services. Absent such measures, use of these types of contracts will be prohibited unless the appropriate Competition Advocate approves the determination that the services required are not commercial. To implement FAR Part 12 for commercial services, a widespread cultural change coupled with a major training effort will need to occur quickly both within the Government and industry community, so that FFP or FP/EPA type contracts can be used effectively for service acquisitions.

The Point of Contact for this subject in the CECOM Legal Office is Ms. Marla Flack, (732) 532-5057, DSN 992-5057.

KATHRYN T. H. SZYMANSKI
Chief Counsel